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Guy M. Hicks
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August 31, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of NEXTLINK TENNESSEE LLC for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*
Docket No. 98-00123

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Brief of BellSouth Telecommunications, Inc. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: ***Petition of NEXTLINK TENNESSEE LLC for Arbitration of Interconnection with BellSouth Telecommunications, Inc.***

Docket No. 98-00123

<u>BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.</u>

As requested by the Tennessee Regulatory Authority ("Authority") at its August 24, 1999 Directors' Conference, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this brief to address the Authority's latitude in reviewing an interconnection agreement that has been submitted to it for approval.

Section 252(e)(1) of the Telecommunications Act of 1996 ("1996 Act") provides that any agreement reached through negotiation or arbitration must be submitted to the state commission for approval. In determining whether to approve or reject the agreement, two different standards apply depending on whether the agreement was negotiated or arbitrated. In reviewing negotiated agreements, the state commission may only reject the agreement if "(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A). By contrast, in reviewing arbitrated agreements, the state commission may reject such agreements (or a portion thereof) only upon a finding that "the agreement does not meet the requirements of Section 251 of this title, including the regulations prescribed by the Commission pursuant to Section 251 of this title, or the standards set forth in subsection (d) of this section." 47 U.S.C. § 252(e)(2)(B). A state commission also is permitted to establish or enforce requirements of state law, "including requiring compliance with intrastate telecommunications quality standards or requirements," provided such requirements are not inconsistent with the 1996 Act. *See* 47 U.S.C. §§ 252(e)(3) & 253.

As to either type of agreement, the state commission "to which an agreement is committed shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. § 252(e)(1). Thus, the 1996 Act clearly limits the latitude of a state commission to either approving or rejecting an interconnection agreement or portions thereof – nothing more, nothing less.

In this case, the interconnection agreement between BellSouth and NEXTLINK Tennessee, Inc. ("NEXTLINK") that will be submitted to the Authority for approval will contain provisions that were negotiated as well as provisions that were arbitrated. Thus, the Authority must apply two different standards of review: first, with respect to those portions of the agreement that were negotiated, the Authority may only reject such provisions if they are discriminatory or not in the public interest; second, with respect to those provisions that were arbitrated, the Authority may only reject such provisions to the extent that they do not meet the requirements of Sections 251, 252(d), or applicable regulations of the Federal Communications Commission ("FCC").

In reviewing the arbitrated provisions of the interconnection agreement between BellSouth and NEXTLINK, the Authority must apply the requirements of Section 251, 252(d) and applicable FCC regulations as they exist at the time the agreement is submitted for approval. In *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Oregon 1999), the court declined to overturn portions of an interconnection agreement on the grounds that the state commission had failed to apply substantive FCC regulations that were not in effect when the agreement was approved by the state commission and signed by the parties. The court concluded that these regulations – which included the FCC's pricing regulations and regulations concerning combinations – were not in effect by virtue of the decision of the Eighth Circuit Court of Appeals staying and then vacating such regulations. The court noted that it could not find a single case to support the contention "that portions of the agreements must be overturned because the [state commission] failed to apply certain FCC regulations to an agreement that was entered into more than a year before those regulations took affect." *Id.* at 1165. *See also U.S. West Communications, Inc. v. Jennings,* 1999 U.S. Dist. LEXIS 6821 (D. Ariz., May 5, 1999).

While the Authority must take into account the current state of the law in reviewing an interconnection agreement, which would include the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 142 L.Ed. 2d 835 (1999), it may not do so selectively. For example, any suggestion that BellSouth must combine network elements for competing carriers would be inconsistent with the 1996 Act and the Supreme Court's decision in *Iowa Utilities Board.* The FCC originally adopted Rules 315(c)-(f) that purported to require incumbents to combine network elements for competing carriers such as NEXTLINK. The Eighth Circuit vacated these rules, and the Eighth Circuit's decision was not appealed to the Supreme Court. Although the status of these rules is currently pending before the Eighth Circuit, the Supreme Court's decision did not alter the fact that Rules 315(c)-(f) were vacated and have not been reinstated. Thus, requiring BellSouth to combine elements that are separate elements in the network would be an end-run around the Eighth Circuit's ruling, and thus would not be permissible.[1]

[1] BellSouth recognizes that Rule 315(b) has been reinstated, which prohibits an incumbent from separating requested network elements that the incumbent currently combines. However, because the Supreme Court vacated Rule 51.319, which identified the specific network

At least one court has struck down a state commission's attempt to modify an interconnection agreement as part of the approval process when the modification was not consistent with the statutory standards for commission review. *See MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999). In that case, MCI alleged that the Illinois Commerce Commission ("ICC") erred when it approved provisions limiting Ameritech's liability to MCI for breaches of the interconnection agreement. The liability limitations were never a subject of arbitration. Instead, the ICC imposed the provisions at Ameritech's request during the approval stage of the negotiation and arbitration process. The court rejected Ameritech's argument that the liability limitations were appropriate under Section 252(e)(3) or 252(e)(2)(A) or 252(e)(2)(B). Accordingly, the court held that the liability limitation provisions had been "erroneously imposed by the ICC" and "must be stricken." 1999 U.S. Dist. LEXIS 11418, *33-*42.

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elements that incumbents must provide, presently there is no list of network elements that an incumbent must offer, whether individually or in currently combined form. Furthermore, even if loops and transport are defined by the FCC as unbundled network elements, the FCC apparently does not share NEXTLINK's view that an unbundled loop combined with unbundled transport is a combination that incumbents currently combine. Specifically, in its rulemaking notice, the FCC stated: "[I]n light of the Supreme Court's decision, we also seek comment on whether the Commission can require incumbent LECs to combine unbundled network elements that they do not already combine (e.g., an unbundled loop combined with unbundled transport)." Further Notice of Proposed Rulemaking, CC Dockets 96-98, 95-185 ¶ 33 (April 16, 1999) (citation omitted).

Respectfully submitted,

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1999 U.S. Dist. LEXIS 6821 printed in FULL format.

U.S. WEST COMMUNICATION, INC., a Colorado corporation, et al., Plaintiffs, RENZ D. JENNINGS, as a member of the ARIZONA CORPORATION COMMISSION, et al., Defendants.

CONSOLIDATED CASES CV 97-26-PHX-RGS-OMP (Lead Case), CV 97-394-PHX-RGS-OMP, CV 97-1723-PHX-RGS-OMP, CV 97-1856-PHX-RGS-OMP, CV 97-1927-PHX-RGS-OMP, CV 97-2025-PHX-RGS-OMP, CV 97-2324-PHX-RGS-OMP, CV 98-342-PHX-RGS-OMP, CV 98-626-PHX-RGS-OMP, CV 98-629-PHX-RGS-OMP

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

46 F. Supp. 2d 1004; 1999 U.S. Dist. LEXIS 6821

May 4, 1999, Decided

DISPOSITION: [**1] Issues REMANDED to ACC for reconsideration. Worldcom and MCI's motion (docket # 331) to strike portions of US West's reply brief or in alternative for leave to file sur-reply brief denied as MOOT.

CORE TERMS: network, interconnection, loop, customer, fiber, carrier, resale, regulation, unbundled, discount, dark, capricious, cable, subloop, telecommunications, comparable, retail, mile, discount rate, reciprocal, arbitrators, mileage, switch, space, collocation, unbundling, installation, deaveraging, incumbent, traffic

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For Federal Communications Commission: Arthur G. Garcia, Theodore C. Hirt, Philip D. Bartz, Jose [**3] deJesus Rivera, Dennis G. Linder, Brian G. Kennedy, David T. Zaring, Civil Division, US Dep't of Justice, Washington, DC.

JUDGES: OWEN M. PANNER, U.S. DISTRICT COURT JUDGE.

OPINIONBY: OWEN M. PANNER

OPINION: [*1008] OPINION

PANNER, J.

These ten consolidated cases arise under the Telecommunications Act of 1996 ("the Act"), Pub. L. No. 104-104, 110 Stat. 56, *47 U.S.C. § 153,* et seq. US West Communications, Inc. ("US West"), the incumbent local exchange carrier ("ILEC") in Arizona, is a party in each case. The Arizona Corporation Commission ("the ACC"), which regulates public utilities in Arizona, is a defendant in each case, as are the members of the ACC in their official capacities ("the Commissioners").

Various prospective competitive local exchange carriers ("CLECs") are parties to one or more cases. They include AT&T Communications of the Mountain States, Inc. ("AT&T"), AT&T Wireless Services, Inc. ("AT&T Wireless"), TCG Phoenix ("TCG")(whose interest in this litigation was assumed by AT&T following the latter's acquisition of TCG), GST Tucson Lightwave, Inc., GST Net (AZ), Inc., and GST Telecom, Inc. (collectively "GST"), MCI Telecommunications Corp. and MCIMetro Access Transmission [**4] Services, Inc. (collectively "MCI"), Sprint Communications Company, L.P. ("Sprint"), Brooks Fiber Communications of Tucson, Inc. ("Brooks Fiber"), e-spire Communications, Inc. ("E-spire") (formerly known as American Communications Services, Inc. ("ACSI")), and WorldCom Technologies, Inc. ("WorldCom") (which has assumed the interest in this litigation formerly held by MFS Communications Company, Inc. ("MFS")). In addition, the Federal Communications Commission ("FCC") has participated as amicus curiae.

SCOPE AND STANDARD OF REVIEW

"Any party aggrieved" by a decision of a state public utilities commission concerning an interconnection agreement "may bring an action in an appropriate Federal district court to determine whether the Agreement . . . meets the requirements of the Act." *47 U.S.C. § 252*(e)(6).

The scope of review is confined to the administrative record. With regard to the standard of review, this court does not sit as a surrogate public utilities commission to second-guess the decisions made by the state agency to which Congress has committed primary responsibility for implementing the Act in Arizona. Rather, this court's principal task is to determine whether [**5] the ACC properly interpreted [*1009] the Act and any implementing regulations, which is a question of federal law that is reviewed de novo. In all other respects, review will be under the arbitrary and capricious standard.

EFFECT OF RECENT SUPREME COURT DECISION

After oral argument in these cases, the Supreme Court decided *AT&T Corp. v. Iowa Util. Bd., 142 L. Ed. 2d 834, U.S. , 119 S. Ct. 721 (1999).* The Supreme Court's interpretation of the Act, and of the implementing regulations, must be applied to all pending cases. See *Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13, 128 L. Ed. 2d 274, 114 S. Ct. 1510 (1994).* "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." Id.

However, in addition to interpreting the Act, the Supreme Court reinstated some FCC regulations that the Eighth Circuit had first stayed and later vacated. Some parties have urged this court to apply those reinstated FCC regulations when reviewing the ACC decisions and interconnection Agreements at issue here. The court declines to do so. Those [**6] regulations were not in effect when these Agreements were negotiated by the parties and approved by the ACC. Consequently, the ACC could not have erred by failing to apply those regulations. *MCI Telecom. Corp. v. GTE Northwest, Inc., 1999 U.S. Dist. LEXIS 3129, F. Supp. 2d , , 1999 WL 151039* *1-6 (D. Or. 1999); *US West Communications, Inc. v. AT&T Communications of the Pac. Northwest, 1999 U.S. Dist. LEXIS 6416,* Civil No. 97-1575-JE, F. Supp. 2d , , slip op. at 4-16 (D. Or. May 3, 1999).

Whether a party may petition the ACC to modify an Agreement on the ground that there has been a subsequent change of law, or whether the ACC should grant such a request, are questions that should be addressed first by the ACC rather than by this court.

DISCUSSION

1. 2-Wire Loop Price

By a 2-1 vote, n1 the ACC authorized US West to charge $ 21.98 per month for an unbundled 2-wire loop. AT&T, E-spire, GST, and WorldCom challenge that decision as arbitrary, capricious, and contrary to law. They contend that the ACC should have adopted the loop price of $ 16.28 per month recommended by a three member arbitration panel.

n1 The vote was 2-1 on each of the pricing decisions at issue in this case.

[**7]

The hearing transcripts reflect that the Commissioners approached their task seriously and made a good faith effort to resolve conflicting evidence and reach a decision that complied with the law while protecting the public interest.

The ACC's task was complicated by the total element long run incremental cost ("TELRIC") pricing methodology that the FCC has pressured state public utilities commissions to adopt. TELRIC employs a "scorched node analysis" which assumes that the existing US West network is replaced by a mythical efficient telephone network that retains only the locations of the existing US West wire centers. As one state public utility commission observed, "TELRIC methodology assumes an optimal network that will never exist and which will produce services the current network cannot provide . . . ." *Re US West Communications, Inc., Docket No. RPU-96-9, 1998 WL 265370* at *5 (Iowa Util. Bd. April 23, 1998).

Because TELRIC focuses on a mythical network instead of US West's existing network, each party was free to offer its own vision of this mythical network, limited only by the party's audacity and its ability to procure an expert witness willing to endorse that party's [**8] vision. Judging from the transcript of the ACC hearings, a majority of the Commissioners became increasingly [*1010] frustrated with this pricing methodology and skeptical about the validity of the self-serving forecasts and models offered by the parties and their hired experts. Nevertheless, the ACC was compelled to make a decision, which it did. Under the circumstances, those challenging the ACC's decision have a difficult task to convince a reviewing court that the ACC was arbitrary and capricious in selecting one vision of this mythical network over a competing vision or in rejecting both visions and making its own reasoned forecast.

A. Cable Sheath Mileage

The existing US West network in Arizona contains approximately 43,504 miles of cable. Some of that mileage overlaps because US West periodically "reinforced" the system to increase capacity. The parties agree that a mythical efficient network would contain fewer miles of cable, since adequate capacity would be installed from the outset. The Hatfield Model version 2.2.2, sponsored by MCI and AT&T, estimated that an efficient network would require 12,296 miles of cable. The arbitrators recommended adoption of that figure, but [**9] the Commissioners concluded it was unreasonably low. During the ACC hearing, AT&T conceded that version 2.2.2 of the Hatfield Model was flawed and often underestimated cable mileage. A newer version of the Hatfield Model (version 3.1) produced an estimate of 26,092 miles of cable, very close to the 26,489 mile estimate generated by US West's RLCAP model. A majority of the Commissioners then voted to adopt the 26,092 figure.

This decision was not arbitrary and capricious. The ACC was not required to adopt AT&T's mileage estimate, which everyone agreed was seriously flawed. The ACC also did not err by allegedly relying upon extra-record evidence. Although the arbitrators did not have the benefit of Version 3.1 of the Hatfield Model, the ACC was not reviewing the arbitrators' recommendation for abuse of discretion but was deciding the matter de novo. Nor can the CLECs seriously assert that the decision is unfair because they were deprived of the opportunity to impeach their own models, or to retract their own admissions regarding the flaws in Version 2.2.2 or the mileage estimates generated by version 3.1 of the Hatfield Model.

In addition, the ACC made its decision in January 1998, [**10] 14 months after the arbitrators had heard testimony. By then, the defects in Version 2.2.2 of the Hatfield Model were well known within the industry. While an administrative agency's decision must be based upon the record, that does not mean the agency is required to ignore its own expertise and knowledge. One reason for deferring to agency decisions is the presumption that the agency has special expertise and knowledge regarding the industry that it regulates, and will apply that expertise and knowledge in its decisionmaking process, as the ACC did here.

The ACC did not arbitrarily increase the cable mileage to achieve a predetermined loop price, as several CLECs have asserted. During the ACC hearing, AT&T predicted that using the 26,092 figure would increase the loop price by $ 11.50. US West insisted the increase would not exceed $ 4.00 and offered to limit the change to $ 4.00 or the actual amount, whichever was less. The ACC agreed to this proposal. There was nothing improper about that decision.

Nor was the ACC obliged to adopt the entire Hatfield Model Version 3.1, which allegedly includes other "corrections" that result in a net $ 1.33 reduction in the loop price notwithstanding [**11] the $ 11.50 increase that resulted from correcting the cable mileage estimate. The ACC understandably was skeptical about this claim, which it did not have an opportunity to adequately investigate. In any event, the ACC did not adopt Hatfield Model 3.1 or any other version of the Hatfield Model. Rather, it considered the results generated by that [*1011] model and by US West's RLCAP model, along with AT&T's admission that Version 2.2.2 of the Hatfield Model understated the cable mileage, in the course of making an educated estimate of the number of cable miles required by an efficient network.

The ACC's written decision does contain one obvious flaw. The decision inexplicably cites network reinforcement as the justification for increasing the cable mileage to 26,092 miles from the 12,296 miles estimated by Version 2.2.2 of the Hatfield Model. In reality, network reinforcement is the justification for decreasing the cable mileage from the 43,504 miles in the existing US West network.

After reviewing the relevant portions of the record, the court is satisfied that this was merely a drafting error. The arbitrators prepared a Recommended Opinion and Order ("ROO"), which was then modified [**12] to reflect the changes ordered by the ACC. When the ACC modified the section on cable mileage, it neglected to revise this one sentence. The reasons for the ACC's decision are clearly stated in the contemporaneous transcripts. It is pointless to remand the matter merely to correct an obvious drafting error.

B. Sharing of Placement Costs

In setting the loop price, the ACC assumed that US West would pay half the costs of placing cable for this mythical network, with the remainder to be paid by other utilities or land developers. In its briefs and again at oral argument, E-spire interpreted the ACC's decision as assuming that US West would pay fully three-quarters of those costs (i.e, third parties would pay one-half the costs one-half of the time). However, the agency's written decision clearly states otherwise.

The ACC's decision was not arbitrary and capricious. Although the CLECs speculate that US West could share trenches with multiple utilities (e.g., gas, electric, cable television), that assumes these other utilities are simultaneously participating in this same intellectual exercise and replacing their established utility networks in urban areas. However, those [**13] networks are already in place, and placement sharing is likely to occur primarily in new subdivisions. The CLECs also speculate that perhaps they could share the cost of building this mythical network, but the ACC understandably declined to rely on such conjecture. If the CLECs were prepared to foot the cost of actually building a new network, then they wouldn't need to use US West's existing network.

C. Depreciation Schedule

The ACC's decision to adopt a 15-year depreciation schedule for copper wire was not arbitrary and capricious. Although there was evidence that copper wire has a physical lifespan of at least 20 years, the issue here is its economic life. There was evidence that copper wire will increasingly become obsolete as a result of technological advances and consumer demands for additional services. While not everyone agrees with that assessment, the ACC has considerable discretion in resolving these conflicting forecasts.

The ACC also did not err by departing from the 24-year depreciation schedule it had established during a prior rate proceeding. For a number of reasons, decisions made during utility rate proceedings do not always reflect actual costs, nor are [**14] they necessarily indicative of what an efficient telephone company would do in a competitive market. Some of the same CLECs disputing US West's proposed depreciation schedule admittedly utilize an even faster schedule for their own networks.

D. Markup for Overhead and Common Costs

The ACC adopted a 15 percent markup, the same amount proposed by E-spire. E-spire contends that its proposal was actually intended for use with the US West model, which differs from the Hatfield [*1012] Model, and the markup for the latter should be only 12.67 percent. However, the ACC was not obliged to adopt E-spire's entire proposal as a package. Some CLECs also cite a study that allegedly supports a lower number, but the ACC could reasonably have determined this study was inapposite or otherwise unpersuasive.

Finally, AT&T points to an incident in which Arbitrator Rudibaugh could not recall from memory precisely what costs were included in the markup. Since the Commissioners did not vote on this issue until a second meeting more than two months later, they had ample time to obtain the requested information during the interim. There is no basis to disturb the ACC's decision.

E. Network Maintenance [**15] Costs

The issue here is the cost of maintaining the mythical efficient network. The Hatfield Model projected a reduction in maintenance costs (compared to the existing US West network) in excess of 30 percent. The arbitrators decided that a 15 percent reduction was more realistic, and the ACC agreed. This decision was not arbitrary and capricious.

F. Cost of Capital

During the prior rate proceeding, the cost of equity was fixed at 11.4 percent. US West proposed to use 12.85 percent in computing the loop price. The arbitrators agreed that 11.4 percent was too low, and recommended 11.9 percent. Instead, the ACC fixed the cost of equity at 12.4 percent.

Both sides rely almost entirely upon conclusory assertions, while pointing to little evidence of what rate of return US West needs to attract sufficient new investment capital. Under the circumstances, this court cannot say that the ACC's decision was arbitrary and capricious. Ultimately, the agency had to choose a number. Faced with a dearth of credible evidence, the ACC drew upon its own experience and expertise, as it was entitled to do.

G. Terminal Installation and Splicing Costs

Although a single pedestal can [**16] theoretically serve eight drops, the ACC concluded that an average of four drops per pedestal is more realistic in Arizona in view of the density of housing, topography, and other factors. That decision was not arbitrary and capricious.

The written order is somewhat contradictory, but the court is satisfied that any confusion results from a simple drafting error (the failure to revise certain language after the original recommendation was modified). Since the agency's intent and reasoning are clear, there is no need to remand for clarification.

H. Three Pairs per Drop

The ACC concluded that a network designed and built today would have three pairs per drop instead of two. Given the high cost of adding additional pairs later, the ACC's decision was not arbitrary and capricious.

I. Conclusion

TELRIC methodology requires the ACC to predict future events, often for a hypothetical telephone network. The ACC necessarily has considerable discretion in selecting these model inputs. Reasonable people might reach different conclusions regarding some inputs, as evidenced by the 2-1 split between the commissioners. Nevertheless, the agency's final decision on the two-wire loop [**17] price is not arbitrary and capricious or contrary to law, and is supported by substantial evidence in the record.

2. Four-Wire Loop Price

The ACC set the price for a two-wire loop at $ 21.98, and the price for a four-wire loop at $ 22.90. Since a four-wire [*1013] loop appears to be roughly equivalent to two two-wire loops, the court is unable to discern any rational basis for the ACC's decision. The ACC points to evidence that it will cost one or two dollars to add an additional pair of wires per drop, but a loop (which may run for several miles) is very different from a drop (which is just the last 50 feet or so of the loop). In addition, the price for a loop reflects not just the copper but also a pro rata share of the cost of digging the trench, overhead, and common costs.

AT&T vigorously defends the ACC's decision, but its own witness testified that the price for a "4-wire loop can be derived by taking the aggregated 2-wire loop price, multiplying it by two, and subtracting the cost of one NID." Rebuttal Testimony of Natalie Baker, p.3. n2

n2 The court commends Sprint's attorneys for their candid concession that the ACC erred.

[**18]

The ACC may have erred. At a minimum, it has failed to adequately explain its decision. This issue is remanded to the ACC for reconsideration.

3. Non-Recurring Charges

The ACC fixed the price for non-recurring charges ("NRCs") at the current retail tariff price less an 18 percent wholesale discount. US West and AT&T both object.

The "retail price less avoided costs" formula applies only when a CLEC purchases finished services for resale. See *47 U.S.C. § 252*(d)(3). It is not clear from this record whether NRCs are properly classified as a "resale" product, particularly when those costs are incurred in connection with a CLEC's purchase of unbundled loops. A resale service is a telecommunications service that US West ordinarily provides at retail to subscribers who are not telecommunications carriers. *47 U.S.C. § 251*(c)(4)(A). The term "network element" is defined in *47 U.S.C. § 153*(29). If NRCs are an unbundled network element, rather than a resale service, then the ACC must price NRCs on the basis of forward-looking costs without regard to the retail price. *47 U.S.C. § 252*(d)(1). Rather than speculate whether NRCs should be categorized as an unbundled element [**19] or a resale service, the court remands this issue to the ACC for reconsideration and to articulate a more detailed explanation for the agency's decision.

4. Customer Transfer Charge

The ACC limited the customer transfer charge to five dollars, reasoning that this is the maximum fee that can be charged when a customer changes long distance carriers. However, the ACC made no finding that this charge accurately reflects the costs that US West incurs. The long distance transfer charge may have been artificially capped at five dollar so customers would not be discouraged from switching carriers. Notably, AT&T did not argue that US West actually spends only five dollars to transfer a customer. Instead, AT&T argued that it should not be responsible for paying the costs that US West incurs because AT&T does not directly "cause" those expenditures. In addition, even if the five dollar charge accurately reflects the costs of changing long distance carriers, the ACC made no finding that the tasks US West must perform to change long distance carriers are comparable to the tasks involved in switching local carriers.

AT&T also contends that a higher customer transfer charge (which [**20] reflects US West's actual costs) would discourage switching between carriers. Perhaps so, but US West is still entitled to be compensated for its actual costs, whether through a customer transfer charge or otherwise. The court does not preclude the possibility that some form of bill-and-keep arrangement might be permissible, if customer transfers will roughly balance and the CLECs will bear the cost of implementing transfers of customers returning to US West. However, the ACC did not [*1014] make the findings necessary to support such a plan.

Some of the CLECs argue that instead of a cost-based charge, the customer transfer charge should be viewed as a retail service that must be made available for resale, and priced accordingly. That assumes the customer transfer charge is a "telecommunications service" and further assumes it is a service US West provides at retail and that there is an existing retail price from which to compute a wholesale price. The ACC did not address this argument in its decision, but should on remand.

This issue is remanded to the ACC for reconsideration and for such further proceedings as the agency deems appropriate.

5. Deaveraging Loop Prices

The [**21] CLECs contend that the ACC erred by establishing a single state-wide loop price, instead of "deaveraging" loop prices into multiple zones (based on density or some other criteria) and charging a different price for each zone. Deaveraging would reduce loop prices in dense urban areas, but significantly increase loop prices in the rest of Arizona.

The ACC concluded that the existing record was inadequate to properly implement deaveraging, and had doubts about the accuracy of the numbers it was being asked to approve. The ACC also was worried about the impact of deaveraging loop prices while retail prices remain fixed and before explicit universal service subsidies are operational. These are legitimate concerns. Cf. *AT&T Communications of the Pac. Northwest, Inc. v. US West Communications, Inc., 31 F. Supp. 2d 861, 864-65 (D. Or. 1998)* (affirming Oregon PUC's decision not to order immediate deaveraging); *MCI v. GTE, 1999 U.S. Dist. LEXIS 3129, F. Supp. 2d at , 1999 WL 151039* at *12-13 (same).

The ACC did not categorically reject deaveraging. Instead, it agreed to commence a separate proceeding to consider whether and how to deaverage loop prices, and potentially to deaverage retail [**22] prices as well. That was a reasonable decision.

Network element prices must be based upon the cost of providing the element. *47 U.S.C. § 252*(d)(1)(A). The ACC's decision does not violate that requirement. See, e.g., *MCI Telecom. Corp. v. U.S. West Communications, Inc., 1998 U.S. Dist. LEXIS 21585*, Case No. C97-1508R, slip. op., (W.D. Wash. July 21, 1998) at 33-34. Although the CLECs would prefer that the market be segmented further, the Act does not explicitly require this. The ACC acted within its discretion when it declined to order immediate deaveraging, and has provided ample justification for its decision.

Some CLECs argue that an FCC regulation, 47 C.F.R. 51.507(f), now mandates deaveraging into at least 3 zones. However, that regulation was not in effect when these Agreements were adopted and the loop prices were established. Whether the ACC must now revisit the deaveraging issue, as a result of the Supreme Court's decision reinstating the FCC's regulation, is a question properly addressed in the first instance by the ACC rather than by this court.

6. Resale Discounts

The discount rate reflects the net costs (e.g., advertising, billing, and collection) that US West could reasonably [**23] avoid by selling a particular service at wholesale rather than retail. *47 U.S.C. § 252*(d)(3). Most of the CLECs contend the ACC set the discount rate too low.

There is no merit to the allegations by some CLECs that the Commissioners conducted an "auction" or otherwise acted improperly. Those transcript excerpts are taken entirely out of context, and simply reflect a little levity at the end of a long and sometimes contentious hearing. Although the CLECs contend the 18 percent discount rate is arbitrary and capricious, and prefer the arbitrators' proposal, during the hearing Arbitrator Rudibaugh advised the Commissioners that the 18 percent [*1015] figure was within the range supported by the record.

Several CLECs also challenge the rate structure adopted by the ACC. Potential cost savings may vary considerably between services. US West spends little to advertise basic residential service, but heavily promotes "vertical features" such as Caller-ID or call-waiting that provide generous profit margins. A single discount rate for all services, i.e., a "unitary" discount, is unlikely to accurately reflect the avoided costs for each individual service. See *MCI v. GTE, 1999 U.S. Dist. LEXIS 3129, F. [**24] Supp. 2d at , 1999 WL 151039* at *15.

An additional consideration is that a CLEC can often purchase a service at the resale discount, or else effectively obtain that same service by buying the unbundled network elements, whichever is cheaper. A discount rate that is generated by averaging a wide range of cost savings can be problematic if the CLEC can pick which services to order at the wholesale price and which to order at the unbundled element price. Id.

The arbitrators recommended that the ACC adopt a multi-prong discount, which ranged from a low of 10.05 percent for basic residential service up to a 63.17 percent discount for vertical features. Instead, the ACC adopted a 12 percent discount for basic residential service, while all other services are discounted by 18 percent. As a result, vertical features are discounted by only 18 percent, even though US West proposed to discount this service by 44 percent and the arbitrators recommended a 63 percent discount. In other instances, the 18 percent discount is applied even though it is not clear that any significant cost savings will result. The ACC's decision does not explain or justify this decision. Rather, the text [**25] of the decision persuasively argues that a single discount rate is not appropriate.

The only other source of illumination is the hearing transcript, which indicates that the commissioners wanted to keep the discount rate structure simple. Simplicity is a desirable trait, but the ACC has not explained how multiple discounts would cause serious administrative difficulties. The ACC did express concern about the proper categorization of novel new services, but that seemingly can be addressed by means other than a unitary discount rate, e.g., by setting an interim rate that applies to novel new services until the ACC fixes a permanent discount rate for that service.

The court is not suggesting that there must be a separate discount rate for each service US West offers. However, the ACC must at least consider the range of cost savings for different categories of services, as well as the potential for abuse through selective ordering tactics, and determine whether additional discount rates are needed. Whether the ACC has, or can even obtain, the information needed to more accurately identify the cost savings attributable to various services will also be a factor in deciding whether [**26] to establish additional discount rates.

Because the decision does not adequately explain the result reached, or demonstrate that the ACC considered all relevant factors, the issue of resale discounts is remanded for further consideration. The court expresses no opinion regarding the proper result on remand.

7. Access to Unbundled Subloops via the BFR Process

The CLECs sought immediate unbundling of all subloops. US West opposed that request on grounds it would compromise network reliability, be technically infeasible in some locations, and require US West to modify all 7600 feeder distribution interface ("FDI") boxes without any guarantee that the CLECs will ever order subloops at most of those locations.

The ACC decided to permit unbundling of subloops, but only through an expedited bona fide request ("BFR") process. Upon receiving a request to unbundle a particular [*1016] subloop or group of subloops, US West has 10 days to furnish a preliminary feasibility analysis and 21 days to furnish a price list. Any dispute will be resolved pursuant to the dispute resolution process established by the Agreement.

The FCC declined to order unbundling of subloops as a matter of course, [**27] because of lingering concerns regarding certain technical issues. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, *1996 FCC LEXIS 4312, CC Docket No. 96-98, 11 FCC Rcd 15499* (Aug. 8, 1996) ("First Report and Order"), P 391. Instead, the FCC left the decision up to each state public utility commission, which is more likely to be familiar with local conditions and better situated to address this issue. Id.

MCI's contention that the ACC is prohibited from considering technical feasibility is premised upon a misreading of *Iowa Util. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997)*, rev'd in part by *AT&T, 142 L. Ed. 2d 834, 119 S. Ct. 721*. Nor is technical feasibility the only relevant consideration, as some CLEC's have argued. Rather, Congress listed certain factors that "at a minimum" must be considered when deciding what network elements must be unbundled, but did not prohibit consideration of other factors. *47 U.S.C. § 251*(d)(2); *AT&T, 119 S. Ct. at 734-36* (rejecting the FCC's interpretation of § 251(d)(2)). There also is no merit to MCI's contention that service outages resulting from subloop unbundling are merely a "cost [**28] issue." Opening Brief at 19. By definition, service outages implicate "network reliability."

Next, MCI argues that the expedited BFR process is discriminatory because it provides US West with speedier access to unbundled subloops. It is unlikely that US West would ever seek to unbundle a subloop for its own customers. Such a request is unique to the CLECs. Consequently, there is no basis to make the comparison that MCI seeks to draw.

Nevertheless, the court questions whether it is really necessary to utilize the full BFR process, with its inherent delays, each time MCI orders an unbundled loop. Through advance planning and cooperation, the parties seemingly could expedite subloop unbundling in many instances while still addressing US West's legitimate concerns. It also is unclear what percentage of subloop unbundling requests actually pose significant technical concerns. If the number is comparatively small, then it may be more efficient to simply establish a process for US West to object to specific requests.

MCI has also proposed to pay US West employees to perform subloop unbundling tasks, which may alleviate concerns that US West's equipment could be damaged if CLEC employees [**29] are given access to the FDI boxes. At oral argument, US West asserted that this violates the Eighth Circuit's decision in Iowa Utilities because it requires US West to connect the cables on behalf of the CLECs. The court disagrees. The CLECs are willing and able to perform those tasks themselves, but have given US West the option of using its own employees to perform the work if US West prefers to retain exclusive control over access to the FDI boxes.

This issue is remanded to the ACC to consider whether US West's legitimate concerns can be addressed by a less cumbersome procedure than is required by the present Agreement.

8. Reciprocal Access to Poles and Ducts

The ACC did not exceed its authority by ordering reciprocal access to all telephone poles, ducts, conduits, and rights-of-way not utilized exclusively for interstate telephone service. The court agrees with Judge Jelderks' analysis of the relevant statutes and the jurisdictional issue. See *US West Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc., 31 F. Supp. 2d 839, 849-51 (D. Or. 1998),* supplemented, [*1017] F. Supp. 2d at , slip op. at 21-30 (D. Or. May 3, [**30] 1999). The interpretation urged by the FCC and the CLECs is contrary to the plain language of the Act.

Although the Act requires CLECs to grant reciprocal access, the FCC and ACC may still have the authority to protect a CLEC against an especially burdensome request for reciprocal access. Consequently, many of the CLECs' concerns regarding the reciprocal access requirement may prove to be unwarranted.

9. Fees to Reserve Space on US West Poles

The ACC did not exceed its authority by allowing US West to charge a fee, equal to US West's approved cost of capital, to reserve space on or in US West poles, ducts, conduits, and rights-of-way. The reserving CLEC obtains an option for a fraction of the cost of actually leasing the space. Even if US West or another CLEC give notice of intent to actually use the space, the first CLEC still has a right of first refusal. The ACC reasonably concluded this is a valuable right for which compensation should be paid.

A reservation fee also tends to discourage CLECs from reserving more space than necessary, and to minimize the likelihood of disputes concerning the sincerity of a CLEC's space reservations. This benefits both US West and [**31] other CLECs. Without a reservation fee, MCI could reserve large portions of US West's network, to the detriment of other CLECs who may also want to reserve space. That may explain why MCI is the only CLEC contesting this reservation fee.

MCI next contends that the fee is discriminatory because US West does not pay a fee to reserve space on its own telephone poles. MCI ignores the fact that US West built and paid for those poles, which is why the ACC used US West's approved cost of capital to fix the amount of the reservation fee. For the same reason, there is no merit to MCI's contention that the reservation fee does not reflect US West's actual costs. Moreover, MCI's interpretation of *47 U.S.C. § 224*(d)(1) imports the same temporal prerequisite (i.e., present usage or occupancy) that MCI has vigorously opposed in the context of dark fiber.

Finally, by requiring US West to reserve space for use by its competitors, Congress arguably has interfered with US West's control over its property. The reservation fee ensures that US West will be compensated for this infringement.

10. Obligation to Exercise Eminent Domain

The ACC ordered US West to take various actions [**32] to accommodate CLEC requests for access to US West's poles, ducts, conduits, and rights-of-way. US West objects to a requirement that US West "exercise its eminent domain power when necessary to expand an existing [right-of-way] over private property in order to accommodate a request from [a CLEC] for access to such [right-of-way]." US West asserts that under Arizona law every utility has eminent domain power, so US West should not have to perform that task on behalf of the CLECs. The court will assume, without deciding, that US West has correctly stated Arizona law in this regard. No party has argued otherwise.

AT&T argues that the Act "clearly requires US West to exercise its eminent domain rights and expand its rights of ways for new entrants . . . ." That overstates the law.

In general, the Act does not require an ILEC to perform tasks on behalf of a CLEC that the latter is equally capable of completing itself. Congress gave the CLECs access to the existing US West network only because it would be inordinately expensive and time-consuming to replicate that network. Similarly, Congress permitted the CLECs to interconnect with the US West network only [*1018] because interconnection [**33] is an essential prerequisite to competition. Such concerns are not present here. If the CLECs are equally capable of exercising eminent domain power on their own behalf, there is no apparent reason why US West should routinely perform that task for them. Cf. *AT&T, 119 S. Ct. at 734-36* (FCC erred by requiring ILECs to unbundle network elements without regard to whether a CLEC can obtain those elements from other sources). AT&T has not explained how it would be unfairly prejudiced by exercising its own eminent domain powers.

AT&T's argument essentially boils down to a naked assertion that anything a CLEC wants, US West must provide. That is not the law. Id. US West is AT&T's competitor, not its butler.

The FCC's First Report and Order does not compel a different result. The language cited by AT&T is precatory: "We believe a utility should be expected to exercise its eminent domain authority . . ." First Report and Order, P 1181 (emphasis added). The FCC knows how to enact binding regulations when it wants to. The FCC adopted numerous substantive regulations at the same time it issued this Report, but conspicuously chose not to issue a substantive regulation [**34] covering this topic. While the FCC sometimes acts through orders as well as formal rulemaking, the court declines to treat the entire 700-page First Report and Order (and its 3,277 footnotes) as one enormous substantive rule with the force of law. See US West v. AT&T, supra, 31 F. Supp. 2d at , slip op. at 21-30. n3

n3 The CLECs correctly note that, in the context of a motion to dismiss early in the case, this court did treat the entire First Report as binding. However, as this case has progressed the court has become more familiar with the issues, the structure of the Act, and the First Report itself, and the court's views have evolved accordingly.

47 U.S.C. § 224(h) is the only statutory authority cited by the FCC. That section offers no support for the proposition that an ILEC must routinely exercise eminent domain powers on behalf of a CLEC notwithstanding that the CLEC is equally capable of accomplishing the same task. The First Report and Order also gives no indication [**35] that the FCC even contemplated that state law might authorize a CLEC to exercise eminent domain powers in its own right.

The ACC assumed it was compelled to follow the FCC's interpretation of the Act and therefore never exercised its independent judgment. This issue implicates important questions of Arizona law and policy with regard to public utilities. In addition, the ACC's superior knowledge of local conditions qualifies it to identify the range of circumstances in which the CLECs genuinely need US West's assistance to acquire rights-of-way or the public interest would otherwise be served by such an arrangement.

Therefore, the court remands this issue to the ACC for reconsideration. The ACC may require that US West exercise eminent domain powers on behalf of the CLECs, but the agency must better define those circumstances and explain why this action is necessary to further competition or is otherwise in the public interest.

11. Access to Dark Fiber

The ACC conditionally approved the CLECs' request for access to US West's dark fiber. US West challenges the ACC's authority to grant the request, while AT&T and MCI challenge three of the conditions. The court denies [**36] the requests, by some parties, to stay portions of this claim pending the FCC's issuance of a replacement for Rule 319, which was vacated by the Supreme Court.

A. Authority to Unbundle Dark Fiber

Dark fiber is a network element and the ACC has the authority to order US West to unbundle it. See *US West v. AT&T, 31 F. Supp. 2d at 854,* supplemented, [*1019] F. Supp. 2d at , slip op. at 32. The Supreme Court's decision in AT&T does not compel a different result. The ACC not only considered whether AT&T and MCI have comparable alternatives to using US West's dark fiber, but also made such a showing a prerequisite to ordering dark fiber.

B. Needs Test

AT&T and MCI challenge a requirement that when requesting dark fiber from US West, they "must establish that another Network Element of comparable expense cannot satisfy [their] needs." This is a reasonable condition. Fiber is a valuable commodity which can transport a very large volume of traffic. The condition helps to ensure this resource is not wasted. It also is consistent with an underlying theme of the Act, which is to provide the CLECs with access to resources that are necessary for local [**37] competition but cannot readily be duplicated. If a comparable alternative is readily available, then the CLECs do not need access to US West's dark fiber. See *AT&T, 119 S. Ct. at 734-36.* Finally, this requirement does not violate *47 U.S.C.* § *251*(d)(2).

AT&T and MCI complain that the condition is discriminatory because US West has access to its own dark fiber without having to demonstrate need. That argument ignores market realities. US West has little reason to waste its own valuable fiber if the same need could be met by another network element of comparable expense. AT&T and MCI also ignore the fact that US West owns this dark fiber, which by definition confers certain privileges and advantages.

C. Right to Reclaim Dark Fiber

AT&T and MCI object to a condition that allows US West to reclaim its fiber, with twelve months notice, "if US West can establish that the fiber is necessary to meet its bandwith requirements or those of another requesting CLEC, provided that the original CLEC's transportation is provided for by alternative means and at comparable prices and quality. The conversion to the alternative means shall be at the expense of the new user of the Dark [**38] Fiber, whether that be US West or another CLEC. One of the alternative means to be considered by US West will be the sharing of bandwith."

In other words, before US West can reclaim its fiber from AT&T or MCI, either for its own use or on behalf of another CLEC, US West must (1) give a year's notice, (2) establish that it or another carrier actually needs the fiber, (3) establish that AT&T/MCI have alternatives at comparable price and quality, and (4) compensate AT&T/MCI for the cost of conversion. This is a reasonable condition that helps to ensure that fiber will be efficiently managed while protecting the interests of all concerned.

AT&T and MCI contend that this condition is discriminatory because US West is not subject to having its own rights revoked. This is tantamount to an uninvited house-guest alleging discrimination because he can be asked to leave, on twelve month's notice, if the homeowner proves that she needs the space for her own family and pays to relocate the house-guest to comparable quarters. AT&T and MCI's other arguments do not merit discussion.

D. Reciprocal Access to Dark Fiber

AT&T objects to the following condition:

If AT&T obtains access [**39] to US West's Dark Fiber, AT&T shall make its Dark Fiber available to US West on a comparable and reciprocal basis. This Section . . . shall not take effect until CLECs (other than wireless CLECs) operating within US West's Arizona service territory provide service to at least 200,000 access lines.

[*1020] MCI challenges a similar condition in its Agreement. The court reluctantly sustains those objections.

The FCC has decreed as follows:

A state may not impose the obligations set forth in section 251(c) of the Act on a LEC that is not classified as an incumbent LEC as defined in section 251(h)(1) of the Act, unless the [FCC] issues an order declaring that such LECs or classes or categories of LECs should be treated as incumbent LECs.

47 C.F.R. § 51.223. The duty to unbundle network elements is an obligation contained in § 251(c), and neither AT&T nor MCI is presently classified as an incumbent LEC in Arizona.

In P 1247 of the First Report and Order, the FCC explained its reasons for enacting § 51.223:

1247. We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local [**40] Exchange Carriers," distinct from obligations on all LECs, would be inconsistent with the statute. Some parties assert that certain provisions of the 1996 Act, such as sections 252(e)(3) and 253(b), explicitly permit states to impose additional obligations. Such additional obligations, however, must be consistent with the language and purposes of the 1996 Act.

The FCC's explanation is not very persuasive. Although Congress chose not to impose certain obligations on every CLEC every time, it is a logical leap to infer that those obligations therefore can never be appropriate in any instance. Moreover, Congress carefully included savings clauses allowing states to impose additional requirements so long as they do not conflict with the Act. See, e.g., *47 U.S.C.* §§ *252*(e)(3), 253(b), 261(c). The effect of the FCC's regulation is to turn the minimum requirements of the Act into a ceiling rather than a floor. That would appear to be at odds with the Congressional mandate.

Although this court questions the FCC's interpretation of the Act, the court also must follow that interpretation. The FCC did more than simply discuss its interpretation in the commentary of the First Report. [**41] The FCC incorporated that interpretation in a formal regulation. Thus, there can be no doubt that the FCC has issued a substantive rule governing this topic, and the state commissions had notice of that action. That distinguishes this situation from certain others (such as access to poles and ducts) where the FCC simply expounded upon its view in the course of a 700-page Report, but did not incorporate that discussion in any of the "final rules" it ultimately adopted. Under the Hobbs Act, *28 U.S.C. § 2342,* the FCC's regulation may be challenged only in the Court of Appeals.

In P 1248 of the First Report, the FCC did hold out a slim reed of hope by suggesting that state commissions may seek permission from the FCC to treat a CLEC as an ILEC pursuant to *47 U.S.C.* § *251*(h). However, § 251(h) applies only when a CLEC has "substantially replaced an incumbent local exchange carrier." § 251(h)(2)(B). It seems unlikely that any one carrier will ever attain such dominant status. Rather, as in the long distance market, there may be several major carriers along with numerous smaller carriers. Thus, this reed may prove illusory.

The ACC must revise the AT&T and MCI Agreements to eliminate [**42] the condition requiring reciprocal access to dark fiber.

12. Single Point of Interconnection

When a US West customer in Arizona calls an AT&T or MCI customer, or vice versa, the networks must interact. AT&T and MCI want a single point of interconnection. Regardless of where in Arizona the call originates or is bound, it [*1021] first must be transported to this point of interconnection, which may be many miles away. Even a call to the next-door-neighbor may need to be transported across town or even across the state.

US West contends this is a very inefficient means to exchange traffic between local networks, and will overload US West's tandem switches and other facilities, forcing US West to expand capacity at considerable expense. It is not as serious a problem for AT&T and MCI because their network architectures do not utilize tandem switches.

Neither the Act nor FCC regulations specify how many points of interconnection a carrier must have. *US West v. AT&T, 31 F. Supp. 2d at 852.* The language in *47 U.S.C.* § *251*(c)(2) authorizing interconnection "at any technically feasible point within the carrier's network" answers only the question of whether a CLEC may interconnect [**43] at a given point, not how many points of interconnection a CLEC must (or may) have. Id. If the word "any" in § 251(c)(2) meant "one," as MCI and AT&T contend, then a CLEC could not establish more than one point of interconnection with US West's network, which could lead to absurd results.

The court also rejects US West's contention that a CLEC is always required to establish a point of interconnection in each local exchange in which it intends to provide service. That could impose a substantial burden upon the CLECs, particularly if they employ a different network architecture than US West.

Whether to require more than one point of interconnection is best determined by each state's public utilities commission, which is most knowledgeable about the details of the parties' respective system architecture and local circumstances, subject of course to the standards established by the Act and any applicable FCC regulations.

In the MFS (now WorldCom) decision, the ACC assumed that it had authority to require more than one point of interconnection, and indicated that it would require additional points of interconnection if the circumstances warranted. In the AT&T and MCI decisions, [**44] the ACC reversed course and assumed that it lacked the authority to intercede. Unlike the MFS decision, the ACC made no mention of allowing US West to seek relief if problems do arise or requiring additional interconnection points when circumstances warrant. Cf. *US West v. AT&T, 31 F. Supp. 2d at 852-53.*

In its briefs, the ACC states that, in making this decision, the agency considered only whether interconnection was physically possible at the requested location. The ACC ignored other factors such as the cost to US West of establishing only a single point of interconnection, because the ACC assumed it could not consider those factors.

Although cost is not grounds to prohibit a CLEC from interconnecting at a particular technically feasible location it has chosen, that does not answer the question of how many points of interconnection there must be. There is a significant difference between saying that the CLEC must connect on a particular street corner or is prohibited from connecting there, versus requiring that it have a connection somewhere within a 30-mile radius of downtown Phoenix (as an example).

In determining whether a CLEC should establish more than one point of [**45] interconnection in Arizona, the ACC may properly consider relevant factors, including whether a CLEC is purposely structuring its point(s) of interconnection to maximize the cost to the ILEC or to otherwise gain an unfair competitive advantage. The purpose of the Act is to promote competition, not to favor one class of competitors at the expense of another.

As an alternative, the ACC may require a CLEC to compensate US West for costs resulting from an inefficient interconnection. See *47 U.S.C. § 252*(d)(1); First [*1022] Report and Order, P 199; *Iowa Utilities, 120 F.3d at 810.* It would be ironic if a law designed to promote a market-driven economy in local telephone service were instead interpreted to prohibit the consideration of cost when making decisions and thereby subsidize and reward inefficient behavior by market participants.

This issue is remanded to the ACC for reconsideration and such further proceedings as the ACC deems appropriate.

13. Tandem Switch Treatment

The ACC's decision to treat the TCG and Brooks switches, and the AT&T Wireless Service mobile switching center, as tandem switches was not arbitrary and capricious. The record also shows that the [**46] ACC did not treat the FCC rule as binding, but voluntarily chose to adopt the same standard anyway.

14. Access to MCI's Long Distance Affiliate

MCI contends the ACC exceeded its jurisdiction by giving US West access to MCI's long distance affiliate. MCI omits critical details. In an effort to obtain compensation at the tandem switch rate, MCI had represented to the ACC that it planned to cover a geographic area comparable to US West's tandem switch by utilizing both MCI's own facilities and those of its long distance affiliate to terminate US West calls. The ACC conditionally approved the tandem switch rate, subject to MCI's compliance with that voluntary representation. Otherwise, MCI will be compensated at the end office switch rate. The ACC's decision was not improper. On the contrary, it was MCI that first proposed this idea.

15. Restrictions on Resale of CENTREX

US West may sell certain products and services, such as CENTREX, only to the specific category of customers that the ACC designated when it approved the US West tariff. The ACC incorporated similar restrictions in the interconnection agreements. CLECs may resell these products only to the [**47] same category of customers who would be eligible to purchase them from US West in the first place. AT&T challenges that restriction and demands the right to resell these products to anyone, even though under Arizona law US West is prohibited from doing the same.

47 U.S.C. § 251(c)(4) requires an ILEC to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail . . ." The ILEC may not "prohibit . . . [or] impose unreasonable or discriminatory conditions or limitations on . . . the resale of such telecommunications service . . . ." However, "a State commission may, consistent with regulations prescribed by the [FCC] under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."

The FCC has promulgated the following regulation:

(a)(1) Cross-class selling. A state commission may permit an incumbent LEC to prohibit . . . [the resale of] services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers [**48] . . . to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

* * * *

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and non-discriminatory.

47 C.F.R. § 51.613. In other words, the states may always impose cross-class restrictions on the resale of residential services. In addition, an ILEC may impose [*1023] other restrictions on resale if it demonstrates, to the satisfaction of the state public utilities commission, that "the restriction is reasonable and non-discriminatory."

Since US West may offer CENTREX only to certain categories of customers, the ACC concluded that it is neither discriminatory nor unreasonable to impose the same restrictions upon AT&T when it resells US West service. The court agrees.

AT&T contends that US West must also prove that the underlying tariff, restricting the sale of CENTREX to certain categories of customers, is itself reasonable and non-discriminatory. The court disagrees. Since every retail service must be made available for resale, AT&T's interpretation [**49] of the statute would effectively put the FCC and this court in the position of reviewing every existing state public utility commission tariff to decide what intrastate services may be sold and to whom. This would represent an extraordinary (and unnecessary) federal incursion into an area previously regulated by the states. The court has found nothing in the Act to suggest that Congress intended such a result.

A second flaw in AT&T's argument is that it places the burden upon the ILEC to justify all cross-class restrictions in the underlying tariff, even though it may have been the state public utilities commission --and not the ILEC-- that insisted upon the restriction in the first place. An ILEC has little incentive to defend restrictions it never supported.

Finally, both § 251(c)(4) and 47 C.F.R. § 51.613 refer to conditions imposed by the ILEC, not conditions imposed by the state public utilities commission, and each specifically refers to conditions imposed upon resale and not to restrictions upon intrastate service in general.

For all these reasons, the court rejects AT&T's interpretation of the statute. The ACC may, consistent with Arizona law, modify its existing tariffs [**50] to remove restrictions on the sale of CENTREX that the ACC believes are no longer appropriate. However, the parties have cited no legal authority that permits either this court or the FCC to force the ACC to involuntarily implement the tariff modifications sought by AT&T.

The ACC's decision on this issue correctly interprets the Act and the ACC's duty, and is affirmed.

16. Telephone Directories

Several provisions require US West to ensure that its affiliate, US West DEX, takes certain actions concerning the contents of the white and yellow page directories that DEX publishes, the sale of display advertising, and the payment of commissions on the sale of advertising. US West contends that DEX is a separate company, and is not a telecommunications carrier, and therefore is outside the jurisdiction of the ACC and FCC. US West also contends that the Act does not authorize the particular requirements at issue.

This claim presents a much closer question than the parties acknowledge. The requirements imposed here extend well beyond mere "directory listings." Resolution of this claim would require the court to venture into uncharted waters, and to determine the jurisdiction [**51] of both a federal and state agency, a task this court does not undertake lightly.

AT&T and MCI have now entered into contracts directly with US West DEX. That development should moot the dispute, but the parties urge this court to reach the merits anyway. The court declines the invitation. If DEX someday breaches the contract, as the ACC suggests, the injured party can seek relief just as in any other contractual dispute. If DEX refuses to renew the contract on reasonable terms, as the ACC speculates, the parties can confront that problem when it occurs. Contrary to the suggestions made at oral argument, this case does not fall within either [*1024] the "voluntary cessation" or "capable of repetition but evading review" exceptions to the mootness doctrine.

17. Coin Phone Signaling

The ACC did not exceed its authority by requiring US West to provide coin phone signaling as an unbundled network element. Coin phone signaling is a feature of the local switch. Unless it is unbundled, US West would be the sole local exchange carrier capable of providing lines for pay phones. US West's reliance on P 147 of the FCC's Pay Telephone Order n4 is misplaced. There is a difference between [**52] the installation and operation of pay telephones and the retail pricing of pay telephone service, versus the provision of telephone lines used by pay telephone operators. Only the last issue is implicated here.

n4 Report and Order, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, FCC 96-388 (rel. Sept. 20, 1996).

18. Providing Superior Service, Modifying Network

Most of these claims have now been dismissed, either on grounds of ripeness or otherwise. Only two disputes remain. First, US West objects to paragraph 12.2 in Attachment 4, which provides that:

US WEST must provide installation to AT&T in the shorter of the time it provides installation to itself or any other Person. US WEST must provide installation to AT&T within ten (10) Business Days if it does not provide the same installation to itself or any other Person.

The MCI Agreement contains similar language. US West [**53] protests that it may not always be able to provide installation within this ten day limit. The court does not perceive this paragraph as requiring US West to provide superior quality service. Rather, it establishes a default standard that applies when the requested installation is unique, hence there is no basis for comparison with the level of service that US West provides to other customers. Establishing minimum service standards falls squarely within the domain of the ACC, and the court declines to disturb the agency's determination of what is reasonable absent a far more compelling showing than has been made here.

The court does not read paragraph 12.2 as requiring US West to perform the impossible. The parties each have very capable staffs. If, through no fault of US West's, an unusually complex installation cannot reasonably be completed within ten days, the parties should be able to agree upon a more appropriate timetable. The contractual dispute resolution process is also available.

US West also objects to paragraph 16.1.1 in Attachment 4, which provides that:

When requested by AT&T, US WEST shall provide interconnection between US WEST Network Elements provided to [**54] AT&T and AT&T's network at transmission rates designated by AT&T. If additional equipment beyond that which US WEST currently has in place is planning to put in place or is otherwise required to have in place is required to meet such transmission rates, the installation and/or acquisition of such equipment shall be accomplished pursuant to the ordering process set forth in this Agreement.

Again, the MCI Agreement contains similar language. At oral argument, the parties were unsure whether this special equipment is necessary in order for AT&T and MCI to interconnect with the US West network, e.g., their equipment requires that data be sent at a particular speed or using a special format, or whether this equipment is required merely because AT&T and MCI prefer faster transmission speeds or some other improvement [*1025] in the quality of US West service.

Generally speaking, AT&T and MCI have the right to interconnect with the existing US West network, not to some ideal network that they want US West to build for their benefit. Nevertheless, US West may be required to modify its existing network or operations "to the extent necessary to accommodate interconnection or access to network [**55] elements." *Iowa Utilities, 120 F.3d at 813, n. 33.* Interconnection agreements may also establish procedures and protocols for interfacing between the parties. Finally, if US West upgrades its own network or would do so upon receiving a request from a customer, it may be required to make comparable improvements to the facilities that it provides to its competitors to ensure that they continue to receive at least the same quality of service that US West provides to its own customers.

Since the intent of the challenged provision is not clear, the court remands this issue to the ACC for clarification. US West also asserts that the challenged provision is superseded by paragraph 1.3.1. The ACC can consider that argument on remand.

19. Recombining Switches With Trunks to Provide Shared Transport

The FCC has classified shared transport as a network element that must be unbundled. That determination was affirmed in *Southwestern Bell Tel. Co. v. FCC, 153 F.3d 597, 604 (8th Cir. 1998).* Presumably, the FCC will revisit that decision now that the Supreme Court has rejected the standards used by the FCC to compile its list of network elements that must be unbundled. For [**56] now, however, US West has given this court no reason to conclude that shared transport should not continue to be unbundled pending the FCC's rulemaking.

The court declines to consider US West's objections to the pricing of shared transport, as that issue was not asserted below and this particular argument has never been addressed by the ACC. US West argues that this issue arose only recently as a result of the Eighth Circuit's decision in Southwestern Bell. However, the ACC has expressed its willingness to revisit pricing issues if any party requests, once the ACC has had at least a year's experience with the current pricing structure. US West can present this issue to the ACC at the proper time.

20. Sham Unbundling and Forced Recombination of Elements

This court previously dismissed, with prejudice, US West's claims that a CLEC is prohibited from purchasing unbundled elements and recombining them (itself) into a finished service, concluding that argument was foreclosed by the Eighth Circuit's decision in *Iowa Utilities, 120 F.3d at 814-15.* The Supreme Court's decision in AT&T does not require a different result.

US West's alternative claim, that it cannot [**57] be forced to recombine those elements for the CLECs, may have more merit. See *Id. at 813* (vacating the FCC's recombination rule, 47 C.F.R. § 51.315(c)-(f)). However, the ACC has advised the court it is in the process of reconsidering its position on this issue. Therefore, the court dismisses this claim as unripe.

At oral argument, US West expressed concern about the length of time that has elapsed since the ACC first began the reconsideration process, with little progress evident to date. The court shares those concerns. In view of the ACC's assurances that it is hard at work on this problem, the court will deny US West's request for an immediate stay of the disputed contractual provisions involving forced recombination. But cf. *5 U.S.C. § 551*(13) ("agency action" includes the "failure to act").

In its supplemental brief, US West asserts that in the aftermath of the Supreme Court's decision "there is no valid unbundling rule or standard" and thus US West [*1026] should not be required to "provide its assembled platform under the guise of unbundling." It is not entirely clear what US West has in mind. If US West is proposing to separate already-combined network elements, that [**58] is seemingly foreclosed by the Supreme Court's decision affirming 47 C.F.R. § 51.315(b). *AT&T, 119 S. Ct. at 736-37.* If US West is proposing to withhold certain network elements, that would appear to violate the terms of the interconnection agreements.

US West must continue to honor its contractual commitments to supply network elements to the CLECs, in the manner prescribed in the contract, unless and until those obligations are expressly modified by a court or by the ACC. Neither contingency has occurred.

21. Bill and Keep

The ACC did not err by adopting bill-and-keep as an interim method of reciprocal compensation for calls between networks. The ACC gave US West an opportunity to seek modification of that ruling at a later time if US West can demonstrate that traffic is imbalanced.

The court declines to address compensation for calls made to internet service providers. That issue was not argued below. In addition, the FCC has indicated that modifications to existing interconnection agreements concerning this issue are left to the discretion of the state public utility commissions. In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic, CC Dockets [**59] 96-98 and 99-68 (Feb. 26, 1999).

22. Physical Collocation

A. Collocation of RSUs

The Act provides for physical collocation of "equipment necessary for interconnection or access to unbundled network elements." *47 U.S.C. § 251*(c)(6). In considering US West's objection to collocation of Remote Switching Units ("RSUs"), the ACC assumed that "necessary" meant only that the item was "used" or "useful." That lax definition is contrary to the ordinary meaning of the word "necessary," but consistent with the FCC's interpretation of the Act.

In light of AT&T, the FCC's interpretation of the word "necessary" in *47 U.S.C. § 251*(c)(6) is no longer tenable. See *AT&T, 119 S. Ct. at 734-36* (rejecting the FCC's application of the "necessary" and "impair" standards in Rules 317 and 319, and declaring that the FCC "has not interpreted the terms of the statute in a reasonable fashion"). Although the FCC's collocation rule, 47 C.F.R. § 51.323 ("Rule 323"), was not directly at issue in AT&T, similar defects are present in Rule 323(b). The FCC appears to have applied the same unacceptable definition of "necessary," and the same expansive view of the ILEC's obligations, [**60] in Rule 323(b) as it did in Rules 317 and 319. See *AT&T, 119 S. Ct. at 736.* In the aftermath of AT&T, it is clear the FCC will have to reconsider Rule 323(b) as well.

This issue is remanded for reconsideration in light of AT&T.

B. Collocation Away from Central Offices

The ACC reasonably concluded that it would be unduly burdensome to use the BFR process for each request for collocation away from a US West central office. If physical collocation is not technically feasible in a particular instance, then US West may object to that specific request, which would trigger the dispute resolution provisions in the contract.

23. Providing Vertical Features with the Switching Element

The Eighth Circuit affirmed the FCC's contention that the Act allows a CLEC to obtain all vertical features of a switch when it purchases the unbundled switching element, even though the vertical features are allegedly finished services that US West believes should be available [*1027] only via a resale discount. *Iowa Utilities, 120 F.3d at 808-10.* See also *AT&T, 119 S. Ct. at 734* (vertical switching features "fall squarely within the statutory definition" of network [**61] elements). US West's claim therefore fails.

24. Most Favored Nation Clause

E-spire contends that the PUC wrongly rejected a proposed "most favored nation" clause, also known as a "pick-and-choose" clause. The Eighth Circuit vacated the FCC's regulation mandating such a clause. *Iowa Utilities, 120 F.3d at 800-01.* At oral argument, this court expressed its intent to dismiss this claim. That no longer is appropriate, now that the Supreme Court has reversed the Eighth Circuit. *AT&T, 119 S. Ct. at 738.* The court will therefore address the merits.

The FCC's rule was not in effect when this Agreement was negotiated and approved by the ACC. Nevertheless, the Supreme Court concluded that this requirement is mandated by the plain language of the Act. Id. The ACC was, at all times, obligated to comply with the Act. Therefore, E-spire's position must prevail regardless of whether there was a binding FCC rule.

The particular language of that clause, and the details of its implementation, are matters to be determined by the ACC on remand.

25. Combining Local and Toll Traffic

Some of the Agreements allow a CLEC to combine local and toll traffic on a single [**62] trunk group. US West complains there is no way to reliably determine which of the traffic that passes along a trunk is toll and which is local. Consequently, US West will not be fully compensated for its share of the access charges associated with toll traffic.

In response to US West's concerns, the ACC added a requirement for the CLEC to provide US West with certain traffic reports. US West was also given the right to audit those reports if it has reason to doubt their accuracy. US West deems these measures inadequate. This court lacks the technical expertise to determine whose position is correct. For purposes of this proceeding, what matters is that US West has not shown that the ACC's decision was arbitrary and capricious.

26. Other Claims

Based upon the discussion at oral argument, it appears there are still proceedings before the ACC concerning the issues raised by Count V (recovery of construction and implementation costs) in Case No. 98-629. Therefore, that claim is dismissed, without prejudice, as unripe. For the same reason, the court also dismisses, without prejudice, Count XII of US West's counterclaim (requirement to construct OSS interface) in Case No. [**63] 97-1856, Count IV (compensation for constructing OSS interface) of AT&T's complaint in Case No. 97-1927, and Count I (failure to include performance standards and noncompliance remedies) of MCI's complaint in Case No. 97-1856.

26. Motion to Strike

Worldcom and MCI's motion to strike portions of US West's reply brief is denied as moot.

CONCLUSION

1. The following issues are REMANDED to the ACC for reconsideration in accordance with the above opinion:

A. Four-wire loop price;

B. Non-recurring charges;

C. Customer transfer charge;

D. Resale discounts (number of discount rates);

E. Unbundled subloops (BFR process);

F. Obligation to exercise eminent domain;

G. Single point of interconnection;

H. Paragraph 16.1.1 (special equipment);

[*1028] I. Forced recombination of elements;

J. Collocation of RSUs; and

K. Most favored nation clause.

2. The ACC shall eliminate the requirement that AT&T and MCI provide reciprocal access to their dark fiber as a condition of using US West's dark fiber.

3. The following claims are DISMISSED WITHOUT PREJUDICE as unripe:

A. US West's forced recombination claims;

B. [**64] Count V (recovery of construction and implementation costs) of US West's complaint in Case No. 98-629;

C. Count XII of US West's counterclaim (requirement to construct OSS interface) in Case No. 97-1856;

D. Count IV (compensation for constructing OSS interface) of AT&T's complaint in Case No. 97-1927; and

E. Count I (failure to include performance standards and noncompliance remedies) of MCI's complaint in Case No. 97-1856.

4. All other remaining claims are DISMISSED WITH PREJUDICE.

5. Worldcom and MCI's motion (docket # 331) to strike portions of US West's reply brief, or in the al-

ternative for leave to file a sur-reply brief, is denied as MOOT.

DATED this 4 day of May, 1999.

OWEN M. PANNER

U.S. DISTRICT COURT JUDGE

1999 U.S. Dist. LEXIS 11418 printed in FULL format.

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware CORPORATION, Plaintiffs, v. ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC., an Illinois Corporation, the ILLINOIS COMMERCE COMMISSION; and DAN MILLER, RICHARD HOLHAUSER, RUTH KRETSCHMER, KARL McDERMOTT and BRENT BOHLEN, in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants.

NO. 97 C 2225

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U.S. Dist. LEXIS 11418

June 22, 1999, Decided

June 28, 1999, Docketed

DISPOSITION: [*1] Illinois Commerce Commission's decision of December 17, 1996 affirmed in part and reversed in part.

COUNSEL: For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Terri Lynn Mascherin, Darryl Mark Bradford, Eric Andrew Sacks, Andrew Malen Spangler, Jr., David Charles Layden, Kristina Marion Entner, John J. Hamill, Jr., David Zev Smith, Jenner & Block, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, defendant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, counter-claimant: Theodore A. Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., counter-defendants: Terri Lynn Mascherin, Darryl Mark Bradford, Jenner & Block, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, intervenor plaintiffs: AUSA, United States Attorney's Office, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS [*2] COMMISSION, intervenor plaintiffs: Theodore C. Hirt, Jonathan T. Foot, United States Department of Justice, Washington, DC.

Deborah A. Golden, AMERITECH CORPORATION, Chicago, IL.

Thomas R. Stanton, ILLINOIS COMMERCE COMMISSION, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: DECISION ON THE MERITS

MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") sue Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. ("Ameritech"), the Illinois Commerce Commission (the "ICC"), and five ICC commissioners in their official capacities under § 252(e)(6) of the Telecommunications Act of 1996 ("the Act"), *47 U.S.C.* § *252*(e)(6). n1 Ameritech asserts a counterclaim against MCI and a cross-claim against the ICC and the individual commissioners under § 252(e)(6) of the Act.

n1 The Act is codified in scattered sections of Title 47 of the United States Code. Citations to sections of the Act are references to the corresponding sections of the Code.

[*3]

BACKGROUND

Historically, local telecommunications services were dominated by state-sanctioned monopolies granted to local exchange carriers such as Ameritech. H. R. Rep. No. 104-204, at 49 (1995) (hereafter, "H. Rep."). The Act imposes a scheme designed to end monopolies in local telecommunications services. The Act recognizes that incoming exchange carriers must be able to make use of the incumbent carrier's existing network in order to compete effectively. Id. The primary mechanisms for opening access to the incumbent carrier's network are found in §§ 251 and 252. Section 251 establishes three methods that the incoming exchange carriers may use to access the incumbent carrier's network. The first method, called "interconnection," allows incoming carriers to construct their own networks and interconnect with the incumbent carrier's facilities on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *47 U.S.C.* § *251*(c)(2). The second method requires incumbent carriers to provide incoming carriers with "nondiscriminatory access to network elements on an unbundled basis." Id. at § 251(c)(3). However, the incumbent [*4] carrier need make available unbundled network elements only if the failure to provide access to the network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Id. at § 251(d)(2)(B). Finally, the Act allows "resale," by which incoming carriers may purchase the incumbent carrier's services at wholesale rates and resell the services to retail customers under a different brand name. Id. at § 251(c)(4).

Section 252 establishes the procedures for determining the terms under which incoming carriers will access the incumbent carrier's network. First, incumbent carriers must negotiate in good faith over the terms of interconnection, access to network elements, and resale. Id. at §§ 251(c)(1) and 252(a)(1). If the parties reach a satisfactory agreement, any open issues are submitted to compulsory arbitration conducted by state public utility commissions. Id. at § 252(b). The state commissions are required to apply the substantive requirements of the Act and any implementing regulations in resolving open issues. Id. at § 252(c). Once an agreement has been reached through negotiation and arbitration, [*5] the proposed agreement must be submitted to the state commission for final approval. Id. at § 252(e)(1). A party who believes the state commission failed to properly apply the Act may seek judicial review of the commission's determinations. Id. at § 252(e)(6).

On March 26, 1996, MCI requested negotiations with Ameritech, the incumbent carrier, for access to Ameritech's network in the Chicago area. Def. Br. at Ex. 2, p. 1-2. On August 30, 1996, MCI filed a petition with the ICC for arbitration of unresolved issues. Pl. Br. at Ex. 6. Ameritech filed a timely response. Def. Br. at Ex. 2, p. 2. The ICC assigned a hearing examiner, who conducted an evidentiary hearing and issued a proposed arbitration decision. Id. Both MCI and Ameritech filed exceptions to the proposed decision. Id. On December 17, 1996, the ICC issued an arbitration decision. Id. On January 28, 1997, MCI presented a proposed interconnection agreement for the ICC's approval. Pl. Br. at 12; Def. Br. at 5. The ICC determined the proposed agreement could only be approved if it was amended in certain respects. The parties submitted an amended interconnection agreement in accordance with the ICC's directives. [*6] Pl. Br. at Ex. 11.

MCI brings this action under § 252(e)(6) challenging specific aspects of the agreement. First, MCI contends the agreement does not require Ameritech to provide MCI with nondiscriminatory access to the network element "shared transport" or "common transport." n2 In order to fully understand MCI's claim, it is necessary to briefly describe the structure of the local telephone network. n3 A telephone customer's home is connected to the network through wires called a "local loop." The local loop connects the customer's home to an "end office," which consists largely of a "local switch." The local switch serves a routing function - it reads the telephone number dialed by the customer and, based on programmed instructions, directs the call on a transmission path to its final destination. If the party receiving the call is connected to the same end office as the caller, the local switch connects the call directly. However, if the caller and the receiving party are connected to different end offices, the call must be "transported" from one end office to another. End offices are connected to one another by "interoffice transmission facilities," which generally consist of [*7] fiber-optic cables capable of carrying hundreds of calls at once. End offices are also connected to "tandem switches" by a type of interoffice transmission facility called a "trunk." Tandem switches are connected to numerous end offices in a hub-and-spoke arrangement, and connect end offices that are not directly connected. MCI's request for "shared transport" refers to Ameritech's interoffice transmission facilities.

n2 The precise meanings of these terms are disputed, as explained below.

n3 The following description of a local telephone network is gleaned from the parties' briefs and from statements at oral argument. Because these foundational facts are not in dispute, the court will forego cumbersome citations to the record.

Although Ameritech agreed to provide MCI with "shared transport," the parties could not agree on the meaning of that term. Ameritech argued that "shared transport" refers only to interoffice transmission facilities purchased on a dedicated basis and shared by other carriers or customers, [*8] but not the incumbent carrier. MCI argued that "shared transport" refers to interoffice facilities shared by customers and other carriers including the incumbent - what the industry refers to as "common transport." At the heart of the parties' dispute is the interpretation of "shared transport" as used by the Federal Communications Commission (FCC) in 47 C.F.R. § 51.319 ("Rule 319"). The ICC determined the FCC regulations were ambiguous. Pl. Br. at Ex. 7, p. 28. Accordingly, the ICC concluded MCI was entitled to shared transport as defined by Ameritech, but MCI could seek access to common transport only through a bona fide request process set out in the interconnection agreement. Id. at Ex. 7, p. 29. MCI contends the ICC violated the Act by requiring it to submit to a lengthy request process in order to gain access to common transport.

MCI's second claim concerns the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the party's transport and termination on telecommunications." *47 U.S.C. § 251*(b)(5). In other words, MCI must pay Ameritech a fee when an MCI customer calls an Ameritech customer, and Ameritech [*9] must pay MCI a fee when an Ameritech customer calls an MCI customer. MCI argued before the ICC that it was entitled to the "tandem interconnection rate" set out in the interconnection agreement. However, the ICC determined that MCI was entitled only to the lower "end office switching rate," concluding that MCI had failed to produce sufficient evidence showing it should be paid the higher rate. MCI contends the ICC decision violates § 251(c)(2)(D), which requires that reciprocal compensation be paid on just, reasonable, and nondiscriminatory terms.

MCI asserts in its third claim that the ICC violated § 251(c)(3) when it accepted Ameritech's proposal regarding the amount of time allowed for Ameritech to provide MCI access to local loops. MCI's proposal gave Ameritech two to five days, depending on the number of requests. Ameritech proposed a five to seven day period. The ICC accepted Ameritech's proposal.

MCI's fourth claim is that the ICC imposed unjust, unreasonable, and discriminatory terms on MCI when it approved Ameritech's proposal for a bona fide request process. The bone fide request process is the vehicle by which MCI may request access to additional network elements. [*10] Ameritech proposed a request procedure that could take up to four months to conclude. MCI's proposal involved a significantly shorter time period. According to MCI, Ameritech's proposal needlessly and intentionally delays MCI's access to necessary network elements.

Finally, MCI claims the ICC erred when it approved provisions limiting Ameritech's liability to MCI for breaches of the interconnection agreement. The liability limitations were never a subject of arbitration. Instead, the ICC imposed the provisions at Ameritech's request during the approval stage of the negotiation and arbitration process. According to MCI, the ICC had no authority under § 252(e)(2) to impose the liability limitations at that point in the process. MCI also contends the liability limitations violate § 251(c) because the provisions are not just, reasonable, and nondiscriminatory.

Ameritech's counterclaim arises from the ICC's decision to grant MCI access to "dark fiber." Dark fiber is simply optical fiber that has been physically placed in the network but is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. n4 Ameritech contends the ICC [*11] had no authority to grant MCI access to dark fiber because the issue was never submitted to the ICC in arbitration. Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board, U.S. , 119 S. Ct. 721 (1999)* (hereafter, "IUB"). Finally, Ameritech argues that even if the ICC had authority to grant MCI access to dark fiber, its decision violated the Act because the ICC failed to determine that denial of access to MCI would impair MCI's ability to provide telecommunications services, as required by § 251(d)(2)(B).

n4 As explained at oral argument, dark fiber is used to save resources. The process of burying cable in the ground or suspending it along poles is very expensive. Therefore, when an exchange carrier lays new cable in the network, it frequently lays more cable than is required. The excess cable is dark fiber, which can be activated if additional carrying capacity is needed.

[*12]

DISCUSSION

The parties agree that the applicable standard of review of the ICC's decisions depends on whether a particular issue is one of fact or of law. Determinations of fact are entitled to substantial deference unless they are arbitrary and capricious. Questions of law are subject to de novo review.

I. Shared Transport

In the preliminary negotiations between Ameritech and MCI, Ameritech agreed to provide MCI access to interoffice transport facilities on a "shared" basis. n5 At arbitration, the parties disputed the meaning of the word "shared," and looked to Rule 319 for the appropriate definition. Def. Supp. Br. at 6. The ICC concluded Rule 319 was ambiguous, and ultimately adopted Ameritech's proposed contract language. n6 The ICC ruled that if MCI wanted access to common transport, it could seek access through the bona fide request process. After the ICC reached its decision, the FCC issued its Third Reconsideration Order, which left no doubt that "shared transport" under Rule 319 encompassed the industry understanding of "common transport." The FCC explained that incumbents must offer access "to the same interoffice transport facilities that [*13] the incumbent uses for its own traffic." Pl. Br. at Ex. 4, P 22. The Third Reconsideration Order also amended the text of Rule 319 to expressly include the concept of common transport within the meaning of the term "shared." MCI argues that the Third Reconsideration Order clearly indicates the ICC's decision was erroneous. n7

n5 Although Ameritech has not expressly admitted this assertion, MCI has repeatedly advanced the argument. See Supp. Resp. at 2; Tr. Apr. 15, 1999 at 9-10. Ameritech has not challenged MCI's position.

n6 The ICC's decision was a determination of law, and therefore is subject to de novo review.

n7 Ameritech argues that this court should not consider the Third Reconsideration Order after the Supreme Court's order in *Ameritech Corp. v. FCC, 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999).* Ameritech Corp. vacated the Eighth Circuit's decision in *Southwestern Bell Tel. Co. v. FCC, 153 F.3d 597 (8th Cir. 1998),* which affirmed the Third Reconsideration Order. However, Ameritech Corp. did not vacate the Third Reconsideration Order, nor did it instruct the Eighth Circuit to do so. The Supreme Court merely vacated the judgment and remanded for further consideration in light of *IUB. Ameritech Corp., 119 S. Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999).* The Third Reconsider Order is still valid.

[*14]

Ameritech responds that because Rule 319 was vacated by the Supreme Court in IUB, there is no basis for reversing the ICC's decision. But the vacation of Rule 319 is irrelevant to the question before this court. MCI need not look to Rule 319 for the authority to compel Ameritech to provide access to shared transport, because Ameritech agreed to do so in preliminary negotiations. Rule 319 merely serves as an external source of definition of the terms in the negotiated interconnection agreement. IUB has no effect on the function of Rule 319 in this case. n8

n8 If the continued vitality of Rule 319 were necessary to compel Ameritech to provide access to shared transport, Ameritech presumably would challenge its obligation to provide MCI access to any type of "shared transport," however that term is defined. The fact that Ameritech challenges only its obligation to provide common transport bolsters the conclusion that Ameritech's obligation to provide shared transport stems from the preliminary negotiations rather than from Rule 319.

[*15]

Ameritech also argues that MCI failed to exhaust its administrative remedies because it did not seek common transport through the bona fide request process recommended by the ICC. But the basis of MCI's claim is that it should not have to undergo the bona fide request process in order to gain access to common transport. Ameritech seeks to bootstrap its way out of MCI's claim by assuming that the ICC's decision to require MCI to undertake a bona fide request is valid. Ameritech's argument is without merit.

Finally, Ameritech contends that the Third Reconsideration Order changed existing law, and that MCI must therefore pursue its remedies under § 29.3 of the interconnection agreement. Section 29.3 provides:

In the event of . . . any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises and reverses . . . the FCC's First Report and Order [which promulgated Rule 319] . . . either party may . . . require that the affected provisions be renegotiated in good faith and this agreement be amended accordingly.

Pl. Br. at Ex. 11, § 29.3. But the Third Reconsideration Order did not change [*16] Rule 319 as that Rule relates to the present issue. The Third Reconsideration Order merely clarified the definition of "shared transport" already contained in Rule 319. As the FCC made clear in the Introduction to the Third Reconsideration Order, "the [First Report and Order] required incumbent [exchange carriers] to provide requesting carriers with access to the same transport facilities . . . that incumbent [exchange carriers] use to carry their own traffic." Pl. Br. at Ex. 4, P 2 (emphasis added). In discussing the issue in depth, the FCC stated:

Some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the [First Report and Order], we expressly required incumbent [exchange carriers] to provide access to transport facilities "shared by more than one customer or carrier." The term "carrier" includes both an incumbent [exchange carrier] as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the [First Report and Order] encompasses a facility that is shared by multiple carriers, including the incumbent [*17] [exchange carrier.]

Id. at Ex. 4, P 22 (citing 47 C.F.R. § 51.319) (emphasis added). The above quotation makes clear that Rule 319's definition of shared transport, as it existed at the time of the ICC's decision, encompassed the concept of common transport.

One might argue, of course, that the ICC was correct in its conclusion that Rule 319 was ambiguous. Even assuming the ICC was correct, there is no need to force MCI to undergo a lengthy bona fide request process. The ICC emphasized that it was "unwilling to conclude that the FCC . . . intended to preclude the provision of 'common transport' as a network element." Pl. Br. at Ex. 7, p. 28. Indeed, the ICC deferred any final resolution of the question until MCI filed a bona fide request so as "to enable the Commission to evaluate the competing contentions of the parties within a more meaningful context." Id. at Ex. 7, p. 29. In other words, the ICC indicated it could not determine the meaning of "shared transport" under Rule 319 on the evidence and arguments before it. The question left open by the ICC has since been answered in the Third Reconsideration Order. To force MCI to undertake a [*18] bona fide request would unjustifiably delay MCI's access to common transport. Delaying access to a network element to which MCI is clearly entitled is inconsistent with the basic purpose of the Act.

Accordingly, the ICC's decision denying MCI access to shared transport without undertaking a bona fide request is reversed.

II. Tandem Interconnection Rate

The Act requires a local exchange carrier to pay mutual and reciprocal compensation for the cost of transporting and terminating calls on another carrier's network. *47 U.S.C.* §§ *251*(b)(5), 252(d)(2). A variety of methods has been proposed for determining the rates one carrier may charge another. Pl. Br. at 23 (and citation therein). One aspect of the rates the ICC imposed in the Ameritech / MCI interconnection agreement is the "tandem interconnection rate." Id. The tandem interconnection rate is a function of other rates set out in the agreement, including the tandem switching rate, a charge for transport and termination, and the end office switching rate. Id. The tandem interconnection rate is higher than the "end office rate," which includes only the end office switching rate and a [*19] charge for transport and termination. Id.

In deciding whether MCI was entitled to the tandem interconnection rate, the ICC applied a test promulgated by the FCC to determine whether MCI's single switch in Bensonville, Illinois, performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch. n9 Id. at 23-24. The ICC determined that MCI was entitled only to the end office rate. MCI contends the ICC's decision imposes reciprocal compensation on terms that are unjust and unreasonable in violation of § 251(c)(2)(d). Because the parties agree that the ICC applied the proper legal standard, its decision rests on factual determinations that are reviewed under an arbitrary and capricious standard.

n9 MCI contends the Supreme Court's decision in IUB affects resolution of the tandem interconnection rate dispute. It does not. IUB upheld the FCC's pricing regulations, including the "functionality / geography" test. *119 S. Ct. at 733.* MCI admits that the ICC used this test. Pl. Br. at 24. Nevertheless, in its supplemental brief, MCI recharacterizes its attack on the ICC decision, contending the ICC applied the wrong test. Pl. Supp. Br. at 7-8. But there is no real dispute that the ICC applied the functionality / geography test; the dispute centers around whether the ICC reached the proper conclusion under that test.

[*20]

The ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's switches or the comparative geographical areas served by the various switches. However, the ICC did discuss the evidence offered by each party on these issues, and concluded from the "totality of the evidence" that MCI had failed to establish it was entitled to the tandem interconnection rate. Pl. Br. at Ex. 7, p. 12. The issue of comparable functionality apparently was not in serious dispute. MCI presented evidence and arguments that its switch served to aggregate calls that could then be distributed to any MCI customer within the switch's service area, and that Ameritech's tandem switches served the same function. Id. at Ex. 7, p. 10. Ameritech offered no counter-arguments to the ICC, nor does it offer any to this court. See Id. at Ex. 7, p. 11 (discussing Ameritech's arguments and evidence only as to the question of geographical area); Def. Resp. at 23-25. Therefore, only at issue is the geographical areas served by the respective switches. The ICC summarized MCI's evidence regarding the geographical area served by its switch as follows:

MCI maintains that its [*21] switch in Bensonville, Illinois serves a geographical area comparable to the area served by [Ameritech's] tandem switch. MCI is authorized to provide local exchange service in the Chicago [service area.] MCI plans to use it Bensenville switch to provide service to any customer in the Chicago [service area] where such service is feasible. [Ameritech] currently serves the Chicago [service area] with three tandem switches . . . . Thus, MCI claims that its switch covers approximately the same geographic area as three . . . Ameritech tandem switches.

Id. at Ex. 7, p. 10 (emphasis added). As the highlighted portions of the quotation make clear, much of MCI's evidence focused on the company's intentions for its switch, which of course are irrelevant to the question whether the switch is capable of servicing the area as intended. However, MCI argued that because its switch currently served the entire Chicago area - the same area that Ameritech served with three tandem switches -- its switch must serve an area comparable to any one of Ameritech's switches.

MCI's argument has surface appeal, but fails under closer scrutiny. During arbitration, [*22] MCI had less than 50,000 customers in the Chicago area. Id. at Ex. 7, p. 11. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. Pl. Br. at Ex. 28, p. 207. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. n10 These are questions that MCI could have addressed, but did not. The ICC compared MCI's proof with the proof offered by an incoming exchange carrier in a different case, noting that the other carrier produced "a map showing geographically widespread deployment of various nodes in its network" and "some discussion of the location of [the carrier's] local exchange customers." Id. at Ex. 7, p. 12. In contract, MCI had expressly refused to provide "specific empirical data, including maps, [*23] to demonstrate that it serves an area comparable to Ameritech's tandem network." Id. at Ex. 21, p. 13. In short, MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to an Ameritech tandem switch or was capable of serving such an area in the future. The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

n10 MCI argues that it is patently unfair to look to the number of customers served by the switch, since Ameritech, as a long time beneficiary of a state-sanctioned monopoly, will almost always have more customers than incoming exchange carriers. However, nothing in the ICC's opinion indicates that it improperly relied on the number of MCI customers in reaching its decision. Furthermore, as the discussion in the text makes clear, identification of MCI customers is relevant to the question of the location of the customers and the geographical area actually serviced by MCI's switch.

[*24]

III. Timing of Connections to Local Loops

"Local loops" are the portions of the network connecting the exchange carrier's end office or switch to the customer's premises. Ameritech submitted to the ICC a proposal allowing Ameritech five to seven days to provide MCI with local loops. MCI's proposal allowed Ameritech two to five days to provide local loops. MCI contends the ICC violated the Act by adopting Ameritech's proposal. MCI argues that the time required to obtain local loops is critical because it determines how long a customer must wait before being switched to MCI's service. During the change-over interval, MCI contends the customer will be subjected to Ameritech's targeted efforts to win back the customer. According to MCI, the ICC's decision violates *47 U.S.C. § 251*(c)(3), which requires an incumbent carrier to provide unbundled network elements on "just, reasonable, and nondiscriminatory" terms, and 47 C.F.R. § 51.313 ("Rule 313"), which requires an incumbent carrier to provide access to network elements on terms "no less favorable" than the terms under which the incumbent carrier provides the elements to itself. n11

n11 In its reply, MCI argues that § 51.311(b) ("Rule 311"), which requires that elements given an incoming carrier must be "equal in quality" to the elements the incumbent carrier supplies itself, also applies to timing of access to local loops. But Rule 313 specifically refers to "the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements," while Rule 311 refers generally to the "quality" of access to unbundled network elements. Rule 313 provides the applicable standard for determining whether the ICC's acceptance of Ameritech's proposal is permissible under the Act.

[*25]

Rule 313(b) provides,

Where applicable, the terms and conditions pursuant to which an incumbent [exchange carrier] offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent [exchange carrier] provides such elements to itself.

47 C.F.R. § 51.313(b). For present purposes, the most important phrase in Rule 313 is the qualifier "where applicable." This phrase makes the "no less favorable" standard conditional on the applicability of the regulation. The difficult question is whether the incoming carrier bears the burden of demonstrating the regulation applies, or whether the incumbent carrier bears the burden of demonstrating the regulation does not apply. In this court's view, the regulation places the burden on the incoming carrier. In understanding this conclusion, it is helpful to contrast Rule 313 with the closely analogous Rule 311. Rule 311 requires incumbent carriers to provide incoming carriers [*26] access to network elements "equal in quality" to the access the incumbent carrier provides to itself. 47 C.F.R. § 51.311(b). However, the incumbent carrier is held to this strict standard only when it is "technically feasible" to provide access of equal quality. Id. If the incumbent carrier does not provide access meeting the requisite standard, Rule 311 unequivocally places the burden of demonstrating technical infeasibility on the incumbent carrier - "the incumbent carrier must prove to the state commission that it is not technically feasible . . ." Id. Rule 311 demonstrates that in crafting the rules regarding parity of access to network elements, the FCC carefully considered which party should bear the burden of proof. Rule 311 also demonstrates that the FCC chose when to place that burden on the incumbent carrier. Yet Rule 313, a companion to Rule 311, contains no comparable language placing the burden on the incumbent; Rule 313 simply mandates provisioning intervals to be congruent "where applicable." The sharp contrast between the language of these two closely analogous rules indicates the FCC did not intend that the incumbent carrier bear the burden of showing [*27] Rule 313 is inapplicable.

This conclusion comports with common sense when one considers the differences between the quality of access addressed in Rule 311 and the timing of access addressed in Rule 313. In considering quality of access, it is difficult to imagine a situation in which an incumbent carrier could not provide incoming carriers access to network elements equal in quality to that the incumbent provides itself. The quality of access presumably is a function of the technologies, services, and physical facilities that comprise the network element. There is no apparent reason why the quality of the technologies, services, or physical facilities would decline simply because the facilities are to be used by a different telecommunications carrier. Therefore, Rule 311 properly forces the incumbent to prove it cannot provide access equal in quality to that which it provides itself. But the timing of access to network elements presents an entirely different situation. As Ameritech points out, it does not unbundle local loops, or any other network element, for its own use. See Def. Resp. at 28. The process of providing access to unbundled network elements to competing carriers [*28] that often operate on a different network is different, and presumably more time-consuming, than the process of provisioning network elements for the incumbent's own use. MCI's witness recognized there are differences between processing orders for unbundled network elements and processing orders for retail services. Def. Resp. at Ex. 15, p. 155; Pl. Br. at Ex. 7, p. 57. Of course, some network elements might be provided to incoming carriers through the same processes through which the incumbent carrier supplies itself. Rule 313 logically places the burden on incoming carriers to demonstrate that the incumbent carrier can provide unbundled elements to the competing carrier in the same time frame that the incumbent provides elements to itself.

The ICC concluded MCI did not sufficiently demonstrate that Ameritech could feasibly provide access to local loops in two to five days. n12 MCI admitted that its pleadings in the arbitration proceedings lacked data supporting its proposal. Def. Resp. at Ex. 15, p. 180. MCI merely argued that Ameritech should be forced to provide access to unbundled local loops in a comparable amount of time to that required to provide local loops for resale. Pl. [*29] Br. at Ex. 7, p. 57. The ICC stated that "MCI does little more than point to its own proposals and allege in the most general of terms that they are necessary for 'parity' or 'nondiscrimination' or that [Ameritech's] proposals are 'inadequate.'" Pl. Br. at Ex. 7, p. 62. The ICC concluded that "MCI's claims regarding provisioning benchmarks mix apples and oranges" because the "procedures for provisioning an unbundled loop and a resale loop are different and the respective provisioning intervals are not comparable." Id. The ICC's decision was not erroneous under Rule 313.

n12 The ICC's decision is a mixed determination of law and fact, and is subject to de novo review.

IV. Timing of Bona Fide Request Process

Both MCI and Ameritech presented the ICC with proposals for a "bona fide request" process by which MCI could request access to additional network elements not specified in the interconnection agreement. MCI proposed an 85-day process, while Ameritech proposed 120 days. MCI's proposal allowed [*30] Ameritech fifteen days from the time of the request to determine if the request was technically feasible. Pl. Br. at 33 (and citations therein). If Ameritech determined the request was technically feasible, it would provide MCI a price quote within an additional twenty business days. Id. MCI would then have thirty days to accept or reject the quote. Id. In the event of a dispute, the ICC would decide within twenty days of Ameritech's response whether Ameritech should be required to provide the element. Id. at 34. Ameritech proposed a more lengthy process. Under Ameritech's plan, Ameritech would have thirty days to evaluate whether a request was required by the Act and, if so, whether the request was technically feasible. Def. Br. at 32 (and citations therein). If Ameritech determined the request was feasible, it then would have ninety days to prepare a quote that includes a complete product description, proposed rates, ordering intervals, methods and procedures for ordering the requested item, and a statement of Ameritech's development costs. Id. Ameritech also agreed to completely process certain less complicated bona fide requests within thirty days of receipt. [*31] Id. MCI would have thirty days to accept or reject the quote, or to seek a remedy under the dispute resolution terms of the interconnection agreement. Pl. Br. at 34 (and citations therein). Dispute resolution could occupy as much as an additional thirty days. Id. Under Ameritech's plan, Ameritech would not be required to provide unbundled network elements until more than four months after MCI's initial request. Id. The ICC ultimately rejected MCI's proposal and adopted Ameritech's proposal. MCI claims the ICC violated § 251(c)(3) of the Act because Ameritech's proposal was not "just, reasonable, and nondiscriminatory."

In support of its position, MCI relies heavily on a statement in a report of the House of Representatives that the Act was designed to promote competition in local telecommunications markets "as quickly as possible." See H. Rep. at 89. According to MCI, the ICC applied a "commercial reasonableness" standard to the bona fide request issue. n13 Pl. Rep. at 16. MCI contends the commercial reasonableness standard is inconsistent with the purpose of the Act because it allows the ICC to approve a procedure that does not resolve disputes as quickly as [*32] possible. MCI goes so far as to say that "a [bona fide request] provision cannot, as a matter of law, satisfy the 1996 Act unless it is as short as possible." Pl. Rep. at 17 (emphasis added). MCI's argument proves too much, and demonstrates that the statement in the House Report cannot be taken literally. It would be possible to resolve bona fide requests in a matter of days or weeks by requiring all parties to immediately dedicate their full attention and resources to the problem. But such a requirement is neither practical nor reasonable. MCI implicitly recognizes that it is not entitled to resolution "as quickly as possible" in its own proposal, which allows a maximum time of eighty-five days. The statement in the House Report reflects a general policy or purpose of the Act, but it does not mean that a bona fide request provision cannot satisfy the Act as a matter of law unless the resolution period is as short as possible. Nor does the statement in the House Report override the plain language of the Act, which requires access to network elements on terms that are just, reasonable, and nondiscriminatory. MCI's attempt to read an "as quickly as possible" [*33] standard into § 251(c)(3) of the Act does not comport with common sense, the plain language of the statute, or MCI's own proposal. The ICC applied an appropriate analysis.

n13 Apparently, the ICC did not expressly articulate the commercial reasonableness standard, but cited with approval another interconnection arbitration decision that applied the standard. Pl. Rep. at 16.

Having determined that the ICC did not apply an erroneous standard to the issue of the bona fide request process, the court must now determine whether the ICC's factual determination that Ameritech's proposal was more commercially reasonable than MCI's was arbitrary or capricious. MCI argues that Ameritech failed to adduce evidence sufficient to support a finding that the four month period was reasonable. But Ameritech presented the ICC with ample evidence sufficient to support the conclusion that Ameritech's proposal was commercially reasonable. Ameritech presented evidence regarding the unpredictable number, timing, and complexity of [*34] the bona fide requests it receives from various competing exchange carriers. Def. Br. at 34-35 (and citations therein). Ameritech also presented evidence regarding similar time frames approved by the FCC and other state commissions in analogous situations. Id. at 35-36. In contrast with Ameritech's presentation, MCI presented little evidence in support of its own proposal. MCI's witness conceded that MCI did not do "any type of empirical analysis of the processes, resources, [or] costs" that Ameritech might incur in responding to bona fide requests, but instead "worked backwards" from Ameritech's 120-day proposal. n14 Def. Resp. at Ex. 23, p. 593. The ICC's determination that Ameritech's proposal was the more reasonable of the two plans was not arbitrary and capricious.

n14 Significantly, MCI presents nothing to this court in defense of its plan. MCI merely attacks Ameritech's proposal as unjust, unreasonable, and discriminatory.

MCI also presents, in a footnote, an argument that Ameritech's proposal [*35] is discriminatory in violation of § 251(c)(3). Pl. Br. at 37, n. 10. MCI contends that § 251(c)(3) requires Ameritech to provide network elements to MCI on the same terms and conditions that it provides the elements to itself. According to MCI, the bona fide request provision is discriminatory because it forces MCI to wait for access to Ameritech's network elements longer than Ameritech must wait. But the "nondiscriminatory" language of § 251(c)(3) has no application here. To say that MCI is entitled to nondiscriminatory access to network elements presupposes that MCI is entitled to any access to the elements. MCI is not entitled to access to network elements beyond those provided for in the interconnection agreement until it successfully completes the bona fide request process. The purpose of the bona fide request process is to determine whether, and on what terms, Ameritech is required to provide access to additional network elements not addressed in the interconnection agreement. Only after MCI obtains the right to access additional network elements through the bona fide request process does § 251(c)(3) forbid nondiscriminatory access to those elements. [*36]

V. Limitations of Liability

The Act contemplates two distinct functions of state public utilities commissions. First, state commissions conduct arbitration pursuant to § 252(b)(1). Second, state commissions evaluate negotiated or arbitrated agreements against the standards set out in § 252(e)(2) and either approve or reject the agreement. At the approval stage, the state commission's authority is limited to determining whether the agreement meets the requirements of § 252(e)(2). See e.g., *TCG Milwaukee, Inc. v. Public Serv. Comm'n of Wisconsin, 980 F. Supp. 992, 999 (W.D. Wis. 1997)*. It is undisputed that liability limitations were not considered until the approval stage; MCI and Ameritech did not agree on liability limitations during preliminary negotiations, nor did they arbitrate the issue. Therefore, unless Ameritech prevails on one of its arguments in support of the ICC's decision to incorporate liability limitations into the agreement, the limitations must be stricken. The court reviews the ICC's decision de novo.

Ameritech first argues that the ICC's decision was appropriate under § 252(e)(3), which allows state commissions to enforce requirements [*37] of state law in reviewing an agreement. In support of its assertion, Ameritech cites *In re Illinois Bell Switching Station, 161 Ill. 2d 233, 641 N.E.2d 440, 448-49, 204 Ill. Dec. 216 (Ill. 1994)*. But Illinois Bell does not establish a state law requiring limitations on Ameritech's liability. In Illinois Bell, a single justice of the Illinois Supreme Court states that limitations of liability are an "important part" of a utility company's contracts. *641 N.E.2d at 449* (Miller, J., concurring). This unremarkable statement does not even suggest that limitations of liability must be included in a utility company's contracts. Ameritech's argument is without merit.

Ameritech next contends the ICC was required to include liability limitations under § 252(e)(2)(B) because without the limitations, the pricing provisions of the agreement would violate the standards of § 252(d). Section 252(d) requires that prices set out in interconnection agreements must be based on the incumbent carrier's costs of providing the network elements at issue.

According to Ameritech, the prices in the interconnection agreement would not accurately reflect Ameritech's costs unless Ameritech's [*38] liability was limited. Ameritech initially contended that its liability exposure was a component of its costs. See Def. Resp. at 41-42. However, MCI correctly argued the Act mandates that prices be set according to forward-looking costs, and not according to a rate-of-return analysis. *47 U.S.C. § 252(d)(1)(A)(ii)*; see also, 47 C.F.R. § 51.105. Under the Act's pricing scheme, the cost of Ameritech's liability to MCI is not recoverable in the prices of unbundled network elements. Recognizing this difficulty, Ameritech changed its strategy and now argues that the liability limitations represent the cost of "gold-plating" Ameritech's network to ensure the network will not fail. Def. Supp. Resp. at 5-6. But the costs of gold-plating the network and the costs of liability are two sides of the same coin. The costs of gold-plating a network element are extraordinary costs incurred solely to avoid liability, and are otherwise unrelated to the cost of producing or supplying the network elements. It is incongruous to say that Ameritech may not charge MCI for the additional cost of Ameritech's liability to MCI, but may charge MCI for the additional cost of avoiding [*39] that liability. The pricing regulations do not allow Ameritech to recover the cost of gold-plating through the prices it charges MCI.

Ameritech next argues that the ICC was authorized to impose liability limitations under § 252(e), which permits state commissions to reject agreements that discriminate against carriers that are not parties to the agreements. All of Ameritech's interconnection agreements with incoming carriers in Illinois contain liability limitations similar to those Ameritech proposed to the ICC in this case. Ameritech argues that if the ICC approved the MCI agreement without limiting Ameritech's liability, the agreement would discriminate against other Illinois carriers. Ameritech's argument proves too much. Under Ameritech's view of the Act, any provision in an interconnection agreement that is favorable to the incoming carrier is impermissible unless that provision is contained in all the incumbent's other interconnection agreements. Taking Ameritech's argument to its absurd extreme, every interconnection agreement within a region must be identical. Furthermore, the template for all subsequent interconnection agreements would be established by the first incoming [*40] carrier to negotiate with the incumbent. This result would be at odds with § 252, which contemplates individualized negotiations between the incumbent and each incoming carrier.

Nevertheless, the absence of liability limitations in MCI's agreement with Ameritech clearly gives MCI an advantage over other incoming carriers. But the anti-discrimination language of § 252(e) does not prevent MCI from gaining this competitive advantage. Whatever the parameters of the discrimination targeted by § 252(e), that section cannot be read to preclude interconnection agreements that give an incoming carrier a competitive advantage over other incoming carriers. n15 As noted above, this interpretation conflicts with the Act's vision of individualized negotiations between the incumbent and each incoming carrier. More importantly, Ameritech's interpretation of § 252(e) is at odds with the very purpose of the Act. The Act was designed to open local telecommunications markets to competition. *Iowa Utilities Board v. FCC, 120 F.3d 753, 816 (8th Cir. 1997)*, rev'd in part by *AT&T Corp. v. Iowa Utilities Board, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. In a free market, [*41] incoming local exchange carriers would compete with each other as well as with the incumbent. Yet under Ameritech's view, § 252 stifles vigorous competition between incoming carriers. The meaning of "discrimination" under § 252(e) is elusive, but that section does not prevent an incoming carrier from gaining a competitive advantage over other incoming carriers by negotiating a more favorable interconnection agreement. n16

n15 In light of the overall purpose of the Act, it is likely that Congress intended § 252(e) to forbid anticompetitive discrimination, i.e., collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers.

n16 Even assuming the absence of liability limitations in MCI's interconnection agreement discriminates against other incoming carriers, Ameritech does not have standing to raise the claims of other carriers.

Finally, Ameritech argues that MCI waived any challenge to the liability limitations. When MCI protested the imposition of liability [*42] limitations, the ICC declared it would not approve the agreement without the limitations. MCI was presented with a choice: it could either accept the liability limitations to gain ICC approval, or it could repeat the entire negotiation and arbitration process by refusing the limitations. Ameritech argues that because MCI elected to go forward, it waived its right to challenge the ICC's decision. Ameritech's argument lacks merit. The Act provides for judicial review of state public utilities commission decisions in § 252(e)(6). If liability limitations were improperly imposed on MCI during the approval stage, MCI's remedy is to challenge the ICC's decision in this court. It is inconsistent with the Act's procedural scheme to conclude that the ICC may deprive MCI of its right to judicial review by forcing MCI either to accept terms that were not arbitrated or to forfeit the considerable time and resources already expended. MCI did not waive its right to challenge the liability limitations.

For the foregoing reasons, the limitations on liability erroneously imposed by the ICC must be stricken.

VI. Dark Fiber

The ICC ordered Ameritech to provide MCI with access to "dark fiber" [*43] as an unbundled network element. "Dark fiber" is optical fiber that is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. Ameritech launches a three-pronged attack against the ICC's ruling. First, Ameritech contends the ICC had no jurisdiction to grant MCI access to dark fiber because the issue was never raised before the ICC in arbitration. Under § 252(b)(4)(A), the ICC was bound to "limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response, if any . . . ." (emphasis added). Ameritech contends MCI's petition did not set forth dark fiber as an issue for arbitration. MCI responds that it raised the issue of dark fiber under the rubric of "dedicated interoffice transmission" and "shared interoffice transmission." Pl. Resp. at 3. The court need not resolve this dispute, because Ameritech plainly raised the issue of dark fiber in its response to MCI's petition. n17 See Pl. Resp. at 3-4 (and citations therein). Ameritech concedes that its response "discussed" dark fiber. Def. Rep. at 7. However, Ameritech contends it was forced to do so only because [*44] "it was impossible for Ameritech to be certain that the ICC was not going to address dark fiber" because it was "extremely difficult to tell from MCI's vague Petition just what issues MCI was setting forth." Id. Ameritech contends it faced a dilemma: it could decline to address dark fiber and run the risk that the ICC would erroneously decide the issue without Ameritech having a chance to present its position, or it could address the merits of the dark fiber issue and risk a later ruling that the response set forth the issue for arbitration. Id. Ameritech chose the latter course, thereby raising the dark fiber issue for arbitration under § 252(b)(4)(A). In essence, Ameritech maintains it could argue the merits of the dark fiber issue before the ICC and yet claim in this court that the issue was not before the ICC. Section 252(b)(4)(A) forbids this result.

n17 This fact distinguishes this case from *MCI Telecommunications, Inc. v. Pacific Bell, 1998 U.S. Dist. LEXIS 17556,* No. C 97-0670 SI (N.D. Cal. Sept. 29, 1998), in which the court found that MCI failed to raise the issue of dark fiber in an arbitration petition identical to the petition before the ICC. Ameritech claims MCI is collaterally estopped from arguing it raised the dark fiber issue in its arbitration petition. Collateral estoppel is inapplicable because here, unlike Pacific Bell, the response set forth dark fiber as an arbitration issue.

[*45]

Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in IUB, which vacated Rule 319. Rule 319 enumerated several specific network elements that must be unbundled under the Act. The Court vacated Rule 319 as inconsistent with § 251(d)(2) of the Act. Section 251(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Court examined the FCC's methodology in promulgating Rule 319, and concluded that the agency had failed to properly apply the "necessary and impair" standard. *119 S. Ct. at 734-35.*

47 C.F.R. § 51.317 (hereafter, "Rule 317") is a companion to Rule 319. Rule 317 sets forth the standards state public utilities commissions are to apply in determining what network elements [*46] other than those specified in Rule 319 must be unbundled. Although IUB did not expressly vacate Rule 317, the rule purports to allow state commissions to apply the same erroneous standard that was fatal to Rule 319. Therefore, the reasoning of IUB applies with equal force to Rule 317. Ameritech contends that Rule 317 was "the sole asserted source of any State commission authority to identify network elements that must be unbundled." Def. Supp. Br. at 9. Because Rule 317 is now a dead letter, Ameritech contends the ICC had no authority to order it to unbundle dark fiber. However, Rule 317 does not grant state public utilities commissions the power to name additional elements. The rule presupposes that such power

exists, and establishes the standards under which the power must be exercised. n18 Nothing in IUB suggests that state public utilities commissions lack power to name additional network elements to be unbundled.

n18 Indeed, Rule 317 is entitled "Standards for identifying network elements to be made available."

[*47]

Nevertheless, Ameritech's argument has some merit. Although state public utilities commissions have the power to name network elements to be unbundled, they must do so under the standards set forth in the Act as interpreted by the FCC. See *IUB, 119 S. Ct. at 730, n. 6,* and *Id. at 729-33* (questioning "whether it will be the FCC or the federal courts that draw the lines to which [state commissions] must hew" and concluding that *47 U.S.C.* § *201*(b) grants the FCC rulemaking authority under the Act). Those standards were set out in rule 317, which no longer governs. In the absence of a standard guiding the state public utilities commission's exercise of its power, the commission might not be able to exercise its power. This court need not decide whether a state public utilities commission may anticipate FCC-promulgated standards and itself undertake to interpret the mandates of the Act. When the ICC rendered its decision on Ameritech's dark fiber, there was a standard in place, albeit the erroneous standard set out in Rule 317. Therefore, Ameritech's attack on the ICC's authority to name dark fiber as a network element is nothing more than an argument [*48] that the ICC applied the wrong standard in making its determination - precisely the argument Ameritech uses as the third prong of its attack on the ICC's decision.

In the initial briefs on the dark fiber issue, Ameritech maintained that the ICC failed to apply the necessary and impair test in any fashion, concluding its discussion after it determined dark fiber was a network element. Def. Br. at 15. MCI responded that even if the ICC did not articulate a finding of impairment, the evidence provided a reasonable basis for the ICC to conclude that without access to Ameritech's dark fiber, MCI would be impaired under the standards set out in Rule 317. Pl. Resp. at 17-18. But assuming MCI is correct, the ICC applied an erroneous standard under the Act after IUB.

Recognizing this difficulty, MCI urges the court to defer its decision on the dark fiber issue until the FCC promulgates new regulations interpreting the necessary and impair standard under the doctrine of primary jurisdiction. The goals of the doctrine of primary jurisdiction include ensuring nationally uniform application of the law and promoting deference to agency expertise. *United States v. Western Pacific R.R. Co., 352 U.S. 59, 65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956).* [*49] The doctrine does not apply here, because this court can render a decision without infringing on the FCC's province. If the court were required to interpret the Act's necessary and impair requirement in order to resolve the dark fiber issue, MCI's argument might have some merit. But the court agrees with Ameritech that the ICC engaged in no analysis of necessity and impairment. The ICC's discussion focuses solely on the question whether dark fiber is a network element; it does not even make passing mention of the necessary and impair standard. Def. Br. at Ex. 2, p. 26-27. The court is not persuaded by MCI's argument that because MCI presented evidence of impairment, and because the law required the ICC to undertake a necessary and impair analysis, a finding of impairment is implicit in the ICC's decision. Pl. Resp. at 17-18. MCI's argument begs the question whether the ICC in fact considered MCI's evidence of impairment as the law required. If MCI's position were correct, there could never be a finding that a state commission failed to apply the necessary and impair test if evidence of impairment was presented. This result would be absurd.

Because the ICC failed to make any determination [*50] of necessity and impairment as required by *47 U.S.C.* § *251*(d)(2), its decision compelling Ameritech to provide MCI access to dark fiber was erroneous and must be reversed.

CONCLUSION

The ICC's decision is affirmed in part and reversed in part. The ICC's decisions to adopt Ameritech's proposals regarding the time frame for providing access to local loops, to adopt Ameritech's proposed schedule for a bona fide request process, and to deny MCI the tandem interconnection rate are affirmed. The ICC's decisions to deny MCI access to shared transport without undertaking a bona fide request, to incorporate liability limitations in the interconnection agreement, and to grant MCI access to Ameritech's dark fiber are reversed.

ENTER:

Suzanne B. Conlon

United States District Judge

June 22, 1999

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on August 31, 1999, a copy of the foregoing document was served on the parties of record, via U. S. Mail, postage pre-paid, addressed as follows:

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