BELLSOUTH

BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

REC'D TN
REGULATORY AUTH.
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OFFICE OF THE
EXECUTIVE SECRETARY

June 15, 1999

VIA HAND DELIVERY

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

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Brief on Threshold Issues. 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: ***Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee***

Docket No. 98-00559

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF ON THRESHOLD ISSUES

I. INTRODUCTION

Pursuant to the Notice issued by the Tennessee Regulatory Authority ("Authority") on June 8, 1999, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Brief on the four threshold issues identified by the Authority.

II. DISCUSSION

A. The Burden Of Proof In This Docket.

The "burden of proof" has been defined as "the duty of a party to present evidence on and to show, by a preponderance of the evidence, that an allegation is true or that an issue should be resolved in favor of that party." Uniform Rules of Procedures for Hearing Contested Cases Before State Administrative Agencies, Rule 1360-4-1-.02(7). "The burden of proof is generally assigned to the party who seeks to change the present state of affairs with regard to any issue." *Id.* Thus, if any party to this docket seeks to change the manner in which BellSouth can offer CSAs, the procedures for approval of BellSouth's CSAs, or the standards by which those CSAs are judged, that party would have the burden of proof. *See Consumer Advocate Division v. Tennessee Regulatory Authority*, 1998 Tenn. App. LEXIS 428 *16 (Tenn. Ct. App. July 1, 1998) (holding that party seeking to change existing rate design "would have the burden of proof").

The burden of proof also would rest with any party alleging that BellSouth's CSAs are discriminatory or anticompetitive, particularly a CSA previously approved by the Authority. *See Southern Railway Co. v. Seaboard Allied Milling Co.*, 442 U.S. 444, 454-55 (1979); *McCallen v. Memphis*, 786 S.W.2d 633, 641 (Tenn. 1990). As the Tennessee Supreme Court has made clear, decisions of administrative agencies "are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action." *Id.*[1]

B. The Nature of Relief Available.

1. Whether the relief should be only prospective.

Even though no party has expressly requested any relief in this docket, and even though it is unclear what relief, if any, is even under consideration, the Authority could not lawfully award retrospective relief that impairs BellSouth's existing CSAs or imposes new obligations or duties with respect to such CSAs. Such retrospective relief would violate Article I, Section 20 of the Tennessee Constitution, which provides "that no retrospective law, or law impairing the obligations of contracts, shall be made."[2]

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[1] The burden of proof issue is complicated somewhat by the fact that this proceeding was initiated by the Authority, and not by any party. Thus, there is no "petitioning" or "moving" party in this docket, who would typically have the burden of proof. *See* Rule 1360-4-1-.02(3). Furthermore, for the most part, the Intervenors do not contend that BellSouth's CSAs are either anticompetitive or discriminatory. *See* SECCA's Responses to BellSouth's First Data Requests Nos. 3-4; MCI's Response to BellSouth's First Data Requests Nos. 2-5. Thus, it is not clear which party, if any, is seeking relief in this docket, which further underscores the inappropriateness of proceeding with a contested case.

[2] The legal prohibitions that preclude the Authority from adopting rules which would impair BellSouth's existing CSAs were discussed fully in BellSouth's Motion to Dismiss the Joint Petition filed by ICG Telecom Group, Inc., TCG MidSouth, Inc., American Communication Services of Chattanooga, Inc., Nextlink Tennessee, L.L.C. and Time Warner Communications of the Mid-South, which requested that the Authority adopt rules implementing a "Fresh Look" requirement. A copy of that motion is attached and is hereby incorporated by reference.

For purposes of Article I, Section 20, the term "retrospective laws" has been defined by the Tennessee Supreme Court as those laws "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978); *see also Owens v. Truckstops of America,* 915 S.W.2d 420, 427 (Tenn. 1996). A vested right has been defined as an interest "which it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice." *See Morris v. Gross,* 572 S.W.2d at 905.

Additionally, in determining what constitutes a "vested right," the Tennessee Supreme Court has focused on whether the retroactive law in question deprives a person of his or her reasonable expectations under the prior law. For example, in *Ford Motor Corp. v. Moulton,* 511 S.W.2d 690, 696 (Tenn. 1974), the issue was whether it was constitutionally permissible to apply an amended statute of limitations which had the affect of reviving an otherwise barred cause of action. Adopting the Court of Appeals' analysis but not its conclusion, the Tennessee Supreme Court held that "the statute had run under the prior law prior to the amendment; and, therefore, petitioners had a right to 'expect' under the prior law they would not be sued; but, if sued, they were assured of a perfect defense." *Id.* at 697; *see also Buckner v. GAF Corp.*, 495 F. Supp. 351, 356 (E.D. Tenn. 1979) (holding that the defendants obtained a vested right in their statute of limitations defense and thus the asbestos exception to the statute could not revive plaintiff's claim, noting that Tennessee "has not retreated from its holding that '...retroactive legislation is unconstitutional only when it deprives a person of his reasonable expectation under the prior law.'").

BellSouth clearly has a vested right in CSAs that the Authority has approved. As a result of such approval, the Authority necessarily found those CSAs to be consistent with existing law, which gave BellSouth a reasonable expectation that it would enjoy the benefits of those contracts. Economic decisions have been made (by both BellSouth and its customers) based upon the terms and conditions of BellSouth's CSAs, and any ruling in this docket that would retroactively seek to modify those terms and conditions would impair vested rights of BellSouth and its customers in violation of Tennessee law.

2. Whether that relief would apply to BellSouth and its affiliates and assigns.

No relief ordered by the Authority in this docket could lawfully apply to "affiliates and assigns" of BellSouth over which the Authority has no jurisdiction. *See, e.g.,* Tenn. Code Ann. § 65-4-104 ("The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities …"). The Authority, like any other administrative agency, must conform its actions to its enabling legislation. *BellSouth Telecommunications, Inc. v. Greer,* 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997); *Tennessee Public Service Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977). The Authority has no power except that found in the statutes. *Tennessee-Carolina Transp., Inc. v. Pentecost*, 206 Tenn. 551, 556, 334 S.W.2d 950 (1960). According to the Tennessee Court of Appeals, while those statutes may be remedial and should be interpreted liberally, "they should not be construed so broadly as to permit the [Authority] to exercise authority not specifically granted by law." *Greer,* 972 S.W.2d at 680. Thus, the Authority cannot regulate affiliates and assigns of BellSouth indirectly through an order in this docket when it cannot regulate such affiliates or assigns directly.

Furthermore, it is axiomatic that only parties to a contested case are bound by an agency's decision in that case. *See, e.g.,* Tenn. Code. Ann. § 4-5-223(2)(b) (declaratory order issued by agency "shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or court in a proper proceeding"); *see also Pierce v. Commonwealth Edison Company*, 112 F.3d 893, 895 (7th Cir. 1997) (company that was not a party to administrative proceeding was not bound by agency's order). Accordingly, any action the Authority may order in this proceeding would not be binding upon a nonparty, including affiliates or assigns of BellSouth.[3]

C. Whether Proceeding With This Docket As A Contested Case Is Consistent With The Court Of Appeals' Decision In *Tennessee Cable Television v. Tennessee Public Service Commission,* 844 S.W.2d 155 (Tenn. Ct. App. 1992).

In *Tennessee Cable Television v. Tennessee Public Service Commission,* 844 S.W.2d 155 (Tenn. Ct. App. 1992), the Tennessee Court of Appeals held that the former Public Service Commission acted unlawfully when it adopted its regulatory reform plan and technology master plan through a contested case proceeding rather than through rulemaking. Applying the factors articulated by the court in *Tennessee Cable*, any decision by this Authority to formulate new policies, rules, or standards with respect to CSAs through a contested case proceeding rather than through rulemaking would be equally unlawful.

In *Tennessee Cable* the court noted that the line between legislative and adjudicative functions "is not always clear" and held that the choice between rulemaking and adjudication is "in the first instance, within the agency's discretion." *Id.* at 160-162 (quoting *Kopsombut-Myint Buddhist Center v. State Bar of Equalization*, 728 S.W.2d 327, 331 (Tenn. Ct. App. 1986)).

[3] Of course, an affiliate or assign of BellSouth could agree voluntarily to comply with any order that this Authority may render in this docket. *See, e.g.,* BellSouth BSE, Inc. Post-Hearing Brief, *In re: Application of BellSouth BSE, Inc. for a Certificate of Convenience and Necessity to Provide Intrastate Telecommunications Services in Tennessee*, Docket 98-00879, at 4-5.

However, according to the court, such discretion "does not immunize an agency's decision from considerations of fairness," and an agency's discretion "may, in fact, be abused." *Id.*

As the *Tennessee Cable* court made clear, "rulemaking is the preferable way to formulate new policies, rules, or standards." *Id.* at 162. The court also cited with approval the following six-factor test in determining whether rulemaking rather than an adjudicatory proceeding is required. Under this test, an agency's determination should take the form of rulemaking

> if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future case, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Id. at 162. Applying these factors to the issues the Authority intends to address in this docket, proceeding with a contested case would be an abuse of discretion.

First, because this proceeding is intended to examine BellSouth's CSAs, any relief ordered by the Authority could potentially affect BellSouth's ability to offer CSAs to its customers, and thus could affect "the general public rather than an individual or a narrow select group." Indeed, one of the issues to be addressed in this proceeding involves the "circumstances under which contract service arrangements should be offered in lieu of the extended service arrangements in the general tariff" as well as the "competitive implications of offering local telecommunications services via contract service arrangements versus the general tariff." *See Second Report of Recommendation of Pre-Hearing Officer,* Docket No. 98-00559, Exhibit A

(Issues 3 and 4). Obviously, every potential CSA customer as well as all of BellSouth's customers currently purchasing service from BellSouth's tariffs could be affected by the resolution of these issues.

Second, any determination concerning the use of BellSouth's CSAs presumably would be "intended to be applied generally and uniformly to all similarly situated persons." In other words, any relief crafted by the Authority would apply to all of BellSouth's customers considering a CSA, and decisions by the Authority concerning the terms and conditions that BellSouth can offer in a CSA and the circumstances under which they can be made available presumably would not vary from customer to customer.

Third, as discussed above, the Authority could not lawfully award retrospective relief that impairs BellSouth's existing CSAs or imposes new obligations or duties with respect to such CSAs. Thus, any relief the Authority might order must be prospective only.

Fourth, there is nothing in the Authority's enabling statutes concerning CSAs. The Authority's desire to examine the "competitive effects" of CSAs stems from the agency's goal of promoting competition and not from a specific statutory obligation. Thus, changes in the use of CSAs by BellSouth would not be "expressly provided by or clearly and obviously inferable from the enabling statutory authorization."

Fifth, the stated purpose for this entire proceeding is to consider changes in the offering of CSAs by BellSouth. These changes could significantly and materially impact BellSouth's ability to offer CSAs in departure "from a clear, past agency position on the identical subject matter." Any such change must be implemented through a rulemaking, particularly when the Authority has approved nearly 200 CSAs to date and when the existing requirements for CSAs are set forth in the rule governing the offering of special contracts by public utilities.

Finally, the purpose of this proceeding -- to consider the competitive effects of BellSouth's CSAs in Tennessee -- obviously involves interpretation of law or general policy, which weighs heavily in favor of a rulemaking rather than an adjudicatory proceeding.

Based on these factors, proceeding with this docket as a contested case would not be consistent with the Court of Appeals' decision in *Tennessee Cable*.

D. Whether Contract Service Arrangements May Be Approved By The Authority Contingent Upon The Conclusion Of This Docket And Subject To Abrogation Or Modification Based Upon The Decision Of The Authority In This Docket.

An administrative agency generally has the power to condition approval of an application. *See Southern Packaging Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922); *Jones v. TVA*, 334 F. Supp. 793, 743-744 (M.D. Fla. 1971); *Kaneb Services, Inc. v. FSLIC*, 650 F.2d 78, 82 (5th Cir. 1981) (upholding agency's conditional approval of a holding company's application to acquire savings and loan associations upon agreement by holding company to limit dividends). However, such power only extends to the regulated applicant or entity seeking agency approval. *See Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 600, 70 S. Ct. 370, 94 L. Ed. 363 (1950) (while agency can impose conditions "on an applicant," an agency cannot impose conditions that "directly affect…a third party dealing with the applicant"). Here, any condition that makes approval of a CSA "subject to abrogation and modification based upon the outcome of this case" would directly affect not only BellSouth but also each CSA customer. BellSouth is not aware of any case law that would authorize the Authority to impose such a condition. As long as a CSA that has been submitted to the Authority for approval complies with existing rules, it should be approved without regard to whether those rules may change as a result of the outcome of this proceeding.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

William J. Ellenberg
Bennett L. Ross
675 W. Peachtree Street, Suite 4300
Atlanta, Georgia 30375

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Richard Collier, Esquire Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37243-0500
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Henry Walker, Esquire Boult, Cummings, et al. 414 Union Ave., #1600 P. O. Box 198062 Nashville, TN 39219-8062
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Jon Hastings, Esquire Boult, Cummings, et al. 414 Union St., #1600 Nashville, TN 37219
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Charles B. Welch, Esquire Farris, Mathews, et al. 511 Union St., #2400 Nashville, TN 37219
[ ] Hand [ ] Mail [✓] Facsimile [✓] Overnight	James Lamoureux, Esquire AT&T 1200 Peachtree St., NE Atlanta, GA 30309
[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Vance Broemel, Esquire Consumer Advocate Division 426 5th Avenue, N., 2nd Floor Nashville, TN 37243
[ ] Hand [ ] Mail [✓] Facsimile [✓] Overnight	Carolyn Tatum Roddy, Esquire Sprint Communications Co., L.P. 3100 Cumberland Circle, N0802 Atlanta, GA 30339

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

REC'D TN REGULATORY AUTH.

NASHVILLE, TENNESSEE

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EXECUTIVE SECRETARY

In Re: ***Joint Rulemaking Petition by ICG Telecom Group, Inc., TCG MidSouth, Inc., American Communication Services of Chattanooga, Inc., Nextlink Tennessee, L.L.C. and Time Warner Communications of the Mid-South, L.P. to Implement Fresh Look Requirements***

Docket No. 98-00046

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves to dismiss the Joint Petition filed by ICG Telecom Group, Inc., TCG MidSouth, Inc., American Communication Services of Chattanooga, Inc., Nextlink Tennessee, L.L.C. and Time Warner Communications of the Mid-South (collectively "Petitioners"). The Joint Petition requests that the Tennessee Regulatory Authority ("TRA") adopt rules implementing a "Fresh Look" requirement, which, essentially, would allow parties that have entered into otherwise valid and binding contracts with BellSouth after the advent of competition to rescind those contracts without incurring the termination liability to which those parties agreed -- at the time of execution -- and that formed a central underpinning of the rates set forth in the contracts.

For the reasons set forth herein, the Joint Petition should be dismissed because: (1) the TRA does *not* have the statutory authority to undertake the

Draconian action requested by the Petitioners; (2) the rules proposed by the Petitioners, even if the TRA had the statutory authority to adopt them, would be constitutionally infirm; and (3) the proposed rules are unnecessary and would embroil the TRA and local exchange carriers in a regulatory quagmire.

II. ARGUMENT

A. The TRA Does Not Have The Statutory Authority To Abrogate Contracts Between Public Utilities And Their Customers.

The "Fresh Look" requirement proposed by the Petitioners would require massive intervention by the TRA into private contracts between incumbent local exchange carriers ("ILECs") and their customers. However, Title 65 *does not* confer such authority upon the TRA. As an administrative agency, the TRA is vested only with the authority given to it by the Legislature. *See Pharr v. Nashville, C & St. L. Ry.*, 186 Tenn. 154, 208 S.W.2d 1013, 1016 (1948). As the Tennessee Supreme Court held in *Tennessee-Carolina Transportation, Inc. v. Pentecost*, 206 Tenn. 551, 334 S.W.2d 950, 953 (1960), "The powers of the Commission [and, necessarily, its successor] must be found in the statutes. If they are not there, they are non-existent."

If the General Assembly had intended to for the TRA to intervene in the marketplace in the obtrusive manner envisioned by the Petitioners, the General Assembly would have made a specific grant of authority to the TRA. Applying general rules of statutory construction, it is clear that the General Assembly did not grant -- and the TRA, therefore, does not have -- the statutory authority to conduct this massive and Draconian intervention that Petitioners request the TRA to undertake with respect to the very contracts between telecommunications public utilities and their customers that the TRA has specifically approved.

While claiming that the TRA has the "jurisdiction" to adopt the requested rules, (Petition ¶ 3), Petitioners do not cite a single statute that even remotely authorizes the TRA to promulgate rules that would abrogate existing contracts between a utility and its customers. That the TRA lacks such statutory authority is underscored by T.C.A. § 65-4-105, which spells out the extent of the TRA's authority over "existing contracts." That authority is expressly limited to contracts between a public utility and a municipality. T.C.A. § 65-4-105(b) & (c). Even with respect to the contractual relationship between utilities and municipalities, however, the General Assembly made clear that the TRA lacks the authority to "alter or impair" any such contract. T.C.A. § 65-4-105(c). Thus, it defies logic for Petitioners to suggest that the Legislature has empowered the TRA to adopt rules altering or impairing existing contracts between ILECs and their customers.

Furthermore, the TRA's rulemaking authority is more circumscribed than Petitioners suggest. This is clear from the plain language of T.C.A. § 65-2-102(a), which is cited by Petitioners. This statute empowers the TRA "to adopt rules implementing, interpreting, or making specific the various laws which it enforces or administers; *provided, that the authority shall have no power to vary or deviate from those laws, nor to extend its power or jurisdiction to matters not provided for in those laws.*" T.C.A. § 65-2-102(a) (emphasis added). Because the TRA is not empowered to abrogate existing contracts between a utility and its customers, promulgating the rules advocated by the Petitioners purporting to give the TRA such power clearly would be unlawful.

There is no merit to Petitioners' claim that the TRA is permitted to adopt "Fresh Look" requirements because "all doubts concerning the Authority's jurisdiction and power should be resolved in favor of the existence of such power." (Petition ¶ 4). As the Tennessee Supreme Court has noted, any authority exercised by the agency must be the result of an express grant of authority by statute or arise by necessary implication from an express statutory grant of power; in either case, according to the Court, "a grant of power to the Commission is strictly construed." *Tennessee Public Service Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612 (Tenn. 1977); *see also South Central Bell Telephone Co. v. Tennessee Public Service Comm'n*, 675 S.W.2d 718 (Tenn. Ct. App. 1984) ("Tennessee authorities support a strict construction of the statutory powers of a utilities board").

What Petitioners attempt, of course, is to use the General Assembly's language declaring the "public policy" of the State as the springboard for a quantum leap into the unknown world of "Fresh Look." (Petition ¶ 5). However, Petitioners' request for TRA action in the instant proceeding is antithetical to that policy, which favors *less* regulation, as opposed to *more* regulation of, the emerging competitive marketplace by the TRA. Furthermore, to suggest that inclusion of a statement of "public policy" by the General Assembly in T.C.A. § 65-4-123 somehow evinces legislative intent in support of a "Fresh Look" requirement is, to put it mildly, to grasp at straws. The pale glow cast by this particular "public policy" candle simply does not illuminate the deep, dark passages of the regulatory labyrinth wherein lurks Fresh Look.

The plain language of the statutes that actually evidence the policies opening the local market to competition demonstrates the fundamental flaws in the Petitioners' position. These statutes authorize the TRA to adopts rules, as necessary, *to do ten things*:

(1) provide nondiscriminatory interconnection of facilities between providers under reasonable terms and conditions;

(2) provide desired features, functions and services on an unbundled and nondiscriminatory basis, to the extent "technically and financially feasible";

(3) provide for unbundling of service elements and functions;

(4) establish terms for resale;

(6) implement interLATA presubscription;

(7) ensure number portability;

(8) provide for the packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers;

(9) provide for universal service; and

(10) prohibit "cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anti-competitive practices."

T.C.A. §§ 65-4-124 & 65-5-208(c). Of the ten purposes for which the TRA is expressly empowered to adopt rules, none even remotely includes a "Fresh Look" requirement.[1]

That the Federal Communications Commission ("FCC") has authorized "Fresh Look" proceedings under certain circumstances is both irrelevant and misleading because the FCC operates under a vastly different regulatory scheme than the TRA. (Petition ¶¶ 8-12). For example, the courts have held that the FCC has the statutory authority to modify provisions of private contracts when necessary to serve the public interest. *See, e.g., Western Union Telegraph Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987). The TRA does not have similar authority.

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[1] It is noteworthy that the Joint Petition does not mention either T.C.A. § 65-4-124 or T.C.A. 65-5-208, even though these statutes expressly spell out the TRA's rulemaking authority in connection with the opening of the local market to competition. This omission, whether intentional or not, must be construed as a tacit acknowledgment by the Petitioners that the General Assembly did not believe that the abrogation of existing contracts by the TRA was critical to the success of competition in Tennessee, as Petitioners have suggested.

The FCC decisions cited by Petitioners also are readily distinguishable. For example, in *re: Matter of Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd. 2677 (April 16, 1992), the FCC allowed grandfathered customers of AT&T's 800 service to terminate long-term contracts without termination liability because the FCC found that "AT&T's termination liability clauses are unreasonable." *Id.* ¶ 25. Here, there are no allegations in the Joint Petition about the alleged unreasonableness of existing termination liability clauses.

Likewise, in *In re: Amendment of the Commission's Rules Relative To Allocation of the 849-851/894-896 MHZ Bands*, 6 FCC Rcd 4582 (July 11, 1991), the FCC held that airlines could terminate long-term contracts entered into with GTE for the provision of air-ground radiotelephone service without regard to the termination provisions in the contract. In reaching this holding, the FCC found that GTE had entered into contracts that bound airlines exclusively to GTE for periods exceeding the term of GTE's license, which, according to the FCC, "was contrary to the public interest ...." *Id.* ¶ 8. No similar concern is present here.

Although Petitioners sing the praises of "Fresh Look" as an essential element of local competition, the only "Fresh Look" requirement adopted by the FCC in its entire 700-page Interconnection order, was in connection with CMRS Providers. *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98 (Aug. 8, 1996). The FCC had adopted rules requiring that interconnection agreements with CMRS Providers comply with principles of mutual compensation and that each carrier pay reasonable compensation for transport and termination of the other carrier's calls. Concluding that many such agreements provided for little or no compensation in violation of the Commission's rules, the FCC ordered that CMRS providers that were party to pre-existing agreements that provide for non-mutual compensation "have the option to renegotiate these agreements with no termination liabilities or other contract penalties." *Id.* ¶ 1094. The FCC did not abrogate these contracts, nor did the FCC seek to impose a "Fresh Look" requirement on all long-term contracts between incumbents and their customers, as Petitioners seek to do here.

The FCC decisions cited by the Petitioners illustrate that the FCC generally has limited its use of a "Fresh Look" requirement as a means to remedy a contract containing legally questionable provisions. The FCC has not endorsed a sweeping application of "Fresh Look" requirements as a means of promoting competition, notwithstanding any suggestion by the Petitioners to the contrary.

Indeed, in *In re: Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (May 8, 1997), the FCC expressly rejected a "Fresh Look" requirement for schools and libraries subject to long-term contracts, which Petitioners' have proposed here. As the FCC reasoned:

> We find that these proposals would be administratively burdensome, would create uncertainty for those service providers that had previously entered into contracts, and would delay delivery of services

> to those schools and libraries that took the initiative to enter into such contracts. In addition, we have no reason to believe that the terms of these contracts are unreasonable. Indeed, abrogating these contracts or adopting these other proposals would not necessarily lead to lower pre-discount prices, due to the incentives the states, schools, and libraries had when negotiating the contracts to minimize costs. Finally, we note there is no suggestion in the statute or legislative history that Congress anticipated abrogation of existing contracts in this context.

Id. ¶ 547. Such reasoning is equally applicable here, and is fatal to Petitioners' proposed rules.

Petitioners' reliance upon "Fresh Look" decisions from other State commissions is equally misplaced. For example, the rules adopted by the Wisconsin Public Service Commission required that tariffs embodying a long-term contract contain a "Fresh Look" provision. The Commission found that such a requirement was consistent with its statutory authority to impose in tariffs "any other condition and procedure required by the commission in the public interest." Wisc. Stat. § 196.37(2). The TRA does not have such expansive "public interest" authority.

Likewise, the "Fresh Look" requirement adopted by the Ohio Public Utilities Commission was predicated upon that Commission's continuing jurisdiction over contracts between a public utility and its customers. *See* Ohio Revised Code, § 4905.31 ("every such arrangement, ... or device shall be under the supervision of the commission, and is subject to change, alteration, or modification by the commission"). The TRA does not have such continuing jurisdiction.

Petitioners also ignore that a number of other State Commissions have expressly refused to adopt the type of "Fresh Look" requirements at issue here. *See In re: New England Tel. & Tel. Co.*, Docket 5713 (Vt. Public Serv. Bd. Aug. 20, 1997) (holding that "NYNEX should not be required to give its customers a 'fresh look" because there was "no reason to free these customers from the obligations that they knowingly took on"); *In re: City Signal, Inc.*, Case No. U-10647 (Mich. Public Serv. Comm'n Feb. 23, 1995) (rejecting "fresh look" proposal, noting that "customers should be aware of the risk involved in entering into long-term contracts" in an increasingly competitive marketplace); *In re: Illinois Bell Tel. Co.*, Case No. 94-0096, 94-0117, 94-0146 (Illinois Commerce Comm'n April 7, 1995) (rejecting "fresh look" proposal and holding that, "[i]n the absence of evidence that the contracts were entered into for anti-competitive purposes, we will not disturb them"); *In re: MFS Communications Co. Inc,* PUC Docket No. 16189 (Texas Public Utility Comm'n November 7, 1996) (holding that "SWBT is not required to provide a fresh look opportunity for its customers currently under long term plans"); *In re: Northwest Payphone Association v. U.S. West*, Docket No. UT-920174 (Wash. Utilities & Trans. Comm'n March 17, 1995) (rejecting "fresh look" proposal, noting that "the Commission ordinarily refrains from interfering in contracts between U.S. West and its customers").

In short, the TRA should dismiss the Joint Petition because it asks for something that the TRA lacks the statutory authority to do --namely promulgate regulations that abrogate existing contracts between public utilities and their customers. The Petitioners cannot confer such authority upon the TRA simply in the name of increased competition or in light of decisions from other jurisdictions.

B. The Proposed Rules Are Unconstitutional, Even Assuming The TRA Had The Statutory Authority To Promulgate Them

BellSouth also submits that there are significant constitutional problems with Petitioners' request for a "Fresh Look" requirement. The TRA is an administrative agency of the State whose statutory powers are dual in nature: legislative and quasi-judicial. *Tennessee Cent. Ry. Co. v. Pharr,* 29 Tenn. App. 531, 198 S.W.2d 289 (1947). Rulemaking by the TRA is an exercise of the delegated legislative - not judicial - authority of the TRA. *Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n,* 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992). It is undisputed that, in exercising its legislative authority, the TRA may not exceed the limitations imposed upon the Legislature by the State and Federal Constitutions. *See Dykes v. Hamilton County,* 183 Tenn. 71, 191 S.W.2d 155 (1946) (Legislature is under the same obligation to observe the Constitution as the courts).

Petitioners are not asking the TRA, *in its judicial capacity*, to determine the constitutionality of an act of the General Assembly, nor is BellSouth. Instead, Petitioners seek to have the TRA, *in its legislative capacity*, adopt a rule which will abrogate existing contracts, which BellSouth submits would be unconstitutional. BellSouth, recognizing the rulemaking authority of the TRA, is informing the TRA of the constitutional impact of the act which it has been petitioned to take. In so doing, BellSouth is making sure that the TRA understands that its rulemaking authority is not unfettered, but is subject to, and constrained by, both the State and Federal Constitutions. BellSouth's position is simple; Petitioners ask the TRA to make a rule which violates the constitutional protections afforded all citizens of this State and Nation, and the TRA cannot do that.

1. The adoption of a "fresh look" requirement would violate the Contract Clause of the Federal and State Constitutions.

The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . . " U.S. Const. art. I, § 10, el. 1. *See also* Tenn. Const. art. I § 20 ("That no retrospective law, or law impairing the obligations of contracts, shall be made"). When applied to state actions that have the effect of impairing the obligations of one or more private parties under contracts, this prohibition has been interpreted to mean that no state may take legislative or administrative action that substantially impairs a contractual obligation, unless such action is justified as *reasonable* and *necessary* to achieve an important public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).[2]

The United States Supreme Court has noted that action adjusting the rights of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. *Id.* at 22. For cases of severe impairment of contractual rights, a careful examination of the nature and purpose of the State action is necessary. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978). State action is especially egregious - in a constitutional sense - where, as here, it impairs the contracts of a narrow class of persons in order to meet its desired purpose. *Id.* at 248.

While public utilities are subject to the "police power" of the State, such "police power" does not give the State, or the TRA, the right to do as it pleases without regard for the rights of its citizens, including public utilities. *See Rivergate Wine & Liquors, Inc. v. City of Goodlettesville*, 647 S.W.2d 631 (Tenn. 1983) (police power does not include authority to promulgate and enforce regulations that are unreasonable, oppressive or discriminatory"). "This power, which in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of

[2] The meaning of the federal and state constitutional prohibitions against the impairment of contracts have been held to be identical. *See Paine v. Fox,* 172 Tenn. 290, 112 S.W.2d 1 (1938).

the people, and is paramount to any rights under contracts between individuals." *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 241 (1978). However, this power is not unfettered, as the State and Federal Constitutions place limits on the exercise by the States of this power. "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Id.* at 242. So, the question is not whether the State's "police power" is greater than the right of the private parties to enter into valid, binding contracts; it is. The question is whether an action of the State, or the TRA, pursuant to this police power is within the constitutional limits which are placed upon the States.

Resolution of this question involves a tripartite analysis. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983). The initial inquiry is whether the state action has, in fact, operated as a "substantial impairment" of a contractual relationship. If a substantial impairment is found, the State, in justification, must have a significant and legitimate public purpose behind the regulation. If such a public purpose can be identified, the adjustment of the rights and responsibilities of the contracting parties must be based upon reasonable conditions and must be of a character appropriate to the public justifying the state action. *Id.*

The threshold inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. *General Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). In this present case, there is no question that (1) Contract Service Arrangements ("CSAs") are valid, binding contracts between private parties and (2) a "Fresh Look" requirement would impair the obligations of these contracts. Indeed, the Petition itself explains that "Fresh Look will provide customers of ILECs an opportunity to opt out of extended contracts [and] . . . termination liabilities in such contracts should be either canceled or substantially limited ...." (Petition ¶ 1).

Similarly unproblematic is a determination that the impairment of CSAs by a "Fresh Look" requirement would be "substantial." This inquiry is crucial because "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Spannaus*, 438 U.S. at 244. The United States Supreme Court has explained that:

> Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.
>
> The severity of an impairment of contractual obligations can be measured by factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. While the United States Supreme Court has provided some guidance as to what constitutes a "substantial impairment" in cases where state action amounts to less than a total destruction of contractual expectations, such an inquiry is unnecessary in this case since a "Fresh Look" requirement would amount to a total impairment of the CSAs in question, which is clearly a "substantial impairment."

Since "Fresh Look" will operate as a "substantial impairment" of CSAs, the TRA must have a significant and legitimate public purpose, "such as the remedying of a broad and general social and economical problem," behind the adoption of the requested amendment to the R17 Rules. *Energy Reserves*, 459 U.S. at 411-12. "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." *Id.* at 412. Because the impairment caused by a "Fresh Look" requirement is absolute, the height of the hurdle such a state action must clear is high. No such significant and legitimate public purpose underlies the Petition, much less one that can clear the highest of hurdles.

The proponents of "Fresh Look" attempt to justify the need to abrogate CSAs on the basis of a need to stimulate competition in the local exchange market. Even assuming that this were a sufficiently "significant and legitimate public purpose," or that such a public purpose were not already being satisfied by

Tennessee's existing statutory and regulatory provisions, a close examination of "Fresh Look" reveals that its purpose is not public, but rather is private. The sole purpose behind "Fresh Look" is a one-time destruction of CSAs so that the competitors of ILECs can take ILEC's largest customers and commit them to extended contracts of their own. The only beneficiaries of such an action will be competing providers like the Petitioners and a small number of large customers.

It is laughable for Petitioners to even imply that the largest customers of the ILECs somehow lack for competitive alternatives, or that this imagined dearth of competitive alternatives facing the largest customers is a "general social or economic problem." While ILECs might have customers who do lack for competitive alternatives, these are not the customers who would benefit from Petitioners' proposed "Fresh Look." If the Petitioners were honestly concerned with trying to address a "general social or economic problem" in Tennessee, through the stimulation of competitive alternatives, they would propose a rule that would stimulate competition in Grundy County or Copper Hill, Tennessee not Nashville or Memphis. Instead, under the guise of "Fresh Look," Petitioners seek to have the TRA use the police power of this State to help them "cherry pick" the largest and most lucrative customers. There is not a public purpose underlying this request, only a private purpose -- greed.

Finally, and assuming some significant and legitimate public purpose could be found to justify a "Fresh Look" requirement -- and it cannot -- "the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves*, 459 U.S. at 412 (quoting *U.S. Trust*, 431 U.S. at 22). The proposed "Fresh Look" requirement cannot be characterized as either "reasonable" or "appropriate." It seeks to destroy CSAs which are prima facie just and reasonable in order to stimulate competition in what is already most competitive segment of the local exchange market. It seeks to destroy contracts which were entered into only in situations where competition already existed, and allow one party to those contracts -- the customers, to avoid the termination liability to which they freely agreed.

Moreover, having avoided the termination liability, these large customers will enjoy the added luxury of "shopping their business" in the already competitive marketplace, while the vast majority of consumers receive no benefit. In contrast, ILECs not only lose their customers, contractual right to termination liability, and other contractual rights, but also bear much of the administrative burden, along with the TRA, of a "Fresh Look" requirement. Petitioners ask the TRA to take these actions despite the fact that no express legal authority exists for the TRA to abrogate these contracts. There simply is nothing "reasonable" or "appropriate" about such a process, especially when its sole purpose is to benefit only a narrow group of customers and competitors.

2. The adoption of a "Fresh Look" requirement would constitute an unconstitutional taking of property without just compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend V.[3] Like the Contract Clause, the Taking Provision operates as a limit upon the State's inherent police power. The United States Supreme Court has explained that:

> [S]ome [values incident to property] are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). This limitation on the police power prohibits the taking of private property except for a public, rather than private, purpose and without the payment of just compensation.

A taking can occur as to an intangible property interest. *Ruckelhaus v. Mansanto Co.*, 467 U.S. 986, 1003-04 (1984). Contract rights are a form of property and as such may be taken for a public purpose only if just compensation is

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[3] This restriction is applied to the States through the Fourteenth Amendment. See *Chicago B. & O. R. Co. v. Chicago*, 166 U.S. 226 (1897).

paid. *U.S. Trust*, 431 U.S. at 19, f.n. 16. Accordingly, the valid contracts entered into by ILECs with their customers are property rights protected by the Takings Clause of the Fifth Amendment.

"It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking . . ." *Ruckelhaus*, 467 U.S. at 1004. Instead, '[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to taking." *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). While no "set formula" has been developed for determining when a "taking" has occurred, the Supreme Court has identified several factors that should be considered. These include "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 1005. A "reasonable investment-backed expectation" has been defined as "more than a 'unilateral expectation as an abstract need." *Id.*

Adoption of a "Fresh Look" requirement will undoubtedly constitute a "taking" of ILECs' property interest in the CSAs, as Petitioners propose a plan that will allow for the total abrogation of these contracts. "Fresh Look" will: (1) deprive ILECs of the benefit of their bargain, (2) inflict additional economic losses in the future as valuable customers are allowed to enter extended contracts with competitors, and (3) impose additional regulatory burdens and expenses on ILECs which are unnecessary, unfair and a cost which was not contemplated at the time the CSAs were negotiated and for which, therefore, no recovery can be made.

The CSAs are the embodiment of ILECs' "investment-backed expectations"; they are the bargained-for rights and obligations of ILECs with respect to their customers. They are also the means by which ILECs can protect their relationship with these customers, which represents a "property interest" that is constitutionally protected. *Id.* at 1011 (holding that a corporation had a reasonable investment-backed expectation with respect to its control over the use and dissemination its trade secrets, and once same are disclosed to others the corporation has lost its property interest in the data.)

The "taking" of ILECs' property is impermissible unless the confiscated property is used for a "public purpose." The "public use" requirement of the Taking Clause is "coterminous with the scope of a sovereign's police power." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). The requisite "public purpose" exists where the government acts "to protect the lives, health, morals, comfort and general welfare of the people. . . ." *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 503 (1987).

Although stimulating competition might constitute a valid "public purpose," as described above the proposition before the TRA would not produce this result.

The taking of ILECs' property solely for the benefit of a few large customers and competitors, who already operate in a competitive local exchange market, produces a private, rather than a public, benefit. Even if such a public benefit were to exist, ILECs bear the entire burden and receive no advantage from this process which in any way compensates them for the "taking" of their property.[4] Thus, a "Fresh Look" requirement would take the private property of ILECs without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. The adoption of a "fresh look" requirement would violate the Tennessee Constitution's prohibition against delegating legislative authority.

Sections 1 and 2 of Article II of the Tennessee Constitution provide that the legislative, executive and judicial branches of government "are three distinct departments." Article II, Section 3 of the same document vests legislative power in the General Assembly. Tenn. Const. art. II, § 3. Read together, these provisions produce the bedrock principle that the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other authority. *See McQueen v. McCanless*, 182 Tenn. 453, 187 S.W.2d 630 (1945). Assuming the TRA were to decide that it possessed the legislative authority to adopt a "Fresh

[4] For example, there is no provision in the proposed "Fresh Look" requirement for the destruction of extended contracts entered into by the Petitioners or other CLECs in order to allow ILECs to enjoy the same benefit as Petitioners and to compete for their customers.

Look" requirement, such authority would amount to an unconstitutional delegation of legislative power to the TRA.

The State Constitution does not preclude the legislature from transferring adjudicative and rulemaking authority to administrative bodies. *See Bean v. McWherter,* 953 S.W.2d 197 (Tenn. 1997). However, such transfers, in order to be constitutional, must be "limited and defined in such a manner that administrative officials can discern and implement the legislature's will." *Id.* at 198. As the Tennessee Supreme Court recently observed, "An administrative agency may be afforded discretion as to implementation of legislative policy but not as to determination of that policy." *Id.* The test for assessing the constitutionally of a grant of legislative authority is "whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent." *Id.*

Petitioners assert that Chapter 408 of the Public Acts of 1995 authorizes the TRA to adopt a "Fresh Look" requirement. (Petition ¶ 5). Adoption of a "Fresh Look" requirement pursuant to this statute would amount to an improper delegation of legislative authority unless "sufficient standards or guidelines" to govern the exercise of this delegated authority are contained in the statute.

A close examination of Chapter 408 reveals that it is devoid of any mention of, or reference to, a "Fresh Look" requirement. This statute provides a detailed plan for the allowance of local competition, including specific authorization for the TRA to adopt rules addressing a number of specific issues related to local competition, but it does not address, even by implication, the authority of the TRA to abrogate existing contracts. What standards or guidance can be found in Chapter 408, or anywhere else in Title 65, to ensure that the decision-making by the TRA in adopting a "Fresh Look" requirement will not be arbitrary or unreasoned? None. What standards or guidance can be found in those same statutes to ensure that the TRA is not being asked to make important policy decisions which might just as easily have been made by the General Assembly? None. Because no adequate standards or guidance are provided, should the TRA rely on Chapter 408 as authority to adopt a "Fresh Look" requirement, it would do so in reliance on an unconstitutional delegation of legislative authority.[5]

C. Petitioners' Proposed Rules Are Administratively Unworkable And Unnecessary

Even assuming the TRA had the statutory authority to grant Petitioners' request and putting aside the constitutional infirmities associated with the proposed rules, a superficial and cursory reading of the Petition reveals the frightening extent of TRA involvement and, thus, resources, necessary to implement Petitioners' Fresh Look requirement. Thus, according to Petitioners,

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[5] BellSouth believes that Petitioners' proposed rules suffer from other constitutional infirmities, including violating the Equal Protection clause and constituting unlawful class legislation. However, for sake of brevity, BellSouth will not address each of these issues here.

1. A CLEC would notify the TRA of an interconnection agreement with an ILEC;
2. The TRA would verify that the interconnection agreement is "operational," which would require a determination by the TRA of whether or not the CLEC is certificated, whether or not the CLEC has filed a price list, whether or not the CLEC and the ILEC have either filed "an executed, approved interconnection" agreement with the TRA or the TRA has verified the ability of the CLEC to purchase interconnection services under a TRA-approved Statement of Generally Available Terms and Conditions, and "completion by the CLEC of its first commercial call within an ILEC market";
3. The ILEC would provide the requesting CLEC with a list of contracts eligible for Fresh Look "in the relevant ILEC market";
4. The TRA would then declare a date for the "commencement of the Fresh Look window";
5. The Fresh Look window would remain open until entry of "an order declaring that effective competition exists in the ILEC market in question";
6. During the twelve-month Fresh Look window, ILEC customers could bail out of contracts with the ILEC and execute contracts with CLECs;

7. The question of what contracts are eligible for Fresh Look would be subject to a complaint procedure;

8. The filing of a complaint would toll the twelve-month Fresh Look period;

9. ILECs would be required to give notice to all of their Tennessee customers "the first time Fresh Look is declared by the TRA in any of the individual LEC's exchanges" by bill inserts approved by the TRA;

10. "The TRA should use public information mechanisms at its disposal, including the issuance of press releases to inform the public about Fresh Look";

11. Also, the TRA should adopt a neutral notice describing Fresh Look, its purpose and operation for use in informing customers;

12. Upon inquiry by a customer about Fresh Look, ILECs should be required to provide the TRA's Fresh Look Notice to the customer by mail;

13. ILECs should be directed to designate one point of contact within each company to which all Fresh Look inquiries should be directed;

14. Election by a customer to terminate an ILEC contract under Fresh Look would serve to reduce and perhaps eliminate any customer liability for termination charges to the ILEC;

15. The ILEC would be responsible for determining the termination liability, if any, upon notice of termination from the customer, which may be oral or written;

16. The ILEC must inform the customer of its termination liability within five (5) business days of the termination;

17. All disputes concerning termination liability are to be resolved *by the TRA* through the complaint process; and

18. ILECs must bear the burden of justifying any termination liability in disputes.

It does not take a genius to recognize that Petitioners are attempting to dig a regulatory black hole for both the TRA and the telecommunications companies of this State. Indeed, what Fresh Look would do is to thrust the TRA into an administrative quagmire of complaints and notices and endless irreconcilable disputes -- a muddy swamp through which CLECs, ILECs, and the TRA would slog day after day. Under the Petitioners' approach, the TRA would be required to decipher and implement issues surrounding: (1) the notice provisions; (2) the verification functions; (3) the "operational" requirement; (4) the list of eligible contracts; (5) when a CLEC has completed its first commercial call; (6) whether a LEC customer has executed a contract with a CLEC during the twelve-month window; and (7) when the twelve-month Fresh Look period has been tolled. It is clear that these procedures constitute a regulatory nightmare, which, like some second-rate movie Dracula, should be dispatched with the procedural equivalent of a wooden stake to the heart: a summary dismissal of this Petition.

Like the B-movie Dracula, Petitioners' claims also collapse when exposed to the realities of daylight. For example, Petitioners' assertion that "many of the largest customers are locked into extended contracts with ILECs, *all of which were entered into in a monopoly environment,*" is simply untrue. (Petition ¶ 7).

The fact of the matter is that every CSA BellSouth has entered into, and which the TRA has approved, was consummated after the Tennessee legislative enacted the Telecommunications Reform Act in June 1995. Indeed, BellSouth did not file its first CSA with the TRA until July 1996, more than a year after the local market in Tennessee was opened to competition and months after the Federal Telecommunications Act became law. (Stinson Affidavit ¶ 2). Furthermore, of the 141 CSAs BellSouth has filed with the TRA since July 1996, approximately 85% were filed at least one year after the Federal Act took effect. *(Id.)*. Thus, even if the parties were to somehow survive the regulatory quagmire their proposed rules present, they would most certainly need divine intervention to resolve the myriad issues arising out of the reality of the competitive alternatives that existed at the time BellSouth's customers voluntarily entered into these legally binding contracts.[6]

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[6] For example, customers, particularly large sophisticated ones, who made service decisions after the enactment of both State and Federal telecommunications legislation, did so with the knowledge that competitive alternatives were, or would soon be, available

Indeed, when customers enter into a CSA with BellSouth, they must have competitive alternative available to them. BellSouth explicitly states as much in its CSA filings with the TRA. In fact, many CSAs involve the provision of Centrex or ESSX service, and Private Branch Exchange ("PBX") service which has long been acknowledged as a competitive alternative to ESSX service. CSA customers, therefore, have always had a competitive alternative available for at least *some portion* of their service needs, and severing the portions of a CSA for which a competitive alternative was available would be problematical at best.

Petitioners also misrepresent their alleged need for a "Fresh Look" to reach customers who currently purchase services through a CSA with BellSouth. First, notwithstanding Petitioners' suggestions to the contrary, Petitioners have been competing in Tennessee for some time. (Petition ¶ 7). Four of the five Petitioners were approved for a certificate of convenience and necessary to compete in the local market in 1995. (Stinson Affidavit ¶ 4). NEXTLINK, ACSI, and Time Warner had their interconnection agreements with BellSouth approved in 1996, and all three have been able to compete against BellSouth for almost two years.

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for the full array of services that they desired to purchase. These customers could, and some did, elect to sign shorter-term agreements or to simply acquire those services on a month-to-month basis in order to keep their options open. It would be unfair to BellSouth now to require a Fresh Look for those customers and, indeed, for those CSAs in which customers entered into long term agreements <u>after</u> the passage of the legislation, because those customers did so with the knowledge that the telecommunications marketplace was being opened to competition. This, however, is exactly the kind of action that Petitioners are urging the TRA to undertake.

The CSAs BellSouth has entered into, and which the TRA has approved, represent BellSouth's response to this competitive marketplace, as the TRA itself has recognized. *Tennessee Regulatory Authority's Report to the General Assembly on the Status of Telecommunications Competition in Tennessee*, 1995-1997, at 17 (June 5, 1997). Petitioners' proposed rules represent nothing more than an attempt to obtain through rulemaking that which they lost in the marketplace.[7]

Second, the TRA has already given Petitioners a second "bite at the apple" with respect to customers who currently purchase services through a CSA with BellSouth. The TRA did so in the MCI/AT&T arbitration, in which it determined that BellSouth's CSAs must be available for resale by CLECs, at the wholesale discount established by the TRA. Therefore, the TRA need not hand Petitioners yet another opportunity to obtain business they have lost in the competitive marketplace and which they can readily obtain through resale.

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[7] That the local market in Tennessee was open to competition almost three years further distinguishes this case from the FCC proceedings cited by the Petitioners. In the only instance in which the FCC has approved a "fresh look" requirement in the name of competition, it did so only with respect to contracts that had been executed prior to the date of the order introducing competition. *See In re: Expanded Interconnection With Local Telephone Company Facilities*, 9 FCC Rcd 5154 (July 14, 1994) (limiting the fresh look opportunity to customers with LEC special access arrangements for terms of three years or longer, entered into on or before September 17, 1992, the date of adoption of the FCC's special access expanded interconnection order). Here, BellSouth has no long-term contracts that were entered into prior to passage of the Telecommunications Reform Act of 1995, and thus, based upon the FCC's approach, there would be no basis for a "Fresh Look" requirement here.

III. CONCLUSION

Petitioners' request for a Fresh Look is fundamentally flawed. There is no clear and unambiguous grant of authority by the Legislature of the type necessary to support the TRA abrogating existing contracts between public utilities and their customers. Furthermore, such Draconian action would be unconstitutional, at least in part, because it serves no important public purpose and represents nothing more than an attempt to transfer BellSouth's revenue -- already won by BellSouth in the competitive marketplace -- to later-arriving CLECs. Finally, customers currently receiving services under a CSA had a competitive alternative available to them when they entered into the CSA, and CLECs have the authority to resell those CSAs today. So, for these and the other reasons set forth in this motion, the TRA should assiduously avoid the implementation of a "Fresh Look" requirement -- one that, BellSouth submits, would constitute an administrative and a regulatory nightmare of the first magnitude. For all of these reasons, BellSouth respectfully urges the TRA to dismiss the Petition.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

William J. Ellenberg, II
Bennett L. Ross
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 1998, a copy of the foregoing document was served on the parties of record, via hand delivery, facsimile or U. S. Mail, postage pre-paid, addressed as follows:

Dennis McNamee, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

D. Billy Sanders, Esquire
Waller, Lansden, Dortch & Davis
511 Union St., #2100
Nashville, TN 37219-1750

Henry M. Walker, Esquire
Boult, Cummings, et al.
414 Union St., #1600
Nashville, TN 37219

Charles B. Welch
Farris, Mathews, et al.
511 Union St., #2400
Nashville, TN 37219

Henry C. Campen
Charles C. Meeker
Parker, Poe, et al.
150 Fayetteville St. Mall, #1400
Raleigh, NC 27602-0389

BELLSOUTH

BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

REGULATORY AUTH.
'98 MAR 6 PM 4 07
OFFICE OF THE EXECUTIVE SECRETARY

March 6, 1998

VIA HAND DELIVERY

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

Re: *Joint Rulemaking Petition by ICG Telecom Group, Inc., TCG MidSouth, Inc., American Communications Services of Chattanooga, Inc., NEXTLINK Tennessee, LLC, and Time Warner Communications of the Mid-South, LP to Implement Fresh Look Requirements*
Docket No. 98-00046

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss. A copy has been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: ***JOINT RULEMAKING PETITION BY ICG TELECOM GROUP, INC., TCG MIDSOUTH, INC., AMERICAN COMMUNICATION SERVICES OF CHATTANOOGA, INC., NEXTLINK TENNESSEE, L.L.C. AND TIME WARNER COMMUNICATIONS OF THE MID-SOUTH, L.P. TO IMPLEMENT FRESH LOOK REQUIREMENTS***

Docket No. 98-00046

AFFIDAVIT

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, Paul T. Stinson, Jr., being first duly sworn, depose and say:

1. I am employed by BellSouth Telecommunications, Inc. ("BellSouth"); my work address is 22K103, 333 Commerce Street, Nashville, Tennessee 37201-3300. In my present job as Manager, Regulatory and External Affairs, my responsibilities include tariff and docket management on behalf of BellSouth in the State of Tennessee. I have 22 years experience in the telecommunications industry. Since 1976, I have had various positions in BellSouth's Regulatory Department and BellSouth's Network Department. I have been employed by BellSouth since February 26, 1976. I have personal knowledge of the matters in this affidavit and understand that it will be used in support of BellSouth's Motion to Dismiss in the above-captioned docket.

2. The following table summarizes the number of Contract Service Arrangement Agreements ("CSA Agreements") filed with and approved by the Tennessee Regulatory Authority (or its predecessor) since June 6, 1995. This information is current through March 4, 1998.

YEAR	MONTH	CSA FILED	CSA APPROVED
1995		0	0
1996	Jan	0	0
	Feb	0	0
	Mar	0	0
	Apr	0	0
	May	0	0
	June	0	0
	July	2	
	Aug		2
	Sept	5	
	Oct	3	5
	Nov	3	3
	Dec		2
Total for 1996		**13**	**12**
1997	Jan	7	
	Feb	1	6
	Mar	14	3
	Apr	25	14
	May	22	19
	Jun	15	21
	Jul	4	22
	Aug	7	4
	Sept	8	7
	Oct	3	8
	Nov	6	3
	Dec	4	6
Total for 1997		**114**	**113**
1998	Jan	6	4
	Feb	6	6
	Mar	2	
Total for 1998		**14**	**10**

3. Since August, 1997, almost every CSA Agreement between BellSouth and its customers has included language by which the customer "acknowledges that it has options for its telecommunication services from providers other than BellSouth and that it has chosen BellSouth to provide the services in this Agreement."

4. Paragraph 21 of the Petition in this matter sets out the proposed criteria for determining when an interconnection agreement is considered operational. The following table contains the applicable dates relative to the Petitioners.

COMPANY	**CCN[1] APPROVED**	**TARIFF FILED**	**I/C AGREEMENT[2] FILED**	**I/C AGREEMENT APPROVED**
ICG Telecom Group, Inc.	08/24/95	04/11/97	04/19/97	05/20/97
TCG MidSouth, Inc	07/14/97	09/09/97	not filed	BST negotiations completed 07/15/96; agreement not yet filed with TRA.
ACSI, Inc.	10/11/95	01/16/97	08/29/96 03/21/97	12/17/96 04/15/97
NEXTLINK Tennessee LLC	09/29/95	05/31/96	05/23/96	06/25/96
Time Warner of MidSouth LP	08/24/95	04/21/97	06/07/96	06/28/96

FURTHER AFFIANT SAITH NOT.

Paul T. Stinson

PAUL T. STINSON, JR.

[1] Certificate of Convenience and Necessity

[2] Interconnection Agreement

Sworn to and subscribed before me, this 6th day of March, 1998.

Carolyn Hamesworth

Notary Public

My Commission Expires:

1.27-2001

88TH DECISION of Level 1 printed in FULL format.

PUBLIC UTILITIES REPORTS - FOURTH SERIES

VERMONT

Re New England Telephone and Telegraph Company

Docket No. 5713

Vermont Public Service Board

SLIP OPINION

August 20, 1997

SYNOPSIS:

ORDER RE: INTRALATA PRESUBSCRIPTION PRESENT: Frederick W. Weston, III, Hearing Officer.

APPEARANCES: Sheldon Katz, Esq., for the Vermont Department of Public Service. Thomas M. Dailey, Esq., for New England Telephone & Telegraph Company. John H. Marshall, Esq., Downs, Rachlin & Martin, for Atlantic Cellular Company, L.P d/b/a Cellular One and Hyperion Telecommunications of Vermont, Inc. William B. Piper, Esq., Paul J. Phillips, Esq., Primmer and Piper, P.C., for Champlain Valley Telephone Company Franklin Telephone Company Ludlow Telephone Company Northfield Telephone Company Northland Telephone Company of Vermont Perkinsville Telephone Company Shoreham Telephone Company Topsham Telephone Company Waitsfield-Fayston Telephone Company, Inc. Melinda B. Thaler, Esq., for AT&T Communications of New England, Inc. Robert Glass, Esq., Glass, Seigle and Liston, for MCI Telecommunications Corporation. I. INTRODUCTION

Today's proposal for decision recommends that the Public Service Board approve a stipulated plan for the implementation of intraLATA presubscription ("ILP") for toll service in Vermont. n1 ILP denotes the capability of a caller to make in-state long distance toll calls by dialing one plus the ten-digit number (area code and number) of the party with whom the caller wishes to speak, irrespective of the carrier providing the toll service. Currently, only New England Telephone and Telegraph Company ("NYNEX" or "Company") and the ten other independent local exchange companies operating in Vermont are able to provide this dialing capability; callers who wish to purchase their in-state toll service from competitive carriers other than their local exchange companies ("LECs") must also dial a five-digit provider code or make special access arrangements. ILP, also referred to as dialing parity, will greatly improve the functioning of the competitive market for in-state toll services (particularly residential), since it will eliminate significant barriers to alternative provision of long-distance services: among them, customer inconvenience caused by the dialing of additional digits. A. Background and Procedural History

IntraLATA presubscription was initially slated for review in the first module of Phase II of this docket. Order of 3/1/95 at 4. In the intervening months, the structure of the docket changed somewhat but, in response to several filings of the parties and to the Board's Order in Docket 5900 (In Re:

NYNEX/Bell Atlantic merger), the original procedural organization was for the most part re-adopted. Order of 313197 at 1-5. In Docket 5900, the Board had ordered NYNEX, as a condition of approval of the Company's acquisition by the Bell Atlantic Corporation, to make ILP available to its customers before the end of the year. Specifically, the Board stated:

We recognize that NET cannot implement ILP overnight and, therefore, direct that ILP take effect on December 1, 1997, or as soon thereafter as possible. There are numerous technical and financial issues in implementing ILP. These include:

- Whether to use the "2-PIC" methodology that allows customers to select different carriers for intra-LATA and inter-LATA calling.

- Whether any calls, (such as 411, 611, 911, 976 and DACC) should be excluded.

- Telephones that should be excluded from ILP.

- When other local exchange carriers should implement ILP.

- Coordination with other local exchange carriers.

- Whether customers who make no election should be assigned to a carrier.

- Procedures by which customers are assigned or may select their carrier.

- Business policies and procedures, including billing practices and charges for changing presubscribed carriers.

- Cost recovery by NET.

- Consumer education.

- Consumer protection.

In order to resolve these issues, we direct NET to make a filing within 60 days containing a plan describing how NET will implement ILP in Vermont by December 1, 1997. The filing shall be made in this Docket and in Docket 5713. The Hearing Officer in Docket No. 5713 shall have jurisdiction to supervise the acceptance, rejection or modification of that plan as well as jurisdiction over related disputes and implementation issues. If the Hearing Officer determines that serious legitimate barriers exist to implementation by December 1, 1997, he may issue an order establishing a later date. Docket 5900, Order of 2/26/97 at 36-37 (footnote omitted). In order to assure the parties and the Board sufficient time to review NYNEX's ILP plan, I directed NYNEX to file it on April 8th, before the sixty days had passed. Also on that day, NYNEX and the other parties filed their witnesses' direct testimony and exhibits. Supplemental testimony followed on May 2nd, and rebuttal testimony was filed five days later.

Hearings on ILP and other (unrelated) issues were held on May 12-16, 1997. During the hearing of May 15th, several of the parties informed me that they had reached agreement in principle on the terms of an ILP implementation plan. Those parties were NYNEX, AT&T Communications of New England, Inc. ("AT&T"), and MCI Telecommunications Corporation ("MCI"). n2 Witnesses for the stipulating parties then presented testimony on the agreement, and were cross-examined.

This proposed decision addresses only the issue of ILP implementation. The remaining issues litigated in Phase II, Module One, will be taken up in a later proposal for decision. B. Legal Issues

The Department of Public Service ("DPS" or "Department") is not a signatory to the Stipulation. The DPS generally supports approval of much of the stipulated ILP implementation plan, but urges the Board to modify it in five particular ways (discussed in detail in Section m, below). DPS Memorandum at 1-2. The DPS argues that (insofar as the record allows) the Board can direct NYNEX to implement ILP in Vermont according to a plan that contains elements of the April 8th plan, of the stipulated plan, and of the various recommendations of the parties. The Department contends that the Board can do so because the parties were given the opportunity to fully litigate all issues associated with ILP and, therefore, no party's right will have been compromised. Id. at 22; DPS Reply Memorandum at 12.

NYNEX disagrees with the Department, noting first that, by its terms, the Stipulation: is a unified settlement of all issues relating to NYNEX's implementation of ILP in Vermont. Unless approved in substantially the same form as set forth in this document, the parties reserve the right to submit a revised stipulation. If agreement on a revised stipulation cannot then be reached, the stipulation shall be null and void. Stipulation at @ 6; NYNEX Reply Memorandum at 29. NYNEX next argues that, in fact, all parties have not had a full and fair opportunity to litigate the issues. NYNEX points out that, upon reaching verbal agreement on May 15, 1997, the stipulating parties discontinued their cross-examination of witnesses on ILP, but reserved the right to resume cross-examination if the Board were to reject the Stipulation. NYNEX Reply Memorandum at 30. Atlantic Cellular and Hyperion Telecommunications of Vermont, Inc. ("Hyperion") filed a joint brief in support of the Stipulation. They argued that it has been the Board's practice not to allow selective challenges to particular components of a settlement "unless the 'combined effect' of the challenge would be to lower costs, a showing not made here." Atlantic Cellular/Hyperion Brief at 2-3 (citations omitted).

The dispute appears to be a minor one. The Stipulation acknowledges the possibility that the Board will not accept it in its entirety, and sets out a procedure for dealing with that eventuality. The stipulating parties' reservation of their rights to further examination of witnesses is Consistent with that provision. The question of whether additional examination of witnesses is needed will depend upon the factual findings and conclusions with respect to those few remaining issues that are in dispute. For the reasons that follow, I conclude that the record is sufficient to justify approval of the Stipulation, with only minor modifications. II. FINDINGS OF FACT

Based on the testimony and evidence presented in this docket, I hereby report, pursuant to 30 V.S.A. @ 8, the following findings of fact. A. General

1. Dialing parity is essential to the development of competition in the in-state toll market. Hogarth pf. at 6-7.

2. The "Stipulated ILP Implementation Plan for the State of Vermont" sets out a reasonable approach for making intraLATA presubscription available to all of NYNEX's customers in the state. Stipulation, generally n3 ; findings 3-30,

below. B. NYNEX's April 8th ILP-Implementation Plan

3. NYNEX filed an ILP implementation plan on April 8, 1997 ("April 8th Plan"). See generally Ross pf.; exh. NET-II-3.

4. The April 8th Plan set out the details associated with implementing ILP in Vermont by December 1, 1997, in accordance with the Board's Order of 2/26/97 in Docket 5900 (In Re: NYNEX/Bell Atlantic merger). Exh. NEI-II-3.

5. The April 8th Plan called for the "2-PIC method" of presubscribing toll carriers. The 2-PIC approach enables customers to choose an intraLATA toll carrier that is the same as or different from their interLATA carrier. n4 Id.

6. Major components of the April 8th Plan included the following:

. For customers with optional calling plans ("OCPs"), the plan required all telecommunications providers to disclose to customers the possibility that OCPs will be removed from the customer's line upon changing the customer's PIC to another carrier. However, NYNEX also proposed not to remove certain multi-line, business OCPs where the PIC change applies only to a portion of the lines. Exh. NET-II-3 at 12-13.

. NYNEX's plan also required providers to ask whether there are existing contractual arrangements between the customer and the existing intraLATA toll carrier, and to invite the customer to contact his or her present toll provider to discuss the obligations before placing an ILP PIC order. Id.

. NYNEX's plan required it to provide customers with bill inserts describing ILP one month prior to implementation, as well as to make available for an interim period an "800" number so that customers could call to obtain additional ILP information and a list of participating carriers. Id. at 5.

. The plan required telecommunications providers to ask new customers to select an ILP carrier when they subscribe for local-telephone service.

Id. at 5, 21-22.

. It required customers to contact their carrier of choice to process ILP requests, but provided that NYNEX would process the customer's selection if asked. Id. at 5.

. NYNEX proposed a $ 5.00 charge for each PIC change. However, NYNEX would waive the charge for one PIC change during the initial 90-day implementation period, or for a new customer's initial subscription to local-exchange service. Id.

. To recover ILP-implementation costs, NYNEX proposed to assess a per-access-line charge assessed to all carriers based on their number of presubscribed lines. Id. C. The Stipulated ILP Plan: Key Differences With the April 8th Plan

7. Under the Stipulation, NYNEX has agreed to certain changes to its ILP-implementation plan. Tr. 5/15/97 at 4-11; Stipulation (included in its entirety as Appendix 1 to this Order).

8. NYNEX will implement ILP on November 6, 1997. Stipulation at @ 2.N.

9. The terms of the Stipulation are based in most respects on those of stipulations signed by carriers in Rhode Island and Maine, and of the ILP plan approved in New Hampshire. Stipulation at @ 1.

10. The Stipulation eliminates the requirement for carriers to warn customers about potential contractual obligations under existing OCPs if the customer changes its PIC. Tr. 5/15/97 at 5.

11. NYNEX agreed to notify customers of the ILP implementation through two bill inserts (rather than only one)-one before the ILP implementation date and the other during the initial implementation period. Id. at 6-7; Stipulation at @ 2.J.

12. Beginning with the effective date of the Stipulation and continuing until the ninetieth (90th) day following the date of ILP implementation, NYNEX will not actively market "PIC-freezes," that is, actively encourage customers to expressly direct NYNEX (their LEC) not to process any PIC-change requests from other carriers. n5 NYNEX may, however, "offer the PIC freeze option to customers on an individual case basis, in response to the expressed needs of the customer which can be satisfied by a PIC freeze." Stipulation at @ 2.L.4.; tr. 5/15/97 at 8-11.

13. NYNEX will process PIC-change requests, but will also encourage customers to request their new intraLATA carrier to process the PIC-change, since the carrier will be able to answer questions about services and rates. During the 30 days prior to ILP implementation, NYNEX will not have to process PIC-changes. Stipulation at @ 2.M.1.; tr. 5/15/97 at 8-9.

14. To ensure expeditious processing of PIC-changes at the beginning of the ILP-implementation period, NYNEX agrees to begin processing changes on November 3, 1997, three days before the ILP implementation date. Stipulation at @ 2.N.; tr. 5/15/97 at 10-11.

15. Under the Stipulation, costs of ILP implementation to be recovered from competitive carriers will be allocated according to their pro-rata shares of intraLATA minutes, not access lines. Stipulation at @ 5.; tr. 5/15/97 at 137; see finding 21, below.

16. NYNEX currently implements Board-approved tariffs for municipal-calling services or "MCS" - that is, calls within a single municipality must be charged as local calls even if routed as toll calls. Friar supp. pf. at 3.

17. Under MCS, however, an interexchange carrier that resells NYNEX's service pays an access charge because the call is still routed as a toll call. Id. at 3-4.

18. In the second phase of Docket 5670, the Board is expected to issue an order resolving MCS, eliminating the few remaining situations where intra-municipality calls are toll-routed. Id.

19. Under the Stipulation, the parties may request that the Board conduct expedited hearings in this docket to resolve any outstanding ILP issues associated with MCS, if the Board does not issue an order eliminating MCS in

Docket 5670 by July 1, 1997. The ILP implementation date of November 6, 1997, assumes a four-month period for the implementation of the revised extended area service ("EAS")-routes. A delay of ILP implementation, for any reason, will require Board approval. Stipulation at @ 1. (fn. 3), @ 2.I, and @ 2.N. (fn 16); tr. 5/15/97 at 58. D. Other Issues

20. Under the Stipulation, NYNEX's estimated costs to implement ILP total $ 1,009,714. This includes $ 85,886 of lost revenues resulting from the waiver of PIC-change charges during the first ninety (90) days of ILP. n6 Stipulation at @ 4.

21. NYNEX will establish a new rate element called the Equal Access Cost Recovery Charge ("EACRC") at $ 0.002247 per minute of use. It is designed to recover the ILP implementation costs, amortized over a two-year period at a compound rate of 11 percent. NYNEX will also identify any over- or under-recovery of these costs, and will propose a "true-up" mechanism on the first anniversary of ILP implementation. The parties will hold a technical session to determine appropriate charges for ILP implementation, and will file those proposed charges with the Board within 90 days after the Board issues a final order on ILP implementation. Id. @ 5.

22. ILP implementation costs are directly related to the number of presubscribed access lines served. Weiss pf. at 15; Ross pf. at 20; tr. 5/15/97 at-137.

23. Under the original NYNEX proposal, InterLATA presubscription implementation costs were recovered according to carriers' shares of access lines. Tr. 5/15/97 at 137.

24. ILP implementation costs do not vary with minutes of use. Although there is not a direct linkage between minutes of use and ILP implementation costs, there is often a loose, positive relationship between carriers' shares of minutes of use and their shares of access lines in a given area. Consequently, allocating ILP implementation costs according to minutes of use is within the range of reasonableness.

Id. at 137-138.

25. Because NYNEX is recovering its ILP implementation costs on a minutes-of-use basis in the other states in which it operates, it has already developed a system for doing so that can be transferred to Vermont. n7 Id. at 138.

26. The Stipulation calls for a $ 5.00 charge per PIC-change. This is the same as the charge for PIC-changes of interLATA carriers. NYNEX has not conducted a study to determine the actual costs of performing intraLATA PIC-changes. Stipulation at @ 2.L.1.; Ross reb. pf. at 6; tr. 5/14/97 at 239.

27. A PIC-change cost study would be relatively inexpensive to undertake, and could probably be completed before the date of ILP implementation. Tr. 5/15/97 at 209.

28. It would be inappropriate to allow NYNEX to recover net revenues lost as a consequence of the waiver of the PIC-change charge during the 90-day initial period. It is, however, proper to allow NYNEX to recover the actual costs of

the PIC-changes during that period, since there will be no revenues received to cover those costs. Weiss pf. at 14; Hogarth pf. at 20.

29. Business customers who purchase NYNEX intraLATA toll service under the term toll agreements (i.e., certain special contracts and its Custom Netsaver program) may be liable for early termination charges or penalties. No early termination charges or penalties are associated with residential intraLATA toll services or optional calling plans (with the exception of the first month's minimum purchase requirement). Tr. 5/15/97 at 123.

30. The market for intraLATA business toll service is marked by a high degree of competition. Docket 5900, Order of 2/26/97 at 25. E. The Independent LECs

31. The FCC has ordered independent local exchange companies ("ILECs") to implement ILP no later than February 8, 1999. Fox pf. at 6.

32. There may be technical matters that will prevent some of Vermont's ILECs from implementing ILP by December 1, 1997. Weiss reb. pf. at 3-4; tr. 5/15/97 at 197-198, 239-241. III. DISCUSSION A. The Stipulated ILP Implementation Plan

All parties who participated in this module of the docket agree that intraLATA presubscription is necessary to the improved functioning of the competitive market for telecommunications services in Vermont. They also agree that ILP should be implemented as soon as is reasonably possible. There were a number of technical details in NYNEX's April 8th plan to which several of the other parties took exception; but, with the filing of the Stipulation, many of these objections were eliminated. NYNEX, MCI, AT&T, and Atlantic Cellular, parties to the Stipulation, urge the Board to approve it in its entirety. Hyperion did not sign the agreement, but recommends its approval.

The Department also is not a signatory to the Stipulation. The DPS generally supports the stipulated ILP plan, but advises the Board to approve it only if it is modified in five ways to satisfy Department concerns. Those areas of concern are:

. "Fresh look;"

. Implementation date;

. The charge for PIC-changes;

. ILP implementation costs to be recovered; and

. The basis and method for recovering ILP implementation costs. DPS Memorandum at 2-5. Each point is taken up in the following sub-sections.

1. "Fresh Look"

The Department points out that the Stipulation does not provide NYNEX customers "who recently agreed to term toll commitments with an opportunity to withdraw from those commitments without penalty or liability now that ILP will allow customers to choose their . . . carrier from among numerous carriers." Id. at 2. Arguing that customers who entered into term toll agreements after February 8, 1996, (the date that the federal Telecommunications Act of 1996 was signed into law) were not "fully informed" about impending changes in the competitive market for in-state toll services, the DPS recommends that the Board should require NYNEX to permit all such customers whose agreements extend beyond the date of ILP implementation to withdraw from those agreements without incurring any termination liabilities. Id.

The Department argues that, because these customers did not have the benefit of full disclosure at the time that they entered into their term toll agreements, it is only fair to give them the chance to avoid termination liabilities if, with the implementation of ILP, they wish to switch to an alternative in-state toll provider. Id. at 6. The DPS's logic turns on two critical points. The first is that NYNEX should have known that ILP implementation in the near future was reasonably foreseeable and, therefore, NYNEX had an obligation to disclose that fact to the customers before they entered into the agreements. Id. Related to this point are the factual questions of whether ILP implementation was "reasonably foreseeable" and whether NYNEX failed to disclose it to its potential term toll customers. The second point is that, at the time these customers entered into the agreements, the market for intraLATA toll service was not sufficiently competitive to make alternative providers realistically available to those customers.

Id. at 7; DPS Reply Memorandum at 9. The DPS then argues that ordering "fresh look" is both within the Board's authority and consistent with its long-standing policies. DPS Memorandum at 7-10.

In response, NYNPX begins by asserting that, because "fresh look" was not specifically identified in the DPS's letter of January 22, 1997, listing issues to be litigated in Phase II of this docket, the issue is not properly before the Board at this time. NYNEX Reply Memorandum at 3. The Company then addresses the issue on its merits. It contends that its customers who may face early termination liabilities under term toll agreements are sophisticated, well-informed business people. As such, they were surely aware of the Act's implications on competition in Vermont, and in that knowledge still entered into agreements with NYNEX. Id. at 6. Furthermore, NYNEX argues that in the past five years, the market for in-state toll services, particularly in the business sector, has become very competitive and that sophisticated users are quite aware of their alternatives. Id. at 6-7. NYNEX then cites a number of decisions by the FCC and other state regulatory commissions denying "fresh look," generally on the grounds that the market, at the time customers entered into term toll agreements and the like, was sufficiently competitive to protect them against the potential abuses of the dominant provider and, therefore, that there were no compelling reasons to excuse these customers from abiding by the terms of their agreements. Id. at 7-10. NYNEX then asserts that there is no evidence in the record on "the nature of the termination clauses. . . that [the DPS] seeks to void, nor does the DPS explain why (or if) affected customers can opt out of NYNEX contracts without penalty or, if a penalty exists, the severity of the alleged penalty." Id. at 10.

NYNEX also argues that the DPS's "fresh look" proposal is not supported by the FCC's 1993 expanded interconnection order. The Company contends that, moreover, "fresh look" would be confiscatory, would interfere with contractual relations in violation of the state and federal constitutions, and would constitute an unconstitutional taking of private property.

Id. at 11-16. Finally, NYNEX argues that making "fresh look" available to all customers who entered into term toll agreements since February 8, 1997, is not supported by the record. Id. at 18.

With respect to NYNEX's procedural objections to the Department's proposal, I conclude that the Board does have the authority to order "fresh look." I also conclude that "fresh look" is properly before the Board at this time. Because ILP was set for resolution in this module and "fresh look" (like the many other technical details associated with ILP) is a legitimate aspect of ILP implementation, I am unpersuaded by NYNEX's argument that, because it was not specifically identified in the DPS' January 22nd letter, it cannot now be taken up by the Board. n8 And, lastly, the evidentiary record is sufficient to reach a decision on the question.

As for the merits of the Department's proposal, I conclude that NYNEX should not be required to give its customers a "fresh look." The record in this case does not support a finding that those customers who might benefit from "fresh look" were unaware of the potential consequences of their decisions to enter into term toll agreements. Nor does it support a finding that NYNEX failed to fully inform potential customers of possible changes in the in-state toll market. If there were some residential customers who faced termination liabilities and who lacked meaningful access to alternative providers, "fresh look" might afford them a needed protection; but, in this instance, the affected customers are sophisticated business users of the telephony system for whom competitive alternatives have been long available. This is the essential point: the market, though perhaps not competitive to the fullest extent, was nevertheless sufficiently competitive to offer them the protections that "fresh look" would otherwise provide. Finding 30. Had these customers lacked meaningful alternatives to the services of the incumbent LEC at the time they entered into their agreements, "fresh look" might very well be justified. n9 As it is, however, I can see no reason to free these customers from the obligations that they knowingly took on. In light of this conclusion, it is not necessary to decide the question of whether the DPS's "fresh look" proposal would violate either the Vermont or United States Constitution.

2. ILP Implementation Date

Footnote 1 of the Stipulation describes the stipulating parties' assumption that a Phase II order in Docket 5670 (In Re: Extended Area Service) will resolve all outstanding issues associated with municipal calling services. Indeed, the parties anticipate that that order will eliminate MCS altogether and, consequently, no special ILP arrangements for MCS routes will need to be made. In the event that Phase II EAS implementation is delayed, ILP may be similarly put off, if the Board so approves. Tr. 5/15/97 at 59-61; findings 16-19.

The Department argues that the evidentiary record does not support a condition that links ILP implementation to EAS implementation. The DPS asserts that the testimony on this point-specifically, that EAS changes would take three months to set up, followed by a one-month period of permissive dialing-was unreliable and based on hearsay. Therefore, argues the Department, the Board should not countenance any delay after November 6th, "unless NYNEX can show by compelling non-hearsay evidence that ILP implementation by November 6 is impossible." DPS Memorandum at 13. "[D]elay beyond that date would be unconscionable." Id. at 24.

NYNEX opposes the Department's recommendation, arguing that in fact the record "amply supports" a finding that EAS implementation will require a minimum of four months. NYNEX Reply Memorandum at 19-20. Nevertheless, NYNEX asserts that it "is willing and able to implement ILP on November 6, 1997, as set forth in the Stipulation, but ILP should not be rushed into simply to satisfy an artificial deadline at the expense of proper EAS implementation." Id. at 21.

I conclude that the Stipulation's provision that ILP be implemented on November 6, 1997, giving the parties an opportunity to seek an extension, is reasonable. Contrary to the DPS's assertions, the record more than adequately supports this provision. n10 Findings 8, 16-19. The proposed implementation schedule is intended to bring ILP to Vermont's consumers quickly and with a minimum of confusion.

3. PIC-Change Charges

The Department argues that the proposed $ 5.00 PIC-change charge cannot be found to be cost-based. It is not, asserts the DPS, justified by any cost study and (citing cost analyses conducted in other states) is, very likely, in excess of the actual costs of making the change. DPS Memorandum at 14-15, fn. 9. The Department argues that the Board should not deviate from its long-standing policy of basing prices on costs by adopting the $ 5.00 fee "without better understanding its potential impact on competition and consumers." Id. at 15. The Department recommends that the Board direct NYNEX to perform a study of PIC-change costs (according to the approved total service long-run costing methodology, "TSLRIC"), and file it prior to the implementation of ILP. Id. at 15, 21.

NYNEX counters that the $ 5.00 fee is reasonable, that it mirrors the FCC-approved charge for interLATA PIC-changes, and that it has not been shown to impede competition. NYNEX Reply Memorandum at 24. The Company also contends that uniform charges reduce consumer confusion and that, in any event, "the $ 5.00 fee is at best de minimus." Id. at 24-25. Lastly, NYNEX argues that the provision represents one of several compromises necessary to the achievement of the overall settlement, and that "the Board should not discount the significance of the unified stance that the industry is putting forward here. Taken on balance, the Stipulation is good for the development of competition in Vermont."

Id. at 26-27. NYNEX warns that the $ 5.00 PIC-change fee "is an integral part of the Stipulation" and would cause the Company "to withdraw from [it]." Id. at 27.

The record does not support a conclusion that the $ 5.00 charge is cost-based. Finding 26. I cannot say at this time what the appropriate fee is. I note that, since the parties whose customers will be most affected by the charge have agreed to it, an inference that they (AT&T, MCI, and Atlantic Cellular) do not see it as a significant barrier to competition can reasonably be drawn. Consequently, I recommend that the Board allow the fee to go into effect on an interim basis, pending the filing and review of a PIC-change TSLRIC study and pricing proposal. Finding 27. I am confident that interim approval will impose little or no adverse impacts upon customers or competition generally, in light of both the fact that the fee will be waived during the initial 90-day ILP period and the fact that I also recommend that net lost revenues associated with the waived fees should not be recoverable by NYNEX (see the following sub-section).

NYNEX should be directed to submit that filing on or before October 15, 1997.

4. Recoverable Implementation Costs

The Stipulation sets out estimated ILP implementation costs, totaling $ 1,009,714, that NYNEX should be entitled to recover. Included among them is $ 85,886 for expected revenues from PIC-change charges that will be foregone during the waiver period. Finding 20. The Department argues that, in this instance, it would be inappropriate to allow NYNEX to recover any revenues in excess of costs. Doing so, the DPS asserts, would be inconsistent with the Board's rejection of the efficient component pricing rule ("ECPR") in Phase I of this docket. DPS Memorandum at 21; Order of 5/29/96 at 43-47 ("Phase I Order").

NYNEX responds that recovery of foregone PIC-change revenues is not equivalent to adoption of the ECPR, since ECPR "would have allowed incumbent carriers to include in the price of their unbundled loops the revenues from other vertical services and toll lost when a customer subscribes to services offered by another carrier using an incumbent carrier's facilities." NYNEX Reply Memorandum at 28 (emphasis in original). The Company maintains that: In contrast, allowing NYNEX to recover foregone PIC change fees during the 90-day ILP implementation period simply recognizes that there are costs that NYNEX will incur and associated revenues that NYNEX would have realized but for the 90-day fee waiver period. There is no attempt under the Stipulation to recover lost revenues from other services, in contrast with the underlying principle underlying ECPR. Foregone PIC change revenues are as much a cost of ILP as are other costs.

Id. (emphasis in original).

NYNEX's reasoning is unpersuasive. While the Stipulation's PIC-change revenue recovery proposal is not as expansive as that of ECPR, it is nevertheless a net lost-revenue recovery mechanism. As the Board concluded in the Phase I Order, the question of whether and to what degree net lost revenues should be recovered depends both on the policy objectives to be served and on the particular circumstances of each case. n11 In this instance, I conclude that, because intraLATA PIC-change fees will be a new (incremental) revenue source whose contribution to the Company's total cost of service is not now recognized in rates, there is no reason to allow NYNEX to recover that portion of these revenues in excess of the new (incremental) costs of making those changes. n12 Those net lost PIC-change revenues (though expected to be small-somewhat less than $ 85,886) would simply constitute a windfall to NYNEX for which there is no compelling public policy justification.

For these reasons, I recommend that the Board allow NYNEX to recover only the actual costs of implementing ILP, currently estimated to be in the neighborhood of $ 1.0 million. Any foregone net revenues in excess of costs should not be included in the amount to be recovered. The cost study to be performed for the purpose of setting the PIC-change fee (see Section III.A.3., above) can serve the second purpose of underpinning the calculation of PIC-change costs to be recovered from all providers.

See Section III.A.5., following. Under @ 5 of the Stipulation, NYNEX and the parties (with the Department if it so chooses), will convene a technical session, after the Board issues this Order, "to determine the charges based on estimated cost figures submitted by NYNEX." Those calculations should be filed with the Board and parties no later than October 15, 1997.

5. Method for Recovering ILP Implementation Costs

Under the terms of the Stipulation, NYNEX will recover its approved ILP implementation costs through a charge per originating minute of use, paid by all in-state toll carriers. Finding 21. Through the use of a "true-up" mechanism, NYNEX's total recovery will neither exceed nor fall short of the actual costs incurred. Id.

The Department objects to this method of cost recovery, arguing that "costs should be recovered in the same way in which they are incurred." DPS Memorandum at 22. Since ILP implementation costs vary with the number of presubscribed lines and not with minutes of toll use, the DPS recommends that the Board direct NYNEX to recover its costs through an assessment against intraLATA carriers in direct proportion to the number of access lines presubscribed to each carrier. Id. at 5; Weiss pf. at 15.

While NYNEX concedes that its preference would be cost recovery according to the number of presubscribed access lines, the Company notes that the Stipulation's minutes-of-use provision was one of several compromises that enabled the parties to reach a comprehensive agreement. Furthermore, the Company points out, other states in which NYNEX operates (Maine, New Hampshire, and Rhode Island) have also adopted the minutes-of-use cost recovery approach. NYNEX Reply Memorandum at 29.

As a matter of economic efficiency, prices should be set to cover the full incremental costs of production (in this case, TSLRIC). Phase I Order at 28-29. That said, it is not always necessary or appropriate that costs be recovered in precisely the way in which they are incurred. Other objectives, such as simplicity or equity, may take precedence. Consider that in competitive markets it often happens-indeed, is the norm-that the fixed costs of production are recovered through volume-sensitive charges: automobiles, for example, or (more to the point) long-distance telephone service (given that much of the network's costs are non-traffic sensitive). In reviewing the estimated ILP costs that NYNEX seeks to recover in part from other carriers, I see that much of the total is sensitive to neither numbers of access lines or minutes of use. The lion's share of these costs would be incurred to prepare NYNEX's network for ILP, regardless of its number of access lines, customers, or minutes of toll usage. n13 The point here is that the Department's recommendation appears to be grounded more in its notions of what is the most equitable allocation of costs rather than in an inviolable principle of economics.

For this reason, and in the reasonable expectation that allocation by minutes of use will produce no less an equitable result than would the alternative, I recommend that the Board approve this provision of the Stipulation as submitted. Finding 24.

6. Conclusion

For all these reasons, I recommend that the Board approve the Stipulation, with the - minor modifications set out in the preceding sections. B. The Independent Local Exchange Companies

The ILECs n14 point out that they are currently under an FCC directive to implement ILP no later than February 8, 1999. Finding 31. They acknowledge that the Board has the authority to order them to implement ILP in advance of that date, but they ask that, if the Board so intends, it determine an implementation schedule that "best meets their own technical and financial circumstances." Fox pf. at 6; finding 32.

In response to my record request made during the May 15th hearing, the nine ILECs submitted a joint letter informing the Board as to their estimated costs and timing for implementing ILP. ILEC Letter, 6/20/97. Since VTEL was not represented at the hearings, a written request for the same information was sent to that company, and it filed its response on June 23, 1997. All of the companies stated that they were capable of implementing ILP before the PCC deadline.

During the hearings, Department witness Weiss stated that, as a general matter, implementation of ILP on a statewide basis will reduce customer confusion while promoting customer choice. Tr. 5/15/97 at 198-200. Nevertheless, the Department does not urge the imposition of a state-wide implementation date, but instead recommends that the Board direct the ILECs to implement ILP according to the schedules described in their filings. DPS Letter, 7/7/97.

I concur. Therefore, I recommend that the Board direct Vermont's ten independent local exchange companies to implement ILP by the following dates:

** See Table in Original. **

I agree also with the Department's recommendation that questions associated with the ILECs' costs of ILP implementation need not be taken up at this time. This question, as well as other technical details, can be initially addressed by the affected parties in their negotiations during the coming months. DPS Letter, 7/7/97, at 2-3. I will expect them to keep the Board informed of their progress.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A, @ 811.

DATED at Montpelier, Vermont, this 7th day of August, 1997. Frederick W. Weston, III Hearing Officer IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and recommendations of the Hearing Officer are adopted.

2. The "Stipulated ILP Implementation Plan for the State of Vermont" is approved, subject to the conditions set forth in Section III of this decision.

3. NYNEX shall implement intraLATA presubscription on November 6, 1997, in accordance with the terms of the Stipulation.

4. NYNEX shall perform a study to establish the costs of effecting intraLATA PIC-changes and, based on those costs, shall also propose a charge for such changes. The study and pricing proposal shall be filed with the Board and Department of Public Service on or before October 15, 1997.

5. On or before October 15, 1997, NYNEX shall file a revised estimate of its ILP implementation costs to be recovered from all intraLATA toll carriers, calculated in accordance with the directives set out in Section III.A.4. of this decision.

6. Vermont's ten independent local exchange companies shall implement intraLATA presubscription according to the schedule set out in Section III.B. of this decision.

DATED at Montpelier, Vermont, this 20th day of August, 1997. FILED: August 20, 1997 ATTEST: Susan M. Hudson Clerk of the Board NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board of any technical errors, in order that any necessary corrections may be made

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.

Appendix 1 STIPULATED ILP IMPLEMENTATION PLAN FOR THE STATE OF VERMONT

SECTION 1 INTRODUCTION

New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX"), MCI Communications Corporation, and AT&T Communications of New England, Inc. collectively hereinafter referred to as the "Parties", have reached a Stipulation on an implementation plan for IntraLATA Presubscription (ILP) in the State of Vermont. This Vermont Stipulated ILP Implementation Plan (the "Plan") is based on the Stipulated ILP Plans approved in Rhode Island and Maine, and also the plan that was initially filed by NYNEX in New Hampshire and subsequently modified by the New Hampshire Public Utilities Commission in an Order issued on August 16, 1996 and clarification Orders issued on October 7, 1996, January 29, 1997, and April 1, 1997. As agreed by the Parties, the Maine Stipulated ILP Plan was modified to reflect Vermont specific changes and clarifications agreed to and reported by the parties on May 15, 1997 during hearings in this docket. n1 The Parties submit for Public Service Board approval the proposed implementation plan for ILP in Vermont. n2

There are many technical and operational changes that the Parties and NYNEX will need to implement to introduce intraLATA presubscription and to provide further choice to Vermont telecommunications consumers. To fulfill the ILP schedule dates set forth in the Plan, the Parties respectfully request that the Board consider the months of effort that will be required to successfully introduce ILP in Vermont, and review and approve this proposal as expeditiously as possible. The industry's ability to meet those dates will depend, in significant part, on such expeditious review and approval.

Summary of VERMONT Stipulated ILP Implementation Plan

The major components of the Joint Parties ILP Implementation Plan are summarized below.

1. Implementation Date: November 6, 1997 n3 .

2. Method: A 2-PIC method which enables customers to choose an intraLATA toll carrier that is the same as or different from their interLATA carrier.

3. ILP Eligible Calls: IntraLATA toll calls are eligible for ILP. NYNEX will continue to provide local service and handle the customer's local calls. ILP ineligible calls, such as Directory Assistance, are described in Section 2-G of the plan.

4. Optional Calling Plans (OCP): Customers who switch to another long distance carrier for their intraLATA toll calls will generally have their OCP removed. This process is described in Section 2-H.

5. Customer Education: Within 30 days of the Board's approval of this stipulation, the Parties and the Department will submit for Board review and approval a competitively neutral customer notice and the language of the 800 number telephone message discussed below. The written notice will be a stand-alone bill insert that explains the benefits of ILP and its relationship to competition, advises customers to call a toll free 800 number to obtain a list of the participating carriers and how to reach them, and identifies the date of implementation of ILP. n4 Further, NYNEX will provide for a period of one year after ILP implementation an 800 number containing brief, competitively neutral information, similar to that adopted in Maine and Rhode Island.

6. IntraLATA toll carrier for existing customers: All existing NYNEX customers will be informed that they will continue to have NYNEX as their intraLATA toll carrier until they affirmatively choose to change carriers. No balloting or allocation is planned.

7. IntraLATA toll carrier for new customers: New customers will be asked to select an ILP camer at the time they establish local telephone service. No ILP marketing activities shall occur during a customer initiated call to establish new service. If the customer refuses to select a carrier, the FCC Second Report and Order, issued August 8, 1996, requires a new customer to dial a carrier access code (10XXX) to complete intraLATA toll calls. NYNEX has submitted a Petition for Reconsideration ("PFR") to the FCC on this issue. The Company has requested the FCC to enable NYNEX to serve as the default carrier for new customers who fail to affirmatively select a carrier. If NYNEX fails to ask for a new customer's intraLATA choice, and the customer affirmatively chooses NYNEX, then the customer's intraLATA toll calls shall default to the customer's interLATA carrier, where possible.

8. Taking ILP PIC Change Orders: Customers requesting an ILP PIC change will be encouraged to contact that carrier directly to process their ILP PIC request. However, if requested by the customer, NYNEX will process the customer's ILP PIC change. No ILP marketing activities shall occur during a customer initiated call requesting an ILP PIC change.

9. ILP PIC Change Charge: A $ 5.00 ILP PIC change charge will be assessed to either the end user or the carrier. For existing customers, a waiver period of 90 days will apply for an initial PIC change charge. Only one PIC change charge will apply when both the interLATA and intraLATA PICs are being changed at the same time.

10. Payphone Lines: The payphone service provider is the subscriber to the line that is used to provide payphone service and is responsible for notifying the Telephone Company of the ILP PIC. A location provider has control over the ultimate choice of intraLATA carriers through its choice of payphone service provider.

11. Cost Recovery of ILP Costs: The cost recovery mechanism shall be based on an equal charge per originating minute of use.

SECTION 2 POLICIES AND PRACTICES

This Section describes policies and practices agreed to by the Parties that NYNEX and the Parties will employ as operating procedures and support systems are modified to allow the implementation of intraLATA presubscription in Vermont.

The Joint Parties' ILP implementation proposal is as follows:

A. Definition of IntraLATA Presubscription: IntraLATA presubscription is an arrangement whereby local exchange customers may select and designate their local exchange company, their interLATA carrier, or another carrier as their presubscribed carrier to provide their intraLATA toll calls, without having to first dial an access code to reach that carrier.

B. The 2-PIC Method: IntraLATA presubscription will be implemented using the "2-PIC method". The 2-PIC method allows a customer to have a presubscribed interLATA carrier and to choose either the same or another carrier to handle their intraLATA toll calling. This method was successfully deployed by NYNEX in New York and Connecticut and has been adopted by the Maine, New Hampshire and Rhode Island Commissions. The 2-PIC method is presently being implemented by most LECs around the country. In addition, it is a method approved by the FCC's August 8, 1996, Order. n5

C. Obligations of Local Exchange Camers: All local exchange carriers, including the incumbent local exchange carrier (ILEC) and competitive local exchange carriers (CLECs), but currently excluding commercial mobile radio service providers, are required to offer intraLATA presubscription to their customers, in accordance with the FCC Order. All parties agree that although this plan may be a model for other providers of local exchange service, this plan applies only to NYNEX.

D. Obligations of Toll Carriers: The Board must consider what the obligations of the presubscribed carriers should be. The Parties recognize that to be eligible to participate as a designated ILP PIC carrier, the carrier must be certified and have approved tariffs on file with the Board. Carriers shall be obligated to inform customers of the difference between intraLATA calls and interLATA calls, and that a customer may choose a different carrier for each. As discussed in more detail in Section 2-H, the Parties propose that competitors, including NYNEX, be required to disclose fully to customers that existing residential and business optional calling plans may be removed from the customer's line upon changing to another ILP PIC. Such full disclosure shall in no instance require that the customer be instructed to verify information with their existing toll provider.

Further, the Parties agree to provide forecasts to the local exchange companies for trunking facilities similar to that information provided in the interLATA arena to ensure there is a sufficient quantity of inter-office trunking to the end office or access tandems to minimize the possibility of service-related blockages. Since some carriers may prefer not to report intraLATA and interLATA separately, carriers may include the intraLATA information with the interLATA information.

E. Customers eligible for ILP: Residence and business lines, including CENTREX, will be eligible for intraLATA presubscription. Coin service is addressed later in this implementation plan in Section 2-O.

F. Calls eligible for ILP: Calls that originate and terminate within Vermont, which are designated as intraLATA toll calls n6 , will be eligible for intraLATA presubscription. Calls described in the following section will not be eligible for ILP.

G. IntraLATA Calls ineligible for ILP:

1. Local Calls: If a NYNEX customer chooses to select another carrier as his or her presubscribed intraLATA toll carrier, NYNEX will continue providing local service and handle the customer's local calls, i.e., those calls defined as local calls in the tariff. n7

2. Other ineligible calls: IntraLATA presubscription cannot be provided on all types of calls due to technical limitations. In some situations, while an individual subscriber line can be presubscribed to an ILP carrier of choice, the type of call being made must be provided over the underlying switch-based exchange carrier network.

The following categories of calls made from a customer's line that is presubscribed to another ILP carrier will be carried over the NYNEX network, notwithstanding the ILP selection made for that line:

a. Directory Assistance calls dialed without a carrier access code;

b. Calls made using NYNEX Operator Call Completion Service and CallMover PlusTM;

c. Calls to N11 Codes (e.g., 911), and 555 pre-fixed codes;

d. Calls completed by a NYNEX operator (0-) will be carried over the NYNEX network until software permitting otherwise is available. Currently, availability is anticipated by the end of 1997.

e. Cellular and Paging calls using Feature Group 2A and Feature Group 3A service with a reverse toll billing option n8 .

f. Calls originating from four-party customers. NYNEX will continue to provide, upon request and where the service is available, its PHONESMARTTM features to a customer regardless of the presubscribed carrier. For example, a customer can continue to retain the Caller ID feature from NYNEX, while not having intraLATA toll calls presubscribed to NYNEX. n9

H. Optional Calling Plans: For customers who currently have an optional calling plan (OCP) and presubscribe to another intraLATA carrier, the Company proposes the following procedures:

1. For a single line residence billing account with an OCP that changes to another ILP PIC, NYNEX proposes to remove the OCP.

2. For single and multi-line business billing accounts changing to another ILP PIC on all their lines, NYNEX proposes to remove the OCP, unless the customer has a contractual arrangement, such as subscribing to the Inward Toll Calling (ITCP) or Outward Toll Calling Plan (OTCP) n10 , or subscribes to Business Package. In addition, NYNEX proposes to downgrade a Business Package Plus customer to Business Package.

3. For multi-line business accounts changing to another ILP PIC on a portion of their lines, NYNEX proposes to leave the OCP in place, with the exception of Selective Calling Service. The Parties agree that competitors, including NYNEX, be required fully to disclose to customers that existing residential and business optional calling plans may be removed from the customer's line upon changing to another ILP PIC, since that plan would probably no longer benefit the customer. Such full disclosure shall in no instance require that the customer be instructed to verify information with their existing toll provider. For mechanized ILP PIC changes received from carriers, the OCPs satisfying the defined criteria will be automatically removed. Customers will have the option of re-subscribing to these NYNEX OCPs, if they so desire. Nothing in this Plan shall prevent any party from informing customers calling to change their ILP PIC that there may be termination liabilities resulting from contractual agreements between the customer and the customer's existing intraLATA toll carrier, provided that the carrier is able reasonably to identify the existence of potential termination liability from the customer's records and without querying the customer. The Parties recognize that there may be future OCPs that could benefit customers regardless of whether they change to another ILP PIC and different treatment may be required for these new OCPs.

I. Municipal Calling Service (MCS):

In contrast to other New England states, the expansion of the local calling areas in Phase II of Docket 5670, as currently anticipated, will eliminate the need to address MCS in Vermont. If MCS is not resolved by expanding local calling areas, then parties agree that the Board will conduct an expedited hearing to address the issue of MCS.

J. Customer Notification: Within thirty days of the Board's approval of this stipulation, the Parties and the Department will submit for Board review and approval a competitively neutral customer notice and the language of the 800 number telephone message discussed below. The stand-alone bill insert explains the benefits of ILP and its relationship to competition, the availability of a toll free 800 number containing a listing of participating carriers and reach numbers (the recording will advise customers how to access the list), and identifies the date of implementation of ILP. NYNEX will send the bill insert to all of its Vermont customers at least 30 days prior to the ILP implementation date, and a second mailing of the bill insert will be performed in the next billing cycle where available envelope space permits, but within ninety (90) days of the initial implementation date of ILP such that customers will have sufficient time within which to implement an ILP PIC change without incurring a fee.

Further, NYNEX will provide for a period of one year after ILP implementation an 800 number containing brief, competitively neutral information. NYNEX also plans to keep carriers informed of ILP through industry letters and workshops. n11

K. Balloting n12 and Allocation n13

The Parties believe that it is not in the public interest to require balloting. Further, for the purpose of this stipulation, the Parties agree that neither balloting nor allocation will be done in Vermont. n14 Existing customers will be able to continue to complete intraLATA toll calls using NYNEX until they affirmatively choose otherwise. In New York, Connecticut, Maine, New Hampshire, and Rhode Island, balloting was not ordered by the Commissions. Balloting has not been required in light of the willingness of competitors to seek customers by different means and to avoid the cost and confusion balloting would entail.

L. ILP PIC Related Issues: In order for the end office switch to recognize and correctly route calls to the presubscribed toll carrier, a customer is assigned an ILP PIC. The Parties propose the following policies regarding ILP PICs:

1. ILP PIC Charges: The Parties propose to charge $ 5.00 per line for an ILP PIC change, which is the same charge applicable to interLATA PIC changes. The $ 5.00 PIC change charge has been applicable in the interLATA arena for over a decade and is a recognized and accepted charge This charge has been approved in New York, Connecticut, Maine, New Hampshire, and Rhode Island. For existing customers, the $ 5.00 PIC change charge will be waived for an initial PIC change made during the first 90 days following the availability of ILP. Carners shall not levy any PIC charge for their ILP selection during a new installation of phone service. When a customer makes a PIC change to NYNEX from a competing carrier, NYNEX shall impute a $ 5.00 charge to itself in the event that the customer is not charged the $ 5.00 fee. In the event a customer is changing both an interLATA PIC and an intraLATA ILP PIC at the same time, the Parties propose to charge only one $ 5.00 charge, the interLATA PIC charge.

2. Reverse Billing Option: Coincident with the implementation of ILP, NYNEX will introduce the billing option of applying the ILP PIC change charge to either the IEC or the end user based on the IEC's request. This billing option is available in the federal tariffs of NYNEX and the other Regional Bell Operating Companies, as well as Southern New England Telephone in Connecticut, and is widely accepted as an industry standard.

3. ILP PIC Verification Service: NYNEX plans to file a tariff offering under PSB 23, called Primary Interexchange Carner Verification Service, that will allow carriers to verify their subscriber's ILP PIC selection in a NYNEX switch. The verification will indicate whether an end user's ILP PIC selection is or is not the requesting carrier's PIC.

Carriers-will submit ILP PIC orders to NYNEX using the Customer Account Record Exchange (CARE) process. A CARE message indicating confirmation or rejection of the ILP PIC change is sent to the carrier in response. By matching the originating CARE record with the NYNEX CARE response, a carrier can determine the status of its subscriber's ILP PIC. The proposed ILP PIC

Verification Service will supplement this process by allowing carriers to request verification of their subscriber's ILP PIC selection in a NYNEX switch. This information shall be used only for establishing and maintaining carrier service for end users who have requested the carrier's service and shall not be used for marketing purposes;

4. ILP PIC Freezes: Currently, Vermont customers have the option of having their interLATA PIC "frozen" on their account which prevents any carrier from requesting a local exchange company to change the customer's PIC without the customer's approval. The freeze option has been made available as a means of customer protection in response to the increase in the number of 'slamming" incidents. Slamming refers to an unacceptable business practice in which a carrier changes a customer's PIC without the customer's prior knowledge. Slamming typically occurs when a carrier submits a mechanized request to change a customer's PIC or ILP PIC directly to the customer's local exchange service provider and does not follow the appropriate FCC guidelines to obtain the customer's permission. The Parties agree that NYNEX will not pro-actively market PIC freezes to its customers prior to or during the first ninety days of ILP implementation. The Parties agree that all LECs shall provide customers with the option of freezing their ILP PIC similar to the option available today for the interLATA PIC. From the effective date of this stipulation until the completion of the 90 day ILP implementation period, LECs may offer the PIC freeze option to customers on an individual case basis in response to expressed needs of the customer which can be satisfied by a PIC freeze. The Parties also agree that all LECs shall follow the FCC guidelines for obtaining the appropriate authorization for ILP PIC changes in Vermont until the Board issues its own rules and regulations on changing ILP PICs. NYNEX will remove a customer's ILP PIC freeze upon direct request by telephone or in writing from the affected customer, or upon a three-way call among the affected customer, NYNEX, and the new carrier to whom the customer wishes to ILP PIC subscribe.

5. ILP PIC Disputes: It is reasonable to expect, based on the increase in the number of slamming incidents reported on a national basis, that ILP PIC disputes will arise between competing carriers regarding specific customer accounts. The Parties agree that NYNEX should not be required to act as an intermediary, but will provide information as needed and if available to investigate ILP PIC disputes between two carriers if NYNEX is not one of the two carriers directly involved. If NYNEX is one of the two carriers involved in the dispute, NYNEX will attempt to investigate and resolve the dispute to the customer's satisfaction.

M. Service Negotiations:

The Parties agree to the following service negotiation procedures:

1. Service Negotiations FOF Existing Customers - NYNEX local exchange customers who request an ILP PIC change to a carrier other than NYNEX will be encouraged to contact that carrier directly to process their ILP PIC request since that carrier can answer any questions that the customer may have regarding the carrier's service and rates. However, if the customer requests that NYNEX take their ILP PIC request, NYNEX will process the order. No ILP marketing activities will occur during customer initiated calls made to carriers for the purpose of effecting an ILP PIC change.

The Parties agree that if a customer calls NYNEX to change its ILP PIC during the thirty (30) days prior to ILP implementation, NYNEX will instruct customers to contact their ILP carrier of choice directly.

The Parties agree that NYNEX and other LECs should not be required to maintain lists of participating carriers who are providing toll service in Vermont and read them to the customers. It is the responsibility of each carrier to inform customers of its services.

2. Service Negotiations for New Service Customers - The Parties agree that NYNEX and the other LECs will inform new local service customers about the availability of ILP during service negotiations and ask the customer to affirmatively select a carrier to provide their intraLATA toll calls. The Parties agree that NYNEX and other LECs should not be required to have service representatives read a list of participating ILP carriers or provide contact numbers for the IECs. Based on the FCC's August 8, 1996, Order, the Parties understand that new service customers who fail to select an intraLATA carrier, must - first dial 10XXX to complete their intraLATA toll calls n15 . The Parties agree that all LECs shall inform the new service customer that failure to select an intraLATA carrier will result in the customer's having to dial 10XXX for intraLATA toll calls. Once these customers decide upon their toll carrier of choice, they can call their carrier of choice to change their ILP PIC selection. If NYNEX fails to advise a new customer of his or her right to select an intraLATA toll carrier, and as a result the customer chooses NYNEX, then the customer's intraLATA calls shall default to the customer's interLATA choice of carrier, where possible. No ILP marketing activities shall occur during customer initiated calls made to carriers for the purpose of establishing local service.

3. Interim Service Procedures for New and Existing Customers - A waiver period of 90 days will apply, after the introduction of ILP, in which existing customers will not be charged a $ 5 ILP PIC change charge for an initial PIC change. In order to reduce customer confusion during the introduction of ILP, NYNEX proposes to provide an 800 number for customers as discussed in the Customer Education section (Section 2-n earlier in the plan.

Again, the Parties support having the customer contact the carrier directly and then having the carrier forward a mechanized ILP PIC change request to NYNEX. The carrier is positioned to answer any of the customer's questions regarding calling plans and rates. NYNEX will take the ILP PIC change request from the customer, if the customer prefers that NYNEX process the order. Mechanized ILP PIC changes from carriers are received and processed on a daily basis, except Sunday. During the New York implementation, NYNEX processed nearly 90% of the orders in this manner. This percentage is consistent with NYNEX's understanding of what other LECs that have implemented ILP have experienced.

N. Initial ILP PIC order processing: NYNEX will flash cut all central offices in Vermont on November 3, 1997 to allow all switches to begin accepting orders for intraLATA presubscription directly from carriers. n16 NYNEX will not accept orders from carriers until this date. At approximately 12:01 AM on the day of the flash cut, NYNEX will begin accepting and processing the orders on a mechanized or manual basis. The date for ILP implementation that will be publicized will be three days later, beginning on November 6, 1997. The ninety (90) day implementation period will extend from November 6, 1997 until February 4, 1998. This process will likely be driven by the carriers rather than NYNEX since the placement of orders will be a function of their promotional advertising and telemarketing programs.

O. Payphones: In the FCC's Report and Order released September 20, 1996 n17 , regarding the implementation of the payphone provisions of the Act, the FCC adopted rules to promote competition and regulatory panty among payphone service providers. In accordance with that order, location providers have control over the choice of intraLATA carriers for payphones located on their premises through their selection of a payphone service provider. The payphone service provider is the subscriber to the line and is responsible for notifying the Company of the ILP PIC.

P. Exchange of Information: NYNEX currently makes available a wide range of information to all competing carriers in connection with interLATA presubscription. NYNEX provides daily data to each carrier, that includes a list of all customers who signed up with that carrier and a list of all customers who elected to change from that carrier. Accordingly, NYNEX will provide similar information as it relates to intraLATA presubscription. NYNEX marketing and sales representatives will not receive ILP PIC information prior to the time that such information is available to other providers of intraLATA services.

Q. Discontinuance of Service: The Board should adopt policies to protect customers and underlying carriers in the event a toll carrier files for bankruptcy or abruptly discontinues service to customers in Vermont. The Parties propose that if a carrier discontinues its provision of presubscribed intraLATA service, the carrier must send written notification of such discontinuance to its customers and their local exchange companies. The carrier will be responsible for paying the ILP PIC change charges to change the customers to another carrier(s) and for notifying the customers that they must select a new carrier. Additionally, the Board should determine the appropriate safeguards for consumers relative to the disconnection of service. In the event the carrier is unwilling or unable to pay the ILF PIC change charge, the Board should determine who shall incur the relevant charge.

SECTION 3 TECHNICAL AND OPERATIONAL REQUIREMENTS

In addition to the issues already identified, the technical and operational processes required to make ILP available to customers in Vermont involve the activities of hundreds of people in almost every department within NYNEX. The New York ILP implementation provided valuable experience in this regard, and work is underway in New Hampshire, where NYNEX is planning to introduce ILP on June 2, 1997. When the Information Systems (IS) work is completed for New Hampshire, most of the IS work effort will have been completed for the other New England states, including Vermont.

Technical requirements: From a network perspective, ILP can be made available to customers served by the 5ESS and DMS 100 digital switches following the completion of switch translations. A list of the switches in Vermont is included as Attachment A. Outlined below are the processes and activities that must be completed to provide ILP:

1. Activate switch generic software for a second PIC option (known as the ILP PIC);

2. Design and load switch translations (software provision);

3. Complete all Board discussions about processes and procedures;

4. Design and/or modify the operational policies and procedures (how do we interact with customers);

5. Complete the design, coding and testing of the information systems (IS) upgrades required in every operational support system that integrate customer contact, billing, provisioning, maintenance and technical support processes;

6. Design and/or modify the operational methods based on testing, etc.

7. Inform all carriers about ILP in Vermont.

8. Train every customer contact employee in ILP policies and procedures;

9. Notify and educate end user customers.

Software Provisioning: The software provisioning process involves work activities that require trunk translations in every switch for every NPA and NXX. This activity will correctly route a customer's intraLATA call to the ILP PIC of their choice. The degree of complexity in each switch depends on the number of NPAs, NXXs, remote switch modules, EAS arrangements, and rate zones.

Information Systems: The IS work is the most complex and expensive process of implementing ILP. As noted, a number of operational support systems must be upgraded to provide for the ILP functionality required to process and bill ILP changes. If Vermont were the first state in New England to implement ILP, IS work necessary to implement ILP would have been expected to take eight to ten months, followed by the operational testing. Since New Hampshire is the first state, most of the overall IS implementation efforts are very similar for Vermont, except for state specific differences such as optional calling plans.

SECTION 4 COSTS

Direct costs relating to the introduction of ILP in Vermont can be grouped into the following categories. These are: switch or network costs; field methods and support costs; customer education costs; customer contact training and support costs; information systems (IS) costs; and foregone ILP PIC Charges. Some costs identified with the implementation of ILP in Vermont, such as IS upgrade costs, are common to two or more NYNEX New England jurisdictions. These "common costs" will be allocated to each jurisdiction on a weighted per access line basis.

Switch costs consist of the right-to-use fees and hardware upgrade costs in NYNEX's Vermont end office and TOPS (Traffic Operator Position System) switches necessary for implementing ILP technology. It also includes the work effort to build the translations and recorded announcements required by these modifications.

Field methods and support costs consist of the costs associated with developing methods and procedures for the field operations; system changes for treatment and collections; IS requirements documents; and providing technical and network support during ILP cut-over.

Customer education costs consist of the costs for bill inserts for ILP customer notification, and a toll free 800 informational number provided for one year. This category also includes carrier notification costs which include carlier ILP workshops and industry letters.

Customer contact training and support costs consist of the costs associated with training, support, and the development of methods and procedures for customer service negotiators.

Information systems costs include the software and hardware modifications to NYNEX's mechanized systems necessary to implement ILP.

The forgone PIC charges consists of the waiver of the initial ILP PIC change charges made during the 90 day waiver period following the introduction of ILP.

The following provides a breakdown of the estimated ILP implementation costs for Vermont:

** See Table in Original. **

The costs detailed above represent NYNEX s best assessment at this time of anticipated ILP expenses, given current information. Additional costs may be realized from customer education or service representative training that had not been anticipated. Therefore, NYNEX's cost projections are subject to revision based on actual experience, changed circumstances or modifications to the plan made during the regulatory process.

SECTION 5

COST RECOVERY PROPOSAL

Although not specifically addressed by the Act, the FCC concluded that there is a need for national rules regarding the recovery of costs for implementing ILP. The FCC identified three specific methods for cost recovery in its Number Portability Order, referenced in the FCC's Second Report and Order in CC Docket 96-98, released August 8, 1996, at PP 92-95: gross telecommunications revenues, number of lines, or number of active telephone numbers. Cost recovery shall be shared by all intrastate toll carriers, including NYNEX. n19 As ordered in New Hampshire, and stipulated to in Rhode Island and Maine, the cost recovery mechanism shall be based on an equal charge per originating minute of use n20 .

The Parties agree that NYNEX will recover the ILP implementation costs for Vermont over a two year period, and that NYNEX will establish a new rate element called the Equal Access Cost Recovery Charge ("EACRC"). The EACRC NYNEX proposes is \$ 0.002247 per minute of use. This charge is based on estimated implementation costs of \$ 1,118,744. n21 NYNEX also proposes a true-up to identify any over- or under-recovery of costs. This true-up will begin on the first anniversary of ILP implementation. A technical session with the Department and the Parties will be scheduled, after issuance of the Board's order approving the ILP plan, to determine the charges based on estimated cost figures submitted by NYNEX. The proposed charges shall be submitted to the Board for approval no later than 90 days after issuance of the Board's order approving the Plan.

SECTION 6

MISCELLANEOUS PROVISIONS

The Parties agree that this Stipulation is being submitted to the Board as a unified settlement of all issues relating to NYNEX's implementation of ILP in Vermont. Unless approved in substantially the same form as set forth in this document, the parties reserve the right to submit a revised stipulation. If agreement on a revised stipulation cannot then be reached, the stipulation shall be null and void. Respectfully submitted, New England Telephone and Telegraph Company d/b/a NYNEX By its Attorney, Thomas M. Dailey, Esquire 185 Frankin Street, Room 1403 Boston, Massachusetts 02110-1585 (617) 743-2255 AT&T Communications of New England, Inc. By its Attorney, Melinda Thaler, Esquire 32 Avenue of the Americas, Room 2700 New York, New York 10013 (212) 387-5617 MCI Communications, Inc. By its Attorney, Robert Glass, Esquire Glass, Seigle & Liston 75 Federal St. Boston, MA 617-82-6355 FOOTNOTES

n1 LATA is an acronym for "local access and transport area." Vermont is a single-LATA state, served in its entirety by the area code 802. Thus, "intraLATA" and "in-state" are synonymous in the case of Vermont.

n2 An agreement ("Stipulation") was formally executed by these parties and Atlantic Cellular Company ("Atlantic Cellular"), and was filed with the Board on June 12, 1997.

n3 Although testimony on the agreement was given during the May 15, 1997, hearing, the final Stipulation was not filed until after the close of the evidentiary record, as expected. Tr. 5/15/97 at 142. Ill order to make complete findings on ILP implementation, I have treated the Stipulation as part of the record in this docket. If any party objects to its inclusion in the record, that party should notify the Board of its objection at the same time that it files its comments on this proposal for decision.

n4 "PIC" for "presubscribed intraLATA carrier" (or intraLATA, as the case may be).

n5 PIC-freezes provide additional protection against "slamming," the unacceptable practice by which a competitive carrier submits a mechanized request to change a customer's PIC (intra- or interLATA) directly to the customer's LEC without obtaining the customer's permission to do so. Stipulation at @ 2.L.4. Competitive toll providers see a LEC's ability to encourage PIC-freezes as an unfair competitive advantage, particularly at the start of ILP, since PIC-freezes constitute an additional barrier to competitors' access to customers. Tr. 5/15/97 at 9.

n6 Note that these cost estimates are unchanged from those in the April 8th Plan. Exh. NET-II-3.

n7 This is an inference drawn from NYNEX witness Ross's statement that "from an operational perspective it makes it easier for NYNEX to implement the per minute of use since we already have the system set up to do that." Tr. 5/15/97 at 138.

n8 The lack of basis for the Company's contention is made clear by the recognition that many elements of the stipulated ILP plan were not specifically mentioned in the Department's letter or, for that matter, in either my March 3, 1995, procedural order or the Board's final Order in Docket 5900. No party is arguing that those other aspects of the Stipulation cannot now be considered by the Board.

n9 It is this that differentiates "fresh look" in the intraLATA toll market from a requirement by an electric utility that, in return for specified services under a special contract, a customer must remain an "all-requirements" purchaser of electric service from that utility for a defined period after the expiration of the special contract. See Approvals of Special Contract #255, 5/28/97, and Special Contract #243, 1/31/97. In the cases of these two special contracts, the customers had no alternative suppliers of electric (or energy) services to whom they could turn for competitive offerings. Business purchasers of in-state toll service are not so constrained.

n10 I do not concur with the Department's contention that NYNEX witness Ross's testimony on the need for a four-month implementation period for EAS was inappropriately based on hearsay. It is clear from the context of her remarks that she was testifying to information that, as an expert, she reasonably relied upon in the course of her work. Tr. 5/15/97 at 58-61. Such testimony is permissable under Vermont Rule of Evidence 703.

n11 Phase I Order at 43-47.

n12 I note that, were the PIC-change charge set to cover only the actual cost of PIC-changes, then foregone revenue would be equal to cost and there would be only costs - and no net revenues - to recover.

n13 Obviously, some costs will vary with volume in some manner, say, with the number of switches, which is itself a function (to some degree) of the number of access lines. But the per-switch costs probably do not vary much at all with the number of access lines connected to any one switch.

n14 Nine of Vermont's ten independent local exchange companies are participating jointly in this docket; they are Shoreham Telephone Company, Inc., Waitsfield-Fayston Telephone Company, Inc. d/b/a Waitsfield Telecom, Northfield Telephone Company, Ludlow Telephone Company, Perkinsville Telephone Company, Champlain Valley Telecom, Inc., Franklin Telephone Company, Topsham Telephone Company, Inc., and STE/NE Acquisition Corporation, d/b/a Northland Telephone Company of Vermont, Inc. The tenth, Vermont Telephone Company ("VTEL"), did not actively participate in this module.

n15 This date corresponds to the implementation date to which NYNEX has committed. If NYNEX's implementation is delayed, then those ILECs that have also agreed to November 6th may also delay their ILP implementation until the later date (but no later).

n16 If, by the end of August, Waitsfield Telecom determines that it can implement ILP on November 6, 1997, then both it and its sister company, Champlain Valley Telecom, shall meet that earlier date. Appendix 1

n1 While described in more detail within the Plan, the changes and clarifications to the Maine Stipulation agreed to by the Parties are summarized as follows: (1) an assumption that Municipal Calling Service (MCS) issues will be rendered moot by Phase II of Docket 5670 in a timely manner (i.e., local calling areas will be defined to include all MCS routes) or that MCS issues will be addressed later in this docket (if not resolved in Docket 5670); (2) NYNEX will not pro-actively market ILP PIC freezes prior to or during the first 90 days of ILP implementation; (3) ILP will be implemented on 11/6/97, however, NYNEX will accept and process orders directly from carriers beginning 11/3/97; (4) carriers are not obligated to disclose to customers potential termination liability implications; and, (5) NYNEX will advise customers to call their carrier selection for ILP PIC changes during the period 30 days prior to ILP implementation. In addition, although not a departure from the Maine Stipulation, the Parties agreed to two customer notice mailings, one before and one during ILP implementation, according to the terms of the Maine Stipulation

n2 The Plan is the result of a negotiated settlement among the parties. The stipulation shall not be construed as an agreement to any matter of fact or law and shall not serve as precedent to any matter of fact or law. MCI and AT&T, for example, do not agree that the $ 5 charge for a PIC change is proper because it has not been shown to be cost based. Similarly, AT&T does not agree that defaulting existing customers is proper. NYNEX, for its part, has agreed to significant restrictions on its marketing flexibility. The parties' willingness to resolve these issues by stipulation is without waiver of rights with respect to these issues in other proceedings before this Board in this state, or any other state or forum, and parties agree that nothing in this stipulation shall operate with collateral estoppel or res judicata effect in this or any other proceeding. The parties reserve any and all rights should the Board after the Plan, rendering the agreement void. The parties further reserve their right to petition the Board in the future for an amendment to any aspect of the Stipulation based upon the passage of time or other change in circumstances.

n3 This date requires a final Board order in Docket 5670, Phase 2 regarding expansion of local calling areas to be issued by July 1, 1997, and that such Order include (if at all) a permissive dialing period on not more than thirty (30) days. The Parties agree to request that the Board issue a Final Order as soon as possible in Docket 5670.

n4 The NHPUC and Rhode Island Division have agreed to maintain the list of ILP carriers as well as make it available on their Web site, and have also agreed to publish the list in a statewide newspaper. A similar request is made of the Vermont Public Service Board, to the extent possible.

n5 Docket CC No. 96-98, Second Report and Order (the FCC Order), at PP8, 49.

n6 See VTPSB Tariff No. 20, Part A.

n7 See VTPSB Tariff No. 20, Part A, Sections 5 and 6, and Exhibit 6.1.1-1.

n8 Landline to wireless calls that are considered ineligible for ILP include toll calls made to a wireless carrier who has subscribed to a Feature Group 2A or 3A billing option, in which the wireless carrier has requested a reverse billing arrangement which means the landline customer does not incur local or toll charges (if applicable) when calling a wireless subscriber.

n9 Whether or not PHONESMART features will operate when a customer is served by another toll carrier will depend on whether that carrier utilizes SS7 technology and passes the relevant information to NYNEX.

n10 These plans (OTCP and ITCP) are commonly known as Customized Netsaver.

n11 Also, as noted earlier, the New Hampshire Commission and Rhode Island Division have agreed to maintain a list of ILP carriers and to make it available on their Web site and publish the list in a statewide newspaper. A similar request is made of the Vermont Public Service Board, to the extent possible.

n12 Balloting is the process in which subscribers would be asked to select from a menu of intraLATA toll carriers the carrier they prefer to carry their intraLATA toll calls. The customers are mailed ballots and requested to return the ballots by a specified date.

n13 Allocation is the process of assigning a carrier to customers who do not return a ballot. The carriers used for allocation would be selected based on the ballot menu and given a proportion of customers based on the percentage of the PIC changes they received from the balloting process.

n14 Neither the Telecommunications Act of 1996, nor the FCC Interconnection Order requires balloting or allocation.

n15 CC Docket 96-128, page 131, par. 263.

n16 As previously noted, this assumes a final Board order in Docket 5670 to be issued by July 1, 1997. If the implementation date is later, the Parties agree that NYNEX will flash cut its switches on a weekend date that is mutually acceptable to the Parties, the Department of Public Service, and the Board, and that NYNEX will begin accepting orders for ILP PIC changes from carriers at 12: AM on the Monday following cut-over. The "public" implementation date will be three (3) days after NYNEX begins to accept orders as provided for herein.

n17 CC Docket 96-128, page 131, par. 263.

n18 As previously indicated, the cost included for the 800 number is based on an informational message only for a 3 month period, while the 800 number will actually be available for a year according to the terms of this Plan, and also include a list of carriers.

n19 In the event that a land line customer is presubscribed to a CMRS provider for intraLATA toll, the CMRS provider is subject to the same monthly charge as part of the cost recovery process.

n20 Use of this cost recovery mechanism is without waiver of rights with respect to this issue in other states and shall not be construed as an admission by any party as to whether it is more or less appropriate than other methods.

n21 The cost of $ 1,118,744 is based on the initial cost of $ 1,009,714 amortized over the two year recovery period at a continuous compounding rate of 11% per year.

27TH OPINION of Level 1 printed in FULL format.

In the matter of the application of CITY SIGNAL, INC., for an order establishing and approving interconnection arrangements with AMERITECH MICHIGAN

Case No. U-10647

MICHIGAN PUBLIC SERVICE COMMISSION

1995 Mich. PSC LEXIS 32; 159 P.U.R.4th 532

February 23, 1995

PANEL:
[*1]

PRESENT: Hon. John G. Strand, Chairman; Hon. Ronald E. Russell, Commissioner; Hon. John L. O'Donnell, Commissioner

OPINION:
At the February 23, 1995 meeting of the Michigan Public Service Commission in Lansing, Michigan.

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

In its October 12, 1994 order in Case No. U-10555, the Commission granted City Signal, Inc., a license to provide basic local exchange service in the Grand Rapids District Exchange, pursuant to Section 302(1) of the Michigan Telecommunications Act, 1991 PA 179 (Act 179), MCL 484.2101 et seq. In doing so, the Commission found that City Signal possesses sufficient technical, financial, and managerial resources and abilities to provide basic local exchange service to every person within the geographic area of the license. The Commission also found that the granting of a license to City Signal would not be contrary to the public interest.

The Grand Rapids District Exchange lies within Ameritech Michigan's licensed service area. Consequently, prior to actually commencing basic local exchange service, the law requires that City Signal have interconnection arrangements with Ameritech Michigan. Interconnections arrangements [*2] are necessary to enable City Signal's basic local exchange service customers to make and receive calls from Ameritech Michigan's basic local exchange service customers, thereby connecting the two providers' networks. Because City Signal and Ameritech Michigan were unable to agree on interconnection arrangements, City Signal filed an application, on August 5, 1994, to establish those arrangements, pursuant to Section 303(2) of Act 179. That section specifically provides that:

"A telecommunication provider shall not provide basic local exchange service to customers or end-users located within another telecommunication provider's licensed service area except through interconnection arrangements consented to by the license holder or as approved by the commission pursuant to section 203." [MCL 484.2303(2).]

A prehearing conference was held on September 12, 1994 before Administrative Law Judge James N. Rigas (ALJ). Ameritech Michigan, GTE North Incorporated (GTE), the Michigan Exchange Carriers Association (MECA), AT&T Communications of Michigan, Inc., (AT&T), MCI Telecommunications Corporation (MCI), Teleport Communications Group (Teleport), Americom Telemanagement, Inc., (Americom), [*3] and Attorney General Frank J. Kelley (Attorney General) were granted intervenor status. The Commission Staff (Staff) also participated in the proceedings.

With its application, City Signal also filed a motion to establish transitional co-carrier interconnection arrangements. On November 10, 1994, the Commission issued an order granting the motion in part and directing Ameritech Michigan to initiate joint technical trials with City Signal to ensure that the two companies' networks are compatible prior to issuance of a final order in this case. The Commission also directed City Signal and Ameritech Michigan to file, no later than December 1, 1994, a report outlining the technical parameters of the trials. City Signal and Ameritech Michigan filed a Technical Trial Report on December 9, 1994. On February 16, 1995, City Signal and Ameritech Michigan filed another report, in which they indicated that the test results of phase one of the trial demonstrated the feasibility of integrating their networks.

Cross-examination of direct and rebuttal testimony took place on November 15 through 18 and 21 through 23, 1994. A final day to cross-examine direct testimony reinstated by the Commission's [*4] November 23, 1994 order and to cross-examine supplemental rebuttal testimony was held on December 2, 1994. The record consists of 2,277 pages of testimony, which was presented by 18 witnesses, and 97 exhibits that were admitted into evidence.

On December 12, 1994, City Signal, Ameritech Michigan, GTE, MECA, MCI, AT&T, Teleport, and the Staff filed briefs. Except for the Attorney General, those same parties filed reply briefs on December 19, 1994.

On January 20, 1995, the ALJ issued a Proposal for Decision (PFD). On February 1, 1995, exceptions were filed by City Signal, Ameritech Michigan, GTE, MECA, MCI, AT&T, Teleport, and the Staff. The same parties filed replies to exceptions on February 8, 1995. GTE late-filed replies on February 10, 1995.

II.

DISCUSSION

Introduction

During the course of this proceeding, various proposals for interconnection were presented by the parties. City Signal took the position that, in addition to establishing the physical terms of interconnection, the Commission must also establish other terms such as mutual compensation, unbundling, number portability, directory assistance, access to data bases, and so on. MCI, AT&T, Teleport, [*5] the Attorney General, and the Staff supported this position. They maintained that such terms are critical to effective and meaningful competition in the basic local exchange service market. According to these parties, meaningful competition means that the existing network must be open and accessible to all competitors on the same basis.

On the other hand, Ameritech Michigan asserted that interconnection, as defined in Section 303(2) of Act 179, is simply the reciprocal ability to hand off traffic from one basic local exchange service provider's network to another basic local exchange service provider's network in a manner that is transparent to the customer. Consequently, Ameritech Michigan argued that the other issues raised by City Signal do not involve interconnection within the scope of Section 303(2). Ameritech Michigan asserted that City Signal and other competitors are simply demanding competitive advantages. As a result, Ameritech Michigan urged the Commission to keep in mind the distinctions between interconnection and subsidization, competition and competitive handicapping, and capital investment and cream skimming. GTE and MECA supported Ameritech Michigan's position. [*6]

These fundamental differences generated a tremendous amount of controversy regarding numerous issues. As a result, those issues will be examined on an issue-by-issue basis.

Linkage to InterLATA Relief

Ameritech Michigan originally argued that the Commission must first address the public policy issue of linking certain components of City Signal's interconnection proposal, namely, unbundling and mutual compensation, n1 to Ameritech Michigan obtaining relief from its interLATA restrictions. n2

n1 Unbundling is the identification and separation of components of the local exchange network. Mutual compensation means that carriers compensate each other for termination of traffic on their respective networks.

n2 As a result of the Modified Final Judgment issued in United States v American Telephone and Telegraph Company, 552 F Supp 131 (DC 1982), aff'd sub nom, Maryland v United States, 460 US 1001, 103 S Ct 1240, 75 L Ed 2d 472 (1983), AT&T was required to divest itself of the Bell Operating Companies, including Michigan Bell (now known as Ameritech Michigan). Since January 1, 1984, the effective date of divestiture, Ameritech Michigan has been expressly prohibited from providing interstate and intrastate interLATA service. Likewise, GTE is also prohibited from providing that service. See United States v GTE, Civil Action No. 831298 (DC 1985). [*7]

Ameritech Michigan asserted that some of City Signal's demands prematurely seek to compel Ameritech Michigan to implement proposals it voluntarily made in its Customers First Plan. n3 Ameritech Michigan stated that one of its greatest concerns in this case is the attempt by a competitor, i.e., City Signal, to pick and choose portions of the Customers First Plan, while denying Ameritech Michigan an integral part of that plan -- interLATA relief. Ameritech Michigan explained that, in its Customers First Plan, it proposed to unbundle the local loop and port n4 components of its existing basic local exchange service. The plan also included a proposal to fully integrate competitive local exchange carriers (LECs) into the public switched network through physical interfaces and compensation arrangements that go beyond mere physical interconnection. However, Ameritech Michigan submitted, these proposals are expressly conditioned on Ameritech Michigan obtaining interLATA relief.

n3 On March 1, 1993, Ameritech, the parent corporation of Ameritech Michigan, filed a petition for declaratory ruling and related waivers to establish a new regulatory model for the Ameritech region with the Federal Communications

Commission. In that petition, Ameritech proposed a regional program designated "Customers First: Ameritech's Advanced Universal Access Plan" (Customers First Plan), which would significantly change the nature of competition. In pertinent part, Ameritech indicated that it will open its local telephone network to competition and integrate its network with those of its local competitors, if it obtains the ability to provide interLATA long distance service.

n4 A port provides dial tone and a telephone number, thereby enabling customers to make and receive calls. [*8]

Ameritech Michigan contended that it would not be appropriate to proceed with unbundling and mutual compensation in the absence of interLATA relief because to do so would have a devastating effect on the company's economic viability. In support of that position, Ameritech Michigan presented the testimony of Dr. Robert G. Harris, an economist and associate professor of business and public policy at the University of California at Berkeley.

Dr. Harris testified that this is a case of targeted entry by City Signal because the Grand Rapids District Exchange is a very lucrative market. According to Dr. Harris, the urban concentration of the Grand Rapids District Exchange provides revenues that Ameritech Michigan needs to subsidize its high-cost customers in residential and rural, low-revenue areas. In Dr. Harris's view, if the Commission grants City Signal the favorable compensation, unbundling, balloting, and number portability it requests, Ameritech Michigan will be placed at a competitive disadvantage. He said that Ameritech Michigan will have to subsidize City Signal by providing universal service, while being unable to provide the same services, i.e., interLATA service, that [*9] City Signal or its long distance affiliate, Teledial, can provide. Dr. Harris concluded that without appropriate changes in federal regulatory policy and relief from the Modified Final Judgment (MFJ) restrictions, Ameritech Michigan and its customers will suffer economic harm from imbalanced competition and cream-skimming. (9 Tr. 1459-61.)

Based on this testimony, Ameritech Michigan argued that if the Commission orders unbundling and mutual compensation, the company will quickly lose revenues necessary to continue to earn a reasonable return and meet its service obligations. In Ameritech Michigan's view, the loss of revenues and profitable lines of business will also hamper the company's incentive and ability to deploy a modern telecommunications infrastructure in Michigan. Ameritech Michigan contended that breaking the linkage between unbundling and mutual compensation and interLATA relief will also have a chilling effect on the future willingness of regulated companies to make innovative proposals.

City Signal, MCI, AT&T, Teleport, the Attorney General, and the Staff opposed the conditioning of unbundling and mutual compensation on Ameritech Michigan obtaining interLATA relief. [*10] These parties asserted that interconnection arrangements incorporating unbundled loops and mutual compensation should not be deferred until Ameritech Michigan's MFJ restrictions are terminated or waived. The Staff acknowledged that, while restrictions on providing interLATA services and supplier-of-last-resort obligations disadvantage Ameritech Michigan, the company is greatly advantaged in other areas. The Staff pointed out that Ameritech Michigan is an enormous corporation compared to City Signal, and it is presently the only provider of basic local exchange service in Grand Rapids. Moreover, the Staff argued that establishing interconnection arrangements that disadvantage City Signal until the MFJ restrictions are removed is contrary to Act 179.

MCI argued that breaking the linkage to interLATA relief will not create an environment in which Ameritech Michigan's financial viability or universal service is threatened. MCI pointed out that Ameritech Michigan will begin basic local exchange service competition with a 100% market share and customer recognition, which comes from decades of being the only basic local exchange service provider in Grand Rapids. In addition, MCI argued [*11] that Ameritech Michigan has the only ubiquitous basic local exchange service network in place. According to MCI, City Signal will need several years to replicate the bulk of Ameritech Michigan's in-place facilities, although it will probably never replicate that company's complete network. Finally, MCI, AT&T, and Teleport cited the February 24, 1994 order in Case No. U-10138, in which the Commission determined that Act 179 favors competition and, therefore, postponing entry into the basic local exchange service market can no longer be justified.

MCI further argued that, in Ameritech Michigan's proposed order on MFJ relief, the interLATA restrictions will not be removed until legal and regulatory barriers to local exchange competition have been removed. To obtain a temporary waiver of those restrictions, MCI submitted, Ameritech Michigan must now show that at least one alternate provider is actually offering basic local exchange service and that Ameritech Michigan has implemented, among other things, unbundling and reciprocal compensation.

The ALJ determined that there is no justification for delaying the consideration of unbundling and mutual compensation until Ameritech Michigan's [*12] interLATA restrictions are lifted. The ALJ was not persuaded that breaking the linkage will place Ameritech Michigan at such a competitive disadvantage that its financial viability and universal service will be threatened. The ALJ concluded that it is simply beyond credible belief that a corporation the size of Ameritech Michigan will be as vulnerable to competition from City Signal as Ameritech Michigan claims. Furthermore, the ALJ found that, inasmuch as Ameritech Michigan's Customers First Plan has not been filed in Michigan, it is irrelevant to this proceeding. The ALJ therefore rejected Ameritech Michigan's proposal to link unbundling and mutual compensation with the lifting of the interLATA restrictions.

Ameritech Michigan excepts to the ALJ's rejection of its arguments regarding linkage. In doing so, Ameritech Michigan relies on the arguments presented in its brief. However, the Commission finds that all of those arguments must be rejected.

The ALJ properly concluded that Ameritech Michigan's proposal to link unbundling and mutual compensation with the lifting of the interLATA restrictions must be rejected. Section 103 of Act 179 provides that:

"Except as otherwise [*13] provided in this act, this act shall not be construed to prevent any person from providing telecommunication services in competition with another telecommunication provider." (MCL 484.2103.)

Consistent with that policy, in its February 24, 1994 order in Case No. U-10138, the Commission stated that if federal policymakers continue to impose restrictions against participation in one market on Ameritech Michigan and GTE, continuing to postpone competitive entry into all other markets can no longer be justified. Furthermore, as pointed out by Staff witness Ann R. Schneidewind, a Technical Specialist in the Commission's Communications Division, there is nothing in the law that requires or even implies that the Commission should defer the granting of a competitive license or approval of interconnection arrangements incorporating unbundled loops and mutual compensation until Ameritech Michigan's MFJ restrictions are terminated or waived. (11 Tr. 2017.)

The Commission also finds that the record supports the conclusion that Ameritech Michigan's claim that it will be highly vulnerable to competition from City Signal lacks merit. City Signal witness Terry L. Murray, an economist and principal [*14] in the consulting firm, Murray and Associates, testified that Ameritech Michigan's claims of serious economic harm are unsubstantiated and highly implausible. Specifically, Ms. Murray testified that:

"Dr. Harris's claims of serious economic harm are like an echo from the past. Since the late 1950's, the LECs have advanced virtually the identical claims of economic harm, 'imbalanced competition' and 'cream-skimming', as grounds for rejecting every federal and state policy designed to promote competition in telecommunications. Regulators were told that revenues from customer premises equipment ("CPE") were an essential source of cross-subsidy to keep local exchange service affordable and universally available; supposedly even a device as simple as a plastic cup attached to a phone receiver to allow the speaker to have a private conversation held the potential to undermine the entire foundation of universal service in America. (footnote omitted.) But the CPE deregulation failed to produce the predicted cataclysm, and LECs such as Michigan Bell were able to upgrade their networks and to provide affordable service even in rural areas.

"Similar arguments have been advanced against [*15] competition for a host of other services, most notably toll services. In each case, regulators have been assured that revenues from the targeted service were essential to the LECs' ability to offer universal service, and in each case, the advent of competition has failed to produce the demise of affordable local exchange service." (12 Tr. 2225.)

Consistent with that testimony, the Commission has already recognized the fact that Ameritech Michigan has previously made exaggerated claims regarding the potential loss of business. In Case No. U-10138, Ameritech Michigan argued that implementation of intraLATA dialing parity would result in catastrophic consequences to Ameritech Michigan and GTE. However, in its July 19, 1994 order in that case, the Commission noted that the Staff's witness, William J. Celio, Director of the Commission's Communications Division, confirmed the fact that, for years, Ameritech Michigan has been predicting dire consequences if the Commission took a particular action. However, the very opposite has occurred. Mr. Celio stated:

"[S]ince 1984 or thereabouts, we've been listening to Mr. Miller testify how the whole world will end, and Michigan Bell will exit [*16] from every meaningful market if the Commission does something. And [in] many cases, the Commission did that something, and . . . the only thing we've done with Michigan Bell is reduce rates and give refunds, because they were making excessive profits. So I have not seen a negative impact [from] Commission decisions." (July 19, 1994 order in Case No. U-10138, p. 20.)

Similarly, in this case, the Commission is not persuaded that including unbundling and mutual compensation in the interconnection arrangements between

City Signal and Ameritech Michigan in the absence of interLATA relief will lead to the financial demise of Ameritech Michigan. In fact, the record supports the conclusion that Ameritech Michigan will actually retain significant competitive advantages under City Signal's proposed interconnections arrangements. Ms. Murray explained that:

"Michigan Bell will retain several competitive advantages. Any competitor that starts with 100% market share and has nearly a hundred years of market presence has an enormous advantage due to customer inertia. Brand loyalty is not simply a phrase in marketing and economics textbooks; it's a marketplace reality. As was evident in the [*17] interLATA marketplace, the market share of a dominant firm erodes slowly, even with substantial competitive entry and vigorous marketing by new competitors. Ten years after the divestiture of AT&T, AT&T retains approximately a 65% share of total toll revenues -- long after the implementation of equal access in all the major market areas and after years of competition from firms that faced fewer regulatory restrictions on their pricing and terms and conditions of service. I expect that a similar pattern will prevail in the local exchange market.

"Added to the advantage of its dominant market position and enormous size advantage over City Signal, Michigan Bell is also the only competitor with ubiquitous facilities in place, the only competitor with a staff of customer representatives who are already trained and experienced in marketing the full range of local exchange services to the full customer base, the only competitor known and recognized as a provider of local exchange service, and -- last but certainly not least -- the only competitor that controls bottleneck facilities its rivals must access in order to provide service throughout an exchange area under the terms of Act 179 [*18] and this Commission's granting of a license to offer local exchange service." (12 Tr. 2223-24.)

Ms. Murray effectively withstood cross-examination by Ameritech Michigan on this issue. When challenged on her testimony that Ameritech Michigan's revenue base is so large that it is not plausible that the introduction of local exchange competition will result in irreparable financial harm to the company or its ratepayers for the foreseeable future, Ms. Murray testified that she did not expect Ameritech Michigan to experience any significant competitive losses that would make that company financially insecure. Moreover, Ms. Murray also stated that even if Ameritech Michigan did not get relief from the MFJ restrictions over the next five to seven years, she would be "shocked" if Ameritech Michigan suffered such severe financial losses that it would jeopardize the company's ability to continue to provide service in all areas of its service territory. (12 Tr. 2246-47.)

The Commission therefore rejects Ameritech Michigan's contention that it will be handicapped and placed at a serious competitive disadvantage if the Commission requires unbundling and mutual compensation. That argument [*19] misses the point because it incorrectly assumes that City Signal has market power. As Ms. Murray testified on cross-examination, City Signal effectively has no market power and imposes no barriers to entry or exit on any other player in the marketplace. Consequently, she indicated that it is perfectly consistent to say that neither carrier is being handicapped if there are rules in place to correct for Ameritech Michigan's market power, because there is no similar market power to be corrected for City Signal. (12 Tr. 2240-41.)

The Commission also agrees with the ALJ that Ameritech Michigan's Customers First Plan is irrelevant to this proceeding. Although Ameritech Michigan asserts that the Customers First Plan is a progressive, innovative, balanced, and procompetitive proposal, the company has not, as yet, filed that plan with the Commission. Furthermore, even if it were before the Commission, Ameritech Michigan's request for a waiver of the MFJ restrictions is still pending at the federal level, a situation over which the Commission has no authority. Moreover, it appears that Ameritech Michigan has taken a significantly different position regarding these same issues at the [*20] federal level. Apparently, Ameritech now agrees that relief from the interLATA restrictions will be contingent on the company implementing certain changes to permit competition in the local exchange market.

Finally, Ameritech Michigan's position is further undermined by the fact that, in its exceptions, it now states that it supports mutual compensation. Therefore, based on the foregoing discussion, the Commission finds that unbundling and mutual compensation should not be conditioned upon Ameritech Michigan obtaining interLATA relief.

Physical Interconnection

City Signal proposed that both the physical and compensation terms of interconnection be modeled after the current arrangements between Ameritech Michigan and other LECs serving exchanges adjacent to Ameritech Michigan. For local traffic, those arrangements are currently embodied in extended area service (EAS) agreements. n5

n5 Extended area service is local calling between adjacent exchanges.

City Signal contended that, as a licensee with the same rights as other LECs, it is entitled to the same quality of interconnection, and on the same terms and conditions that an LEC serving an adjacent service territory [*21] has with Ameritech Michigan. According to City Signal, any other type of arrangement for local traffic, such as the relationship between the LECs and the interexchange carriers (IXCs) or cellular carriers, would be discriminatory and result in inferior connections and degraded service to City Signal. MCI, AT&T, Teleport, the Attorney General, and the Staff supported City Signal's position.

Under its proposed arrangements, City Signal stated that the physical connections between the networks should be designed in such a way that traffic can flow freely between customers in a manner that is technically transparent to them. Specifically, City Signal would use its network to establish physical meet-points at Ameritech Michigan end-offices or at common distribution points, such as a designated tandem location. n6 Likewise, Ameritech Michigan would also establish physical meet-points at City Signal's end-offices or use a common hand-off at a designated tandem location. In other words, physical interconnection would be similar to the current meet-point arrangements between Ameritech Michigan and adjacent LECs, except that direct connections to each end-office would be permitted. City [*22] Signal explained that these physical interconnections would include all types of traffic -- local, toll, operator-assisted, cellular, paging, access, directory assistance, and emergency services.

n6 A tandem office is a switching center for the switched telephone network that interconnects two or more central offices that cannot be directly connected.

Ameritech Michigan opposed City Signal's proposed physical interconnection arrangements. Ameritech Michigan explained that the physical arrangements for EAS traffic have historically existed between LECs that served separate geographic areas. Generally, Ameritech Michigan stated, those arrangements involve one LEC extending a two-way facility to the boundary of its geographic area where it meets, and is connected to, a similar facility of the other LEC. According to Ameritech Michigan, the historical reason for the development of this type of arrangement is that the two companies had distinct geographic territories with an adjoining boundary and distinct rights and responsibilities. However, Ameritech Michigan continued, unlike the situation between two adjoining LECs for the hand-off of EAS traffic, alternative exchange carriers [*23] and LECs do not serve customers in distinct geographic areas and there is no naturally established boundary between the providers' facilities.

Ameritech Michigan therefore maintained that, in the absence of an agreement between the parties to provide meet-point arrangements, physical interconnection must be based on Ameritech Michigan's tariffed, switched toll access interconnection arrangements, including virtual collocation, n7 which are used by the IXCs. Ameritech Michigan pointed out that those arrangements have been developed through policymaking proceedings at the federal level and adopted by statute in Michigan. n8

n7 The FCC defines virtual collocation as follows: "[A]n offering in which the LEC owns (or may lease) and exercises exclusive physical control over the transmission equipment, located in the central office, that terminates the interconnector's circuits. The LEC dedicates this equipment to the exclusive use of the interconnector, and provides installation, maintenance, and repair services on a non-discriminatory basis. . . . The interconnecter has the right to designate its choice of central office equipment, and to monitor and control the equipment remotely. (footnote omitted)" (In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, July 14, 1994, p. 8.)

n8 Section 310(6) of Act 179 provides that: "A provider of access services shall make available for intrastate access services any technical interconnection arrangements, including collocation required by the federal government for the identical interstate access services." [*24]

More specifically, for local traffic originating on City Signal's network and terminating on Ameritech Michigan's network, Ameritech Michigan proposed that physical interconnection occur through switched access. The interoffice trunks n9 between City Signal's and Ameritech Michigan's end-offices would be provided either by Ameritech Michigan under its switched access tariffs or by City Signal and interconnected at Ameritech Michigan's end-offices through the latter company's virtual collocation tariffs. For local traffic originating on Ameritech Michigan's network and terminating on City Signal's network, Ameritech Michigan stated that it will deliver this traffic through separate trunk groups from its end-offices to City Signal's end offices or tandems. In short, Ameritech Michigan wants City Signal to purchase collocation facilities and services for interconnection from Ameritech Michigan. It would provide City Signal with central office space and facilities that are separate from Ameritech Michigan's facilities. Under these arrangements, Ameritech Michigan stated, a provider such as City Signal can use its own transport facilities to connect to Ameritech Michigan's local [*25] exchange network. MECA and GTE supported Ameritech Michigan's proposal.

n9 A trunk is a telephone circuit with a switch at both ends. A trunk may connect two central office switches, two private branch exchanges, or a private branch exchange and a central office switch.

The ALJ determined that Ameritech Michigan should be required to interconnect with City Signal on the same terms and conditions that Ameritech Michigan interconnects with other LECs for local traffic. He agreed with City Signal that interconnection must be provided on an equal and nondiscriminatory basis. According to the ALJ, no credible reason was presented as to why a meet-point interconnection arrangement should not be used when that is the rule with respect to interconnection with other LECs. The ALJ therefore found that Ameritech Michigan's physical interconnection proposal should be rejected and that the logical interconnection point between Ameritech Michigan's network and City Signal's network is at a point in between the two carriers' end offices.

Ameritech Michigan excepts to the ALJ's recommendation. Again, Ameritech Michigan reiterates the arguments presented in its brief. Additionally, Ameritech [*26] Michigan asserts that the ALJ did not indicate where the meet-point between Ameritech Michigan's and City Signal's end-offices would actually be. Ameritech Michigan explains that, because there are no natural boundaries established between competing carriers within the same geographic area, this will lead to endless disputes.

In response, MCI states that, contrary to Ameritech Michigan's representation, historical meet-point arrangements are not dependent upon the naturally established boundaries between adjacent LECs. Rather, MCI points out, Ameritech Michigan itself explains that, "each company was conceptually responsible for 50% of the connecting facility, even if the geographic boundary, which was and is the meet-point, would not be located exactly at the halfway point between the two providers' central offices. The EAS arrangement provided a cost adjustment formula so that each LEC ended up recovering 50% of the facility." (Ameritech Michigan's exceptions, p. 9.) MCI explains that this is precisely the type of interconnection arrangement it proposed and that the ALJ adopted.

The Commission finds that all of Ameritech Michigan's arguments must be rejected because, as a licensed [*27] LEC, City Signal is entitled to the same type of co-carrier arrangements that other LECs currently have with Ameritech Michigan. Ameritech Michigan's attempts to distinguish City Signal, and other alternative LECs, from existing adjacent LECs are not persuasive. The fact that interconnection for EAS is between two different geographic areas, while City Signal's interconnection will be within the same geographic area as Ameritech Michigan, is a meaningless distinction that does not justify different arrangements for City Signal. As Ms. Murray testified on rebuttal:

"The mere fact that City Signal will compete directly for traffic within the service territory now served exclusively by Michigan Bell does not justify differential treatment of City Signal. To apply such disparate treatment to City Signal relative to Michigan Bell would elevate Michigan Bell to the status of a 'preferred' competitor and undermine the Commission's efforts to secure the benefits of local exchange competition for Michigan consumers." (5 Tr. 290.)

The record also supports a finding that, in contrast to the manner of exchanging local traffic between adjacent LECs, Ameritech Michigan's proposal for interconnection [*28] with City Signal is needlessly complicated. MCI witness Elizabeth G. Kistner, a consultant specializing in analysis of telecommunications public policy issues, explained that the exchange of local traffic between Ameritech Michigan and City Signal, like the exchange of local traffic between adjacent LECs, can be accomplished through a simple transmission link between the two carriers, which may be terminated in each carrier's switching office in the same manner as any other interoffice transmission facility. According to Ms. Kistner, collocation of transmission facilities is not required or necessary for this form of network integration. (7 Tr. 815-16.) Ms. Kistner stated that there is simply no technical reason to segregate local traffic to and from City Signal's network onto separate trunks. That configuration would require twice the trunk groups compared to the direct use of two-way trunks, which are regularly used in interconnecting different carriers' networks. Consequently, Ameritech Michigan's proposed arrangements would result in an unnecessary duplication of facilities.

Furthermore, the Commission finds that Ameritech Michigan's proposed arrangements are not economically [*29] feasible for City Signal as a newly licensed LEC. Ms. Kistner indicated that, under Ameritech Michigan's collocation tariff, the charges consist of a $ 8,240 nonrecurring charge and $ 861 in monthly rent for the space. (7 Tr. 865.) In contrast, Ms. Kistner testified that collocation charges are not included in the EAS agreements that provide for meet-point arrangements. Rather, she indicated that compensation between the carriers is limited to payment for facilities provided by one carrier for the other carrier in accordance with the 50% responsibility requirements. Ms. Kistner explained that Ameritech Michigan and the other LECs do not charge each other on a per minute basis for traffic that is exchanged over the common facilities. (7 Tr. 816.) Instead, as discussed more fully in the next section of this order, each carrier terminates the traffic originated on the other carrier's network in exchange for the reciprocal termination of its own traffic by the other carrier.

Finally, Ameritech Michigan's argument that there is no meet-point specified for the interconnection between Ameritech Michigan and City Signal is not well taken. As MCI correctly points out, actual boundaries [*30] are insignificant between competing LECs because the 50% responsibility rule will be applicable, just as it is between other LECs. In short, each company will be responsible for 50% of the connecting facility, even if the connecting point is not located exactly halfway between the two providers' central offices. To illustrate, GTE's witness, Edward C. Beauvais, Senior Economist for GTE Telephone Operations, confirmed on cross-examination that there is no collocation of GTE facilities at Ameritech Michigan's end-offices. Likewise, there is no collocation of Ameritech Michigan facilities at GTE's end-offices. Instead, Mr. Beauvais explained that Ameritech Michigan and GTE merely cooperate to build the trunk facility between two offices. (7 Tr. 1135). Ameritech Michigan and City Signal should cooperate in a similar manner.

Based on the foregoing discussion, the Commission finds that City Signal, as a licensed LEC, is entitled to physical interconnection arrangements on the same terms and conditions afforded adjacent LECs. Specifically, interconnection for the exchange of local traffic between Ameritech Michigan and City Signal should be available either at the end office, the [*31] tandem, or at a mutually agreed upon meet-point. The cost of constructing and maintaining the facility should be shared on a 50/50 basis between Ameritech Michigan and City Signal.

Mutual Compensation

When a telephone call is originated on one carrier's network and terminated on another carrier's network, costs are incurred by the second carrier in terminating that call. Martin W. Clift, Jr., City Signal's Director of Regulatory Affairs, testified that carrier end-user billing and the resulting inter-carrier compensation arrangements are based upon the type of traffic exchanged between the carriers. Mr. Clift indicated that traffic for LECs can be generally categorized as local and EAS, intraLATA toll, access, cellular, and paging. As a general rule, the carrier that bills the end-user compensates the connecting carrier(s) for helping to deliver the traffic. (5 Tr. 493.) Mr. Clift further explained that, for basic local exchange services, which can involve multiple LECs, compensation for the origination and termination of such traffic is governed by intercompany EAS agreements. (5 Tr. 494.) In short, LECs in Michigan do not compensate each other for terminating local [*32] or EAS calls. Instead, they have a "bill-and-keep" arrangement, the rationale being that the traffic between the respective companies is roughly equal, so that mutual billing would net out to zero. Finally, Mr. Clift explained that, for interexchange toll access, City Signal proposes to file with the Federal Communications Commission (FCC) rates that are identical to Ameritech Michigan's access rates. City Signal will mirror those rates for intrastate interexchange access.

City Signal's position is that, as a licensed basic local exchange provider, it is entitled to the same terms and conditions for compensation that exist between Ameritech Michigan and other LECs. City Signal therefore requested that the Commission direct Ameritech Michigan to enter into a mutual compensation arrangement with City Signal for the hand-off of local calls on a bill-and-keep basis consistent with its arrangements with other LECs. MCI, AT&T, Teleport, the Attorney General, and the Staff supported mutual compensation.

The Staff presented recommendations for transitional rates, terms, and conditions for the mutual compensation of each carrier. The Staff proposed a mutual compensation rate of $ .05 [*33] per local call terminated. In support of that rate, the Staff reiterated that Ameritech Michigan and the other LECs do not pay each other for termination of local calls because the volumes in each direction are assumed to be equal. In contrast, Ameritech Michigan charges IXCs approximately $ .10 per call for interexchange toll access calls terminated on Ameritech Michigan's network. As presented in the testimony of Elizabeth Durbin, Supervisor of the Network Cost Section in the Commission's Communications Division, the $ .05 per call rate represents an intermediate step between present LEC compensation for EAS interconnections and charges for toll access. According to Ms. Durbin, these two types of interconnection use many of the same facilities and, furthermore, the $ .05 per call rate establishes a first step toward a restructured compensation arrangement. Ms. Durbin stated that compensation arrangements may eventually more closely reflect those for toll access, but any such determination should be deferred to a subsequent proceeding.

The Staff also proposed that, if the number of local calls each LEC terminates on the other LEC's network is within plus or minus 5%, the $ [*34] .05 rate would not apply. In effect, this would result in the bill-and-keep arrangement that exists today for local traffic between LECs.

However, if a significant variation in traffic volumes results, the $ .05 rate would permit a provider to recover costs incurred in terminating this larger volume of calls.

AT&T agreed with the Staff that a flat per-call rate should be approved as an interim measure. However, AT&T opposed any bill-and-keep method because it believed that it is inconsistent with the Commission's Cost Principle No. 4 adopted in Case No. U-10620. That principle provides that any function necessary to produce a service must have an associated cost.

MCI supported a bill-and-keep method regardless of traffic variations. However, if the Commission decides to apply discrete charges, MCI argued that the charge should be a per minute rate. MCI stated that the rate equivalent to the Staff's per call rate would be $ .015 per minute. MCI also asserted that the billing threshold should be increased to plus or minus 50% to account for skewed traffic balances projected from the use of transitional number portability substitutes. During cross-examination, the Staff agreed [*35] that MCI's proposed $ .015 per minute rate is comparable to the Staff's $ .05 per call rate. However, the Staff continued to recommend a per call termination rate because Ameritech Michigan and City Signal expressed an inability to measure the duration of local calls.

Teleport supported City Signal's proposed bill-and-keep arrangement. However, if the Commission prefers a per call rate, Teleport proposed that it should not exceed half of the rate Ameritech Michigan charges its end-users today for each local call. In Teleport's view, this would reflect the costs related to only the termination of each call.

Supported by MECA, Ameritech Michigan proposed that compensation between it and City Signal be handled through the payment of existing toll access charges. Ameritech Michigan explained that access charges are usage and distance sensitive, and capture the most accurate use of the network by measuring the duration of calls.

For local calls, Ameritech Michigan proposed that tariffed toll access charges should apply as currently described in Ameritech's Tariff F.C.C. No. 2 for the termination of local traffic from City Signal end-users to Ameritech Michigan's end-users. However, [*36] until Ameritech Michigan is permitted to provide interLATA services, it did not propose to compensate City Signal for terminating local calls from Ameritech Michigan's end-users to end-users on City Signal's network. For toll traffic between Ameritech Michigan and City Signal, Ameritech Michigan submitted that its tariffed access rates should apply to its provision of service and City Signal's own cost-based access rates should apply for the use of City Signal's facilities.

GTE proposed that the compensation policy for origination and termination of traffic between carriers be based upon a comprehensive origination responsibility plan, whereby end-users must be billed for all calls and compensation must be based upon usage among certified carriers. GTE maintained that each LEC should be allowed to establish a rate structure consisting of rates that reflect costs on a per minute or per call basis. According to GTE, certified carriers should pay access charges to any other licensed carrier required to complete the call from the originating party.

The ALJ determined that the Staff's proposal offers a reasonable middle ground for a transitional mutual compensation arrangement. He [*37] found that the Staff's $ .05 per call rate is an intermediate step away from the existing bill-and-keep arrangements between LECs and toward the use of access charges urged by many of the parties. The ALJ was not persuaded, however, that the billing threshold should be increased to plus or minus 50%, because it is unknown at this time whether the traffic balance will be skewed. Instead, the ALJ found that the Staff's 5% variation will reflect billing costs related to small traffic variation, and it will also permit termination costs to be recovered should traffic volumes vary above that level. Finally, the ALI found that no credible justification was presented to deny compensation to a terminating carrier that incurs costs for completing calls on behalf of an originating carrier. The ALJ therefore recommended that the Commission reject Ameritech Michigan's position and implement the Staff's proposals for mutual compensation on a transitional basis.

Ameritech Michigan, GTE, MCI, AT&T, and Teleport filed various exceptions and clarifications to the ALJ's findings. Most notably, Ameritech Michigan now states that it agrees that terminating carriers should receive compensation for [*38] the costs that they incur when completing local calls on behalf of an originating carrier. However, Ameritech Michigan takes issue with the ALJ's recommendation that the Commission adopt a flat rate per local call termination charge and a plus or minus 5% call volume threshold.

Ameritech Michigan argues that the ALJ erred in recommending a terminating local call rate of $ .05 because no evidence was presented that this rate adequately recovers the costs incurred by either Ameritech Michigan or City Signal for terminating local calls. In fact, Ameritech Michigan points out that the Staff acknowledged that its proposed rate was not cost-based but merely represented the mid-point between no charge and a rate of $ .10 per call. Consequently, Ameritech Michigan maintains that this proceeding should not be used to set rates when evidence that is necessary to a proper rate determination has not been presented.

In particular, Ameritech Michigan argues that imposition of the same compensation amounts per call terminated on both carriers' networks ignores the differences in the obligations and costs of Ameritech Michigan and City Signal. According to Ameritech Michigan, each company must [*39] be required to use its own access charges based on its own costs. In Ameritech Michigan's view, there is simply no basis for allowing City Signal to require Ameritech Michigan to handle traffic through its network and perform multiple switching without paying for that service, as do the IXCs. Additionally, Ameritech Michigan submits, a flat per call rate does not adequately reflect the way in which costs are incurred by the terminating carrier. Ameritech Michigan points out that the cost of call termination is sensitive to both the duration of the call and the amount of transport and tandem switching facilities that are used. Ameritech Michigan argues that because call durations are different between classes of customers, one provider could have significantly higher terminating minutes of use but nearly equal call volumes. Thus, Ameritech Michigan submits that it would be inappropriate to charge anything but the actual per minute distance sensitive usage rates specified in its toll access tariffs.

Ameritech Michigan also disagrees with the ALJ's determination that no compensation should be paid for terminating local calls unless the call volumes terminated by one provider exceed [*40] by 5% the call volumes terminated by the other provider. Ameritech Michigan asserts that this could result in a provider incurring significantly higher costs, but being unable to recover those costs because the call volumes remain within the 5% range that precludes compensation. Furthermore, Ameritech Michigan points out that the ALJ did not indicate how the 5% threshold would work in terms of billing. Specifically, Ameritech Michigan questions whether each carrier would bill for all of its traffic or only that portion over 5%, if the billing threshold is exceeded. Consequently, Ameritech Michigan maintains that, at a minimum, the Commission should reject the 5% factor and adopt a compensation mechanism that is usage sensitive and recognizes the respective costs incurred by carriers for the termination of local traffic. Ameritech Michigan concludes that mutual compensation should be based on current intrastate IXC access rates, which have already been approved by the Commission.

MECA agrees with Ameritech Michigan, adding that the Staff's proposal simply takes Ameritech Michigan's access rates and discounts them. In MECA's view, it makes no sense to change rates that are currently [*41] just and reasonable simply to give an advantage to new competitors.

In response, MCI argues that Ameritech Michigan offers no evidence to support its argument that all interconnecting carriers should be classified as its access customers. MCI asserts that Ameritech Michigan could have produced evidence of its costs associated with traffic termination for competing LECs, but it chose not to address that issue in its testimony or to file any cost studies in support of its access charge proposal. Furthermore, MCI continues, Ameritech Michigan's assertion that switched access rates take into account the appropriate usage of the company's terminating facilities and the duration of a call is completely unsupported by any empirical evidence of record. MCI submits that all parties had fair notice of, and ample opportunity to contest, the Staff's proposals, and Ameritech Michigan's failure to do so indicates that it has no factual basis for its exception.

Furthermore, MCI continues, requiring each carrier to charge its own costs associated with termination, as advocated by Ameritech Michigan and MECA, is inappropriate for new entrants into the market. MCI says that forcing new entrants, [*42] which will likely have lower network expenses and cost structures than the LECs, to charge their own costs for terminating traffic would provide a windfall to incumbent LECs.

City Signal responds that MECA wants to require City Signal to pay long distance access charges for termination of local calls, while its own member companies maintain a bill-and-keep arrangement for the same type of calls. City Signal urges the Commission to ignore MECA's predilection for one-sided arrangements that require payments from new entrants while exempting its own members.

Teleport also excepts to the $ .05 per call rate, but for different reasons. Teleport argues that this rate is simply too high to facilitate economically viable local exchange competition. Teleport explains that the retail rates for business and residential calling are $ .082 and $ .062 per message, respectively. If City Signal has to pay Ameritech Michigan $ .05 to terminate a call, Teleport asserts, City Signal's margin to cover the originating side of the call and other common overhead costs is only $ .032 and $ .012, respectively. Teleport reiterates that the Commission should set the rate no higher than $ .041 per message [*43] for business calling and no higher than $ .031 for residential calling.

On the other hand, City Signal and MCI argue that the ALJ erred in not recommending the adoption of City Signal's bill-and-keep proposal. In doing so, they argue, the ALJ abandoned his key determination that interconnection between City Signal and Ameritech Michigan should be on the same terms and conditions as interconnection between Ameritech Michigan and other LECs, which is a bill-and-keep arrangement. MCI contends that if the Commission adopts the ALJ's recommendation, City Signal will be relegated to the status of a second class carrier because, unlike other LECs, it would have to pay an explicit rate for termination of its calls.

AT&T requests a clarification regarding the ALJ's recommendation. AT&T points out that, for local calls within plus or minus 5%, there is still an obligation to book all costs incurred and all revenues due from the termination of that traffic. According to AT&T, each company must maintain a complete financial accounting of relevant costs and revenues so that it can comply with various Commission rules and statutory requirements.

In response to AT&T's clarification, the Staff [*44] states that both LECs should be required to track all costs and revenues due from the termination of local calls in order to determine whether the calling is, indeed, within plus or minus 5%. However, as to the accounting, the Staff believes that the companies should follow generally accepted accounting principles.

The Commission finds that the ALJ properly analyzed this issue and that his recommendation is fully supported by the record. In particular, the Commission is convinced that mutual compensation arrangements are critical for the further development of local exchange competition. As Dr. August H. Ankum, a manager in Teleport's Regulatory and External Affairs Division, testified, without mutual compensation, Ameritech Michigan will continue to operate as if competing carriers are mere customers instead of licensed LECs. (7 Tr. 989.) Dr. Ankum explained why a reasonably priced compensation mechanism is so important to competitors.

"At this early stage of competitive entry, local exchange competitors will capture an insignificant number of subscriber lines. Even if competitors succeeded in capturing 1% of the subscriber lines in a particular serving area, the incumbent [*45] LECs will still retain the other 99% of the subscriber lines. The likelihood is great, therefore, that competitors would be required to terminate virtually all of the local calls made by their own customers on the incumbent's network. Conversely, the incumbent will only have to terminate a tiny percentage of calls made by its customers on the competitor's network. Clearly, any imbalance in the pricing of a compensation arrangement will be insignificant to the incumbent but could very well crush the local competitor whose local traffic requires paying the incumbent LEC to terminate calls on the incumbent's network." (7 Tr. 975-76.)

Furthermore, as is evident from its exceptions, Ameritech Michigan has abandoned its one-way compensation proposal. Consequently, it is unnecessary to address that proposal.

After a review of all of the arguments, the Commission finds that the Staff's proposal offers a reasonable middle ground for a transitional mutual compensation arrangement. Given the range of proposals and opinions on this issue, the ALJ properly determined that the Staff's proposal represents an intermediate step away from the existing bill-and-keep arrangements between LECs [*46] and toward the use of access charges. In contrast, Ameritech Michigan failed to produce any cost data or evidence contradicting the Staff's proposal.

Nevertheless, the Commission is persuaded that the $ .05 per call rate should be restated on a per-minute-of-use basis, because that approach recognizes different customer calling characteristics. Although the Staff supported a per call rate because it believed that Ameritech Michigan does not have the capability to measure the duration of local calls, Mr. Panfil testified on rebuttal that Ameritech Michigan does, in fact, have that capability. (9 Tr. 1508.) In its reply brief, Ameritech Michigan confirmed that it has the ability to measure local calls on a per-minute-of-use basis and that this process is the same one used today to measure and bill for access services. Furthermore, the Staff agreed that $ .015 per minute is equivalent to the $ .05 per call rate.

The Commission further finds that the 5% billing threshold, calculated on a per-minute basis, is reasonable because it should adequately account for any skewed traffic balances between Ameritech Michigan and City Signal, while reducing billing costs when traffic volumes [*47] are essentially balanced. In contrast, the Commission is not persuaded that a 50% threshold will permit cost recovery. In addition, the Commission clarifies that when traffic exceeds the 5% billing threshold, compensation for all calls should be paid, not just the amount that exceeds 5%.

As to AT&T's requested clarification, the Commission finds that, for local calls within the plus or minus 5% threshold, Ameritech Michigan and City Signal should follow generally accepted accounting principles for tracking costs and revenues associated with the termination of that traffic.

Finally, the Commission finds that City Signal's proposal to charge access rates that are identical to Ameritech Michigan's access rates during the transitional period is reasonable. As Mr. Clift explained, Ameritech Michigan's access rates can be considered the market rate for access services in the Grand Rapids District Exchange. Furthermore, as a non-dominant carrier, City Signal may file and use rates with the FCC subject to one-day's notice, and there is no requirement that those rates be based on any preset criteria. (5 Tr. 497.)

In making the foregoing determinations, the Commission specifically rejects [*48] the argument that it is giving an advantage to newly licensed competitors. To the contrary, the Commission's finding is an attempt to strike an appropriate balance between the competing interests in this case on a transitional basis. The Commission emphasizes that, like many of the other issues, the compensation arrangements will be examined further in a subsequent generic proceeding. Consequently, Ameritech Michigan and other parties will have another opportunity to present evidence of traffic exchange costs in that proceeding.

Unbundling

As explained by AT&T witness Ronald E. Sarah, a manager in AT&T's State Governmental Affairs Department, unbundling is "the identification and disaggregation of physical bottleneck components of the local exchange network into a set of 'piece parts' which can be individually provided, costed, priced, and interconnected in such a way as to provision all service offerings, including those offered by the LEC." (8 Tr. 1307.) Staff witness Thomas L. Saghy, an Auditing Specialist in the Commission's Communications Division, explained that a local loop is "the connection between the local subscriber's network interface and the vertical side [*49] of the main distribution frame residing in the telephone company central office serving that subscriber. In layman's terms this would be the wire connected from the outside of a person's house to the serving central office." (11 Tr. 2155.)

Ameritech Michigan currently does not offer, and it does not propose to offer, unbundled loops as a service in its tariffs. Rather, the loop facility is only offered bundled with and as a part of other services such as basic local exchange service, Centrex services, or dedicated point-to-point private line services.

In its application, City Signal requested that the Commission require Ameritech Michigan to unbundle its local loops to permit City Signal to provide basic local exchange service to every customer within the geographic area of its license. City Signal represented that it needs to purchase only the unbundled loop, which it would then resell to its customers packaged with its own facilities or services in order to provide basic local exchange service in areas in which it does not have transmission facilities. In short, City Signal stated that the switching and transport functions that are included in Ameritech Michigan's current services [*50] are not necessary, because City Signal will be providing those functions. It is City Signal's position that Ameritech Michigan's refusal to provide unbundled local loops in the absence of interLATA relief constitutes the bundling of unwanted services or products for sale or lease to another provider, contrary to Section 305(1)(m) of Act 179.

In support of its position, City Signal pointed out that even a well-financed competitor that ultimately intends to rely solely on its own network facilities to compete with an incumbent LEC would experience some delay in replicating the ubiquitous local exchange network that an LEC such as Ameritech Michigan already has in place. Under these circumstances, City Signal argued, the only way that a new entrant can hold itself out to provide service to all customers within a given exchange area is to rely on a combination of its own facilities and facilities acquired from the incumbent LEC. City Signal represented that a similar process occurred in the interexchange market, in which new entrants such as MCI and Sprint initially relied extensively on leased AT&T circuits and then gradually replaced those circuits with their own facilities as economics [*51] permitted.

City Signal further contended that requiring Ameritech Michigan to provide unbundled local loops is in the public interest. According to City Signal, the offering of unbundled loops will benefit all customers in the Grand Rapids District Exchange by ensuring that there will be a competitive alternative to Ameritech Michigan when City Signal commences its operations. In addition, City Signal submitted that properly structured unbundling can help to avoid wasteful duplication of those facilities that are most efficiently built once and used by all carriers, while at the same time ensuring that the LEC responsible for building and maintaining those facilities is fully compensated for the costs incurred in doing so.

City Signal also requested that the Commission set the price for unbundled loops at the price Ameritech Michigan charges itself. City Signal contended that the appropriate pricing methodology is total service long run incremental cost (TSLRIC). City Signal further argued that if Ameritech Michigan is allowed to charge City Signal rates for unbundled loops with a built-in contribution above economic cost, Ameritech Michigan will be able to underprice City Signal, [*52] despite the fact that City Signal will be able to provide the service at a lower cost.

City Signal used information it obtained from Ameritech Michigan in discovery to determine unbundled loop rates for the Grand Rapids District Exchange. Relying on Exhibit A-48, City Signal stated that the incremental cost of the loop portion of a business access line is $ 7.58 per month, while the incremental cost of the loop portion of a residential access line is $ 11.12 per month. City Signal therefore contended that those prices support an $ 8 per month business loop rate and an $ 11 residential loop rate. City Signal further stated that if the Commission prefers a single rate for all loops, both business and residential, Exhibit A-49 shows the statewide average cost for all business and residential loops is $ 8.99 per month, which supports a $ 9 per month loop rate.

City Signal's $ 8 and $ 11 rates were based on total company incremental loop costs, meaning combined intrastate and interstate costs. City Signal took the position that if Ameritech Michigan recovers any portion of those costs through federally-imposed end-user common line (EUCL) charges, any EUCL recovery should offset the [*53] $ 8 and $ 11 unbundled loop rates. City Signal argued that this is appropriate to ensure that Ameritech Michigan does not overrecover its costs.

The Staff supported City Signal's unbundling proposal. It argued that Sections 305(1)(g) and (m) require the provision of unbundled loops. Furthermore, the Staff asserted, Act 179 requires City Signal to provide residential and business service to all customers desiring that service in its licensed exchange area. The Staff agreed with City Signal that, in the short term, this cannot be accomplished unless unbundled loops are available.

The Staff also supported City Signal's proposed pricing for unbundled loops on a transitional basis. The Staff argued that the price must recover the cost of providing the unbundled loop. Thus, the price floor must equal the TSLRIC of the unbundled loop. In addition, the Staff submitted, the price must not exceed the rates Ameritech Michigan charges its own customers for use of these same components or services. The Staff concluded that the $ 8 and $ 11 rates meet both of those criteria and, therefore, those rates are reasonable on a transitional basis.

MCI, AT&T, Teleport, and the Attorney General [*54] supported City Signal's and the Staff's positions regarding unbundling on a transitional basis. However, MCI, AT&T, and Teleport presented extensive arguments in support of the further unbundling of Ameritech Michigan's network. Specifically, Donald A. Laub, a manager in MCI's State Regulatory and Governmental Affairs Department, testified that City Signal's unbundling proposal does not go far enough to enable a competing LEC to provide basic local exchange service to every person within the geographic area of its license. According to Mr. Laub, further unbundling of the loop into feeder and distribution portions of the loop is essential for the potential development of new technologies, such as personal communications services. He also stated that all signalling functions generated by the incumbent LEC must be made available on an unbundled basis. AT&T's witness, Mr. Sarah, agreed that the local loop must be unbundled into at least three basic network components -- loop distribution, loop concentration, and loop feeder.

MCI, AT&T, Teleport, and the Attorney General also supported City Signal's proposed pricing for unbundled loops. MCI argued that, with application of proper [*55] TSLRIC, the provision of unbundled loops will not impose any cost burden on the consumers of the other functions, and the price will be free of any subsidy.

Ameritech Michigan opposed being required to offer unbundled loops. Instead, Ameritech Michigan proposed that competing alternative exchange providers use existing services as an alternative to building their own facilities or using other alternatives, e.g., cable television facilities and wireless connections. Ameritech Michigan pointed out that it offers a wide range of tariffed services that can be used for this purpose. According to Ameritech Michigan, these existing services provide the functionality that is requested by City Signal and the intervenors in this case, i.e., a connection from a customer's premise to the alternative exchange carrier's switch. In Ameritech Michigan's view, the most basic service available to an alternative exchange provider is a voice grade private line circuit. Ameritech Michigan witness Daniel J. Kocher, Director of Ameritech's Planning and Implementation, Open Market Strategy, testified that there are no technical or functional differences between a single local distribution channel of [*56] voice grade private line and the unbundled loops demanded by City Signal. Mr. Kocher stated that the facility used between the central office and the customer's premises would be the same whether it was associated with an unbundled loop, a local exchange service, or a private line. (10 Tr. 1872.)

Ameritech Michigan also described other existing tariffed services that could be used by an alternative exchange carrier such as City Signal to connect its customers to the City Signal switch. According to Ameritech Michigan, those services include dedicated services or private lines of varying capacities, which provide a point-to-point, non-switched connection from one customer's premises to another customer's premises. In addition, Ameritech Michigan asserted that switched services may be used for the connection from a customer's premises to City Signal. For example, Ameritech Michigan stated that available options include resale of business lines or trunks under either the shared tenant services (STS) tariff, the Centrex tariff, or switched access services such as a line-side connection through Feature Group A (FGA). Based on the existence of all of these services, Ameritech Michigan [*57] argued, unbundled loops are simply not necessary.

In support of its position, Ameritech Michigan argued that the Commission does not have the authority to compel the company to offer unbundled loops. First, Ameritech Michigan argued that the clear intent of Section 305(1)(m) of Act 179 is to preclude a basic local exchange service provider from bundling two or more services or products, thereby forcing customers to buy an unwanted service or product. Supported by MECA and GTE, n10 Ameritech Michigan contended that an example of a prohibited activity under this section would be an attempt to bundle basic local exchange service with toll service. However, these parties argued that this provision cannot be interpreted to allow for the unbundling of existing facilities and their leasing to competitors. Moreover, Ameritech Michigan submitted that Act 179 broadly defines telecommunications services as those "offered to customers for the transmission of two-way interactive communication and associated usage." [MCL 484.2101(t).] According to Ameritech Michigan, components of an existing network, which competitors might find useful for their own purposes, are not services as defined by [*58] Act 179. Additionally, as indicated earlier, Ameritech Michigan asserted that it has not even sought to offer unbundled loops as a service and the Commission cannot force it to do so.

n10 Although GTE generally agreed with Ameritech Michigan's position, both of its witnesses testified on cross-examination that GTE does not necessarily oppose the offering of unbundled loops, but it is concerned about the pricing of those loops.

Ameritech Michigan went on to argue that the Commission has already recognized that Act 179 does not grant it the authority to mandate that Ameritech Michigan, or any other telecommunications provider, lease unbundled loops. Ameritech Michigan stated that, in the 1994 report to the Governor and the Legislature, the Commission recommended that the Legislature consider several amendments to Act 179 prior to the sunset of the law in 1996. According to Ameritech Michigan, the Commission recommended that Section 206(1), which relates to the Commission's authority to order changes in the terms and conditions under which a new telecommunications service is offered, be amended to grant the Commission specific authority to require unbundling. Ameritech Michigan [*59] inferred from the proposed amendment that if the Commission believed it already had authority to require unbundling, there obviously was no need to ask the Legislature to amend Section 206(1).

Ameritech Michigan next argued that interconnection is simply an arrangement that allows the hand-off of traffic between two networks. As a result, Ameritech Michigan submitted, the interconnection arrangements required by Section 303(2) of Act 179 are those interconnections necessary to allow a competitive local exchange provider to hand-off local traffic to and from the existing license holder's network. According to Ameritech Michigan, arrangements for the hand-off of traffic between Ameritech Michigan's and City Signal's networks can take a variety of forms, none of which require or include leases of unbundled loops or other elements of its network. To the contrary, Ameritech Michigan asserted, Section 310(6) of Act 179 establishes that the minimum requirement imposed on an access provider is the level of interconnection imposed by the FCC, which is collocation. Ameritech Michigan therefore concluded that unbundled loops are not a form of interconnection or collocation and, in fact, [*60] they are not even a form of access because an unbundled loop by itself, without a connection to a switch, does not provide access to the local exchange network.

Ameritech Michigan also asserted that it would be contrary to public policy to require it to provide unbundled loops. The company contended that there has been no showing of estimates of demand or comparative costs of building facilities versus using existing services versus leasing unbundled loops. Ameritech Michigan argued that it is not the Commission's duty to ensure that a competitor succeed or make a profit on each and every component of its service. The company stated that no substantive evidence was presented to demonstrate why unbundled loops, priced at cost, are essential to competition.

Ameritech Michigan further argued that a Commission order compelling it to offer unbundled loops would constitute an unconstitutional taking or confiscation of its property in violation of both the Michigan and United States Constitutions. In its reply brief, Ameritech Michigan devoted 27 pages to discuss numerous cases that it maintained support its position. Relying on those cases, Ameritech Michigan asserted that it is [*61] sufficient to show that a party's right to use its property has been restricted to constitute a taking. In Ameritech Michigan's view, the forced lease of unbundled loops to competitors would be a taking both as a physical deprivation of Ameritech Michigan's property as well as a deprivation of the company's right to operate its network and business in accordance with its original governmental franchise. Moreover, Ameritech Michigan argued that a citizen cannot be compelled to use its own property to perform a service for the benefit of a third party. In Ameritech Michigan's view, whether it is characterized as a service or a lease, unbundling is a permanent physical interference depriving Ameritech Michigan of all use and control of leased loops, thereby amounting to a physical occupation. Ameritech Michigan concluded that a reading of Act 179 to permit such a taking would render the statute unconstitutional.

Ameritech Michigan went on to argue that further support for concluding that ordering unbundled loops would constitute a per se taking of property can be found in the recent decision in Bell Atlantic Telephone Companies v Federal Communications Commission, 24 F3d [*62] 1441 (D.C. Cir. 1994). In that case, Ameritech Michigan asserted, the Court rejected the FCC's position that it possessed the power to compel unbundling through involuntary physical collocation.

Ameritech Michigan next argued that, absent express compensation procedures in a statute, a statute authorizing a taking of property must be held unconstitutional. Here, Ameritech Michigan argued, Act 179 is silent on the issue of compensation to be paid to those who are compelled to unbundled their services, probably because the Legislature never intended to empower the Commission to compel unbundling. Ameritech Michigan therefore concluded that, even if Act 179 could be interpreted to allow compelled unbundling, the statute itself must be found unconstitutional because it fails to provide any safeguards to the rights of the property owner to contest the taking of its property.

As to City Signal's proposed rates for unbundled loops, Ameritech Michigan argued that they are significantly less than prices for existing services. In Ameritech Michigan's view, the lease rates for the unbundled loops would not be compensatory to Ameritech Michigan and are an attempt to force the company to [*63] subsidize City Signal's entry into competition. In contrast, Ameritech Michigan argued, even if the Commission were authorized to effect a taking of its loops, the company would be entitled to receive the fair market value of the loops. Ameritech Michigan asserted that, at a minimum, it would be entitled to be compensated for the contribution it would have received from its own use of the loop facility to provide basic local exchange service. Ameritech Michigan explained that when it uses a loop to provide basic local exchange service, it receives revenues and resulting contribution from not only the monthly rate for the service, but also, for example, from local and toll usage as well as from other services provided to its customers over the loop. If City Signal were to lease the unbundled loop, Ameritech Michigan concluded, Ameritech Michigan would lose the opportunity to generate those revenues and the resulting contribution.

Ameritech Michigan went on to criticize the Staff's support for the pricing of unbundled loops, claiming that it was inappropriate and unreasonable. The company argued that the Staff arbitrarily chose a ratio of costs between the loop and drop components [*64] of existing services. The Staff then applied that cost ratio to existing rates for basic local exchange service. However, Ameritech Michigan contended that current basic local exchange rates incorporate residual pricing and rate of return regulation and are not cost-based. Ameritech Michigan further stated that the Staff's analysis inappropriately created a fluctuating unbundled loop rate, based upon application of the federal EUCL charge. The company also argued that the loop rates are based on average cost structures so that the actual loop facility may be more or less costly than the average. In Ameritech Michigan's view, City Signal will choose to build its own facilities where it is less expensive to do so and will use Ameritech Michigan's facilities only where the average cost is less than the actual cost of the loop. Ameritech Michigan concluded that this will result in its subsidizing City Signal's entry into competition.

Many of these same arguments were made by MECA and GTE. In addition, MECA stated that City Signal's request for unbundled loops priced at TSLRIC is designed to avoid investment in Michigan's telecommunications infrastructure for the sake of corporate [*65] profit.

The ALJ found that the Commission has the power to require Ameritech Michigan to provide City Signal with unbundled loops. He was persuaded that Sections 305(1)(g) and (m) of Act 179 require the unbundling that City Signal requests in this case. In contrast, the ALJ found that the position advanced by Ameritech Michigan is far too narrow and would negate the purpose of Act 179 to promote competition. In the ALJ's view, limiting the application of Act 179 as urged by Ameritech Michigan and others would allow a provider to avoid unbundling by simply never offering a service in the first place, a result not intended by the Legislature.

The ALJ further found that Ameritech Michigan's existing services are not adequate to meet the needs of City Signal to allow it to compete in the basic local exchange service market. He was persuaded that the evidence showed that the proposed alternatives would not permit City Signal to provide an economically competitive alternative to Ameritech Michigan's existing service, again contrary to the intent of Act 179. Furthermore, the ALJ was not persuaded, as urged by MECA, that City Signal's request is grounded in its reluctance to invest [*66] in the basic local exchange network. Rather, the ALJ agreed with the Staff that this position was necessarily rejected by the Commission when it granted City Signal a license to serve the area.

The ALJ further determined that City Signal's proposed rates of $ 8 per month for business loops and $ 11 per month for residential loops are reasonable as transitional rates. The ALJ recognized that a more extensive record could have been made with regard to this issue, but given the time constraints and the number of issues raised, the evidence presented was sufficient to support his determination on a transitional basis. Finally, the ALJ found that Ameritech Michigan's criticisms of the Staff's analysis of the proposed rates were disingenuous, because it had the opportunity to present its own analysis, but declined to do so.

Ameritech Michigan, GTE, and MECA except to the ALJ's findings. Ameritech Michigan reiterates the arguments presented in its reply brief. Among other things, Ameritech Michigan repeats verbatim its arguments that the Commission lacks authority under Act 179 to compel Ameritech Michigan to offer unbundling and, if the Commission orders the company to do so, it [*67] would constitute a taking of Ameritech Michigan's property in violation of the United States and Michigan Constitutions. GTE simply states that the ALJ's determination is contrary to Act 179 and not supported by the record.

MECA also reiterates its arguments that the Commission has no authority to order unbundled loops. In doing so, MECA presents a number of arguments regarding the scope of the Commission's authority under Act 179. For example, MECA argues that the Legislature intended that the Commission work within the framework established in Act 179. That framework consists of a set of different regulations that apply to specified services currently offered by LECs, namely, basic local exchange service, access service, and toll service. MECA contends that there is no indication in Act 179 that the Legislature intended that the Commission dismantle the local network and force a provider to sell or lease parts of that network to other providers, in lieu of providing access service.

MECA also excepts to the ALJ's conclusion that City Signal's request for unbundled loops is not based on its reluctance to invest in the basic local exchange network. First, MECA argues that if [*68] City Signal is not reluctant to invest, there is no need for unbundling. Second, MECA states, if the Commission's granting of a license indicates that City Signal has the resources to invest in its own loops, then there is no economic barrier for City Signal to do so. Third, MECA believes that it is obvious that City Signal proposed unbundled loops because the purpose of unbundled loops is to use them in lieu of investment. Fourth, MECA contends that, even if City Signal is not reluctant to invest, the appropriate regulatory scheme is one in which investment is encouraged and a competitor can make a profit based on its own investment and efficiency. Toward that end, MECA asserts, the shift to competition should not simply shift control of the existing network to other providers, but should be designed to encourage the building of additional facilities, thereby providing reliability and extra capacity which, in turn, will lead to lower prices and new services. In contrast, MECA concludes that the use of unbundled loops and low-cost pricing of those loops will permit competitors to make an economic "killing" in the local exchange market.

City Signal, MCI, AT&T, Teleport, and the [*69] Staff all filed replies to Ameritech Michigan's and MECA's exceptions. Like the exceptions, the replies generally reiterate arguments made on brief. Consequently, only those arguments that offer some new insight into this issue will be set forth.

City Signal responds that the Commission's authority to establish interconnection arrangements pursuant to Section 303(2) of Act 179 cannot be examined in a vacuum. Rather, City Signal submits, Section 303(2) must be examined in conjunction with the rest of Act 179, in particular, Section 305. City Signal points out that Section 305 contains a list of acts that a licensed basic local exchange service provider cannot legally do, many of which are directly relevant to interconnection. Thus, City Signal asserts, the Commission cannot set terms of interconnection that would allow Ameritech Michigan to do that which it is forbidden to do under Section 305, in particular, Section 305(1)(g) and (m).

As to Ameritech Michigan's and MECA's interpretation of Section 305(1)(m), City Signal responds that the prohibition in that subsection is a prohibition on bundling service to another provider. City Signal points out that Ameritech Michigan uses [*70] the example of bundling long distance service with basic local exchange service. However, City Signal asserts that those are end-user services, not interconnection services between providers. According to City Signal, limiting that subsection to bundling of end-user services ignores the clear wording of the statute.

Furthermore, City Signal contends, Ameritech Michigan continues to try to separate service components from physical components of a service. In Ameritech Michigan's view, City Signal submits, the unbundled loop is only a piece of physical plant unless it is combined with computerized switching services. However, City Signal asserts that the problem with this argument is that all of Ameritech Michigan's services involve a combination of physical plant and services. For example, if Ameritech Michigan leases a private line to City Signal, part of that private line service will be the physical, dedicated line. According to City Signal, there is no distinction between plant and services in determining whether the Commission can unbundle services under Act 179 and, furthermore, the distinction has no meaning in the constitutional sense.

Relying on In re Quality of [*71] Service Standards for Regulated Telecommunication Services, 204 Mich App 607 (1994), MCI and the Staff argue that the Commission has those powers and duties that are incidentally or reasonably necessary to administer Act 179. MCI submits that, even if an unbundled loop is characterized as equipment, the Commission would have the powers reasonably necessary to fulfill the intent of Act 179, i.e., to foster competition. Contrary to Ameritech Michigan's contention, City Signal states that there is nothing in Act 179 that expressly defines the term "service" or limits it only to the final product sold to the customer. MCI argues that it is unreasonable to argue that the Commission has authority to regulate the service, but not the components or equipment that facilitate such service. MCI asserts that it is reasonably necessary for the Commission to conclude that its power to regulate basic local exchange services includes not only the service provided to the customer, but also the components or equipment that facilitate the provision of that service.

The Staff further maintains that the Legislature was aware of unbundling when it enacted Act 179. According to the Staff, the FCC [*72] and the federal courts have ordered and upheld the unbundling of a number of components of the network to permit the competitive provision of telecommunications services. In the Staff's view, even the court-ordered divestiture of AT&T constituted an unbundling of the telecommunications network, which required that access to bottleneck facilities be offered to competitors on nondiscriminatory prices, terms, and conditions. The Staff asserts that it cannot be argued that the prohibitions in Section 305 of Act 179 were written with some other understanding of bundling in mind.

The Staff further responds that it is simply not true that unbundling will not promote infrastructure development. The Staff points out that City Signal has made a huge investment in the Grand Rapids area, including construction of a fiber optic cable network with state-of-the-art switching equipment.

Finally, City Signal, MCI, and the Staff respond that unbundling does not constitute the confiscation or taking of Ameritech Michigan's property. At the outset, MCI states that there are cases that indicate that the Commission need not address Ameritech Michigan's constitutional arguments because those cases [*73] conclude that the Commission may not have authority to determine the constitutionality of Act 179. Relying on Universal Am-Can Limited v Attorney General, 197 Mich App 34 (1992), MCI states that Michigan courts have uniformly held that administrative agencies do not have authority to determine the constitutionality of a statute that they administer. In any event, however, MCI asserts that Ameritech Michigan's analysis is faulty because, among other things, requiring the provision of unbundled loops would not constitute a taking of property and no party has suggested that Ameritech Michigan not be compensated for the provision of unbundled loops. City Signal adds that Ameritech Michigan cites dated cases that involve outright takings without reference to the history behind, or the provisions of, Act 179.

Ameritech Michigan, GTE, and MECA also except to the ALJ's determination that the Staff's proposed rates for unbundled loops are reasonable as transitional rates. Ameritech Michigan and MECA again reiterate their argument that pricing an unbundled service must take into consideration the appropriate level of contribution to the common costs of the firm in addition to the [*74] incremental cost of providing the service. In contrast, Ameritech Michigan states, the characterization of long-run incremental cost as an appropriate standard for establishing the price of services is simply incorrect because nothing in Act 179 supports such a pricing philosophy. To the contrary, Ameritech Michigan submits, long-run incremental cost, as referenced in Section 308(1) of Act 179, is simply a floor that a provider cannot go below in setting prices. According to Ameritech Michigan, the purpose of LECs determining long-run incremental cost is to demonstrate that services are not subsidized, not to establish appropriate pricing. MECA adds that pricing unbundled loops at less than fully embedded cost would be harmful to ratepayers in the long run.

In Ameritech Michigan's view, the only explicit ratesetting standard described in Act 179 is the requirement that basic local exchange rates be just and reasonable. [Section 304(4).] Ameritech Michigan maintains that this requirement does not translate to rates set at long-run incremental cost because that would be discriminatory, resulting in rates that are not compensatory and denying Ameritech Michigan the ability to earn [*75] a fair return on its assets. Ameritech Michigan concludes that its profitability should not be affected by competition and, therefore, the proposed pricing should be rejected.

Ameritech Michigan again criticizes the Staff's analysis in support of City Signal's proposed pricing. The company maintains that, although the ALJ did not address this issue, the Staff's analysis inappropriately suggested a fluctuating unbundled loop rate based upon application of the federal EUCL charge. Ameritech Michigan submits that, on cross-examination, the Staff's witness did not know whether and how the EUCL charge would apply to unbundled loops and acknowledged that the issue was not within the jurisdiction of the Commission. Furthermore, Ameritech Michigan argues, it is inappropriate to base a loop rate on a basic local exchange rate that applies in addition to the EUCL charge and then to suggest that the loop rate should be reduced by that charge when purchased by a competitor. According to Ameritech Michigan, the Staff did not consider the EUCL charge in applying its ratio to rates and, therefore, the Staff's analysis does not make any sense. Ameritech Michigan concludes that, because it [*76] is appropriate and necessary to apply the EUCL charge to unbundled loops, it plans to do so when it voluntarily offers unbundled loops.

City Signal requests a clarification on this issue because the ALJ did not specifically address whether the prices include the EUCL charge. City Signal states that under the Staff's analysis, the $ 8 and $ 11 rates are total company cost rates that would include both intrastate and interstate costs. Thus, City Signal states, whether or not a EUCL charge applies to an unbundled loop, it would pay a total of $ 8 and $ 11 per loop because the costs on which those rates are based already include the costs accounted for in assessing an EUCL charge. Because the ALJ adopted City Signal's pricing proposal and the Staff's analysis, City Signal assumes that the ALJ also adopted the Staff's position regarding the applicability of the EUCL charge.

In response, Ameritech Michigan states that City Signal is anxious to have these rates approved because it intends to charge the EUCL charge to its end users and, consequently, it will have a net cost of only $ 2.73 ($ 8 minus the business EUCL charge of $ 5.27) compared to Ameritech Michigan's current business [*77] line rate of $ 10.71. According to Ameritech Michigan, this would give City Signal either a level of margin unheard of in the local exchange business or room to price its services at a level that Ameritech Michigan cannot match.

In response to Ameritech Michigan, the Staff states that the proposed unbundled loop rates are not only compensatory because they include a return on investment, they also make a contribution to Ameritech Michigan's common overheads. The Staff also asserts that it was clear that the $ 8 and $ 11 rates included any EUCL charge that would be assessed. Consequently, in adopting the Staff's analysis, there was no need for the ALJ to make a specific reference to the EUCL charge.

The Staff further responds that nothing in Act 179 requires that prices be set to ensure the same level of profit for a provider after the implementation of competition that it had before competition. Nevertheless, the Staff states, Ameritech Michigan's revenues and profits have continued to grow as competition has developed. In fact, the Staff claims, if City Signal purchases Ameritech Michigan's unbundled loops, the latter company's profitability will be less affected because it [*78] will be reimbursed for the costs related to that investment rather than being left holding stranded investment due to City Signal's constructing its own duplicative loops. In any event, the Staff states that it plans to address, in a generic proceeding, the specific level of contribution that would be appropriate in the long run.

After consideration of all of the arguments, the Commission finds that it has authority under Act 179 to require unbundling. Specifically, the Commission derives that authority from Sections 305(1)(g) and (m), which provide that a provider of basic local exchange service may not:

"(g) Refuse or delay access or be unreasonable in connecting another provider to the local exchange whose product or service requires novel or specialized access requirements.

(m) Bundle unwanted services or products for sale or lease to another provider." [MCL 484.2305(1)(g) and (m).]

The Commission has already found that it has authority to require the unbundling of services. In its September 8, 1994 order in Case No. U-10620, the Commission also relied on Section 305(1)(m). There, the Commission determined that it would be unreasonable to read Act 179 as not giving the [*79] Commission authority to enforce that section's prohibition against bundling. The Commission, however, further found that the issue of what constitutes unbundling would be examined in a future proceeding. This case is the appropriate proceeding in which to address that issue.

In reaffirming its authority to require unbundling, the Commission rejects Ameritech Michigan's and MECA's interpretation of Section 305(1)(m), which is that the Commission has the authority only to prevent a provider from bundling one tariffed service with another tariffed service. The Commission is persuaded that had the Legislature intended that the prohibition on bundling apply only to tariffed services, it would have specifically stated that in Section 305(1)(m). It did not do so. Moreover, as City Signal correctly points out, Ameritech Michigan's and MECA's examples of bundling are not appropriate because they relate to end-user services. In contrast, Section 305(1)(m) prohibits bundling services provided to another provider. Thus, the Commission finds that Ameritech Michigan's and MECA's interpretation of Section 305(1)(m) is incorrect.

Further evidence of the fact that the Commission is not precluded [*80] from requiring unbundling of basic local exchange service can be found in Section 202(f)(viii) of Act 179. That section, which lists the items that are to be included in the Commission's report to the Governor and Legislature, states that the Commission must include a method to determine the total long run incremental cost pricing "for each component of the local exchange network and access services." [MCL 484.2102(f)(viii).] Because the Commission has the authority to cost each component of the local exchange network, it follows that the Legislature intended the Commission to have the power to unbundle those components.

Ameritech Michigan's attempt to separate service components from the physical components of a service is not persuasive. Again, as City Signal so aptly points out, all of Ameritech Michigan's services involve some combination of physical plant and services. Thus, such a distinction does not, in any way, undermine the Commission's authority to require unbundling.

In advancing their argument that the Commission has no authority to require unbundling, Ameritech Michigan, GTE, and MECA also overlook the importance of Section 305(1)(g). Although MECA argues that [*81] this section supports the use of access service as an alternative to unbundled loops, that interpretation ignores the fact that unbundled loops are, indeed, a form of access. As a new entrant in the local exchange market, City Signal needs the special requirement of unbundled loops to hold itself out to provide service to every customer in its geographic area. Ameritech Michigan is prohibited from refusing that service.

Turning to Ameritech Michigan's argument that the 1994 report to the Governor and the Legislature recognized that the Commission lacks authority to require unbundling, the Commission finds that the company has misinterpreted that report. The proposed amendment discussed in that report relates to Section 206(1) of Act 179, which deals with the offering of new services. In that regard, the Commission merely suggested more clearly defined powers to require changes in terms and conditions under which a service is offered. The proposed amendment has nothing to do with the Commission's authority to establish unbundling as a term of interconnection pursuant to Section 303(2) of Act 179.

Equally misplaced is Ameritech Michigan's argument that compelling it to provide [*82] unbundled loops would constitute a confiscation of property in violation of the Michigan and United States Constitutions. The Just Compensation Clause of the Fifth Amendment to the United States Constitution prohibits only uncompensated takings of property. (U.S. Const., Am V.) None of the parties in this case has proposed that Ameritech Michigan not be compensated for its provision of unbundled loops. Indeed, the pricing of those loops was litigated during the course of this proceeding. Consequently, despite Ameritech Michigan's litany of cases on this issue, the concept of the taking of property without just compensation is not applicable to the facts of this case.

The Commission specifically rejects Ameritech Michigan's reliance on the Bell Atlantic case because it is based on a mischaracterization of that decision. Contrary to Ameritech Michigan's representation, the Court in that case vacated the FCC order only insofar as it required physical collocation of competitiors' facilities inside the LECs' facilities. The decision did not address the FCC's authority to require unbundling.

The Commission also rejects Ameritech Michigan's interpretation of interconnection because, [*83] like its interpretation of bundling, it is too narrow. Section 303(2) of Act 179 empowers the Commission to establish the terms of interconnection, absent agreement between the parties. Nothing in that section of the statute limits the Commission to any particular form of interconnection.

Having found that the Commission has authority to require the unbundling of Ameritech Michigan's local loops, the record also supports the conclusion that unbundled loops are vital to local exchange competition and in the public interest. Ms. Murray testified that unbundling offers customers a competitive alternative to Ameritech Michigan's services in the following manner:

"[F]or customers that City Signal would serve using Michigan Bell's loop or 'access' facilities, City. Signal would provide facilities-based competition for Michigan Bell's switching and transport facilities. Of course, City Signal would also provide these customers with a competitive alternative to Michigan Bell's customer service and billing functions. Finally, City Signal would compete with Michigan Bell in designing creative service offerings and pricing arrangements that would best meet individual customer needs and [*84] desires. Therefore, competition in which City Signal includes a Michigan Bell provided loop as one element of a total package of local exchange services could constitute a true competitive alternative to Michigan Bell's bundled local exchange offering." (5 Tr. 278.)

In addition, Mr. Laub testified that unbundling accomplishes several important goals. He stated that:

"First, it permits potential competitors to purchase only those functions that they need from the incumbent LEC. This permits those network functions that can be provided on a competitive basis to be provided competitively, while limiting the extent of costly and unnecessary duplication of functions for which competition may not be viable. Second, it creates new points of interconnection -- new interfaces -- between the incumbent LECs and [competitive local exchange service providers].

"Finally, unbundling provides a basis for estimating the total service long-run incremental cost ("TSLRIC") of the use of network functions on a consistent basis. In doing so, the joint application of unbundling and TSLRIC offers a mechanism for the ready detection of subsidy and discrimination in pricing." (6 Tr. 702-03.)

Based [*85] on this testimony, the Commission rejects Ameritech Michigan's assertion that no substantive evidence was presented to demonstrate why unbundled loops are essential to competition.

On the other hand, the Commission is not persuaded that further unbundling of the local exchange network, as advocated by MCI, AT&T, and Teleport, is necessary at this time. In fact, Mr. Laub testified that the more comprehensive unbundling is not immediately necessary for entry of competitive firms into the local exchange market. Rather, he indicated that those other unbundled network functions should be adopted in a more generic or permanent proceeding. The Commission agrees that the issue of more extensive unbundling should be addressed in the context of a generic proceeding.

The Commission therefore finds that unbundling is necessary to enable City Signal to hold itself out to provide service to every customer within the geographic area of its license. As Ms. Murray testified, the only way that a new entrant can do this is to rely on a combination of its own facilities and facilities leased from the incumbent LEC. (5 Tr. 280) It is simply unrealistic to expect a new LEC to be able to initially [*86] rely solely on its own facilities to serve all customers in an exchange area. Furthermore, contrary to Ameritech Michigan's contention, the demand for unbundled loops is not speculative. As Ms. Murray explained, a potential demand for unbundled loops exists for every customer in the Grand Rapids area where City Signal has yet to build its own loop facilities. (5 Tr. 283.) Furthermore, even if City Signal built its own network, there would still be a need for unbundling. Ms. Murray testified that certain incumbent LEC facilities will continue to be bottleneck facilities even for competing facilities-based LECs for some time into the future. (5 Tr. 280.) In fact, contrary to MECA's suggestion, City Signal has already made a significant investment in the Grand Rapids area. However, it needs to combine its facilities with Ameritech Michigan's loops to be able to hold itself out to provide service to every customer in the geographic area of its license.

The Commission also rejects Ameritech Michigan's contention that its existing services will provide viable alternatives for City Signal and, consequently, unbundling is unnecessary. Brad Evans, City Signal's Executive Vice-President, [*87] effectively refuted that position.

Mr. Evans, who has over 15 years experience in the telecommunications industry and was formerly one of GTE's top designers and marketers of private fiber optic networks, testified that none of Ameritech Michigan's dedicated point-to-point private line connections are equivalent to the provision of an unbundled loop. He explained that, while an unbundled loop is a basic connection from the serving wire center to the customer's premise, such access is not provided over video and audio connections. Additionally, Mr. Evans testified that a voice grade private line service is not an adequate alternative to unbundled loops, because it provides for two channel terminations and unnecessary transmission equipment. Furthermore, he indicated that the costs for these services include maintenance, testing, and other items or activities are not applicable to the unbundled loops that City Signal is seeking. Mr. Evans further stated that sub-voice grade service does not provide sufficient bandwidth to maintain voice quality and, consequently, it is technically insufficient. As with the voice grade connection, Mr. Evans also stated that digital data and high [*88] speed data connections provide for two channel terminations and unnecessary transmission functionality. (5 Tr. 389-90.)

Continuing, Mr. Evans also stated that FGA services provide access to an IXC and, consequently, they are not relevant here. Furthermore, even if they were relevant, Mr. Evans explained that FGA requires an end-user to dial a seven-digit access code before forwarding the local dialing instructions. As a result, the end-user would have to dial a total of 14 digits to process local calls. (5 Tr. 390.) In addition, although Ameritech Michigan indicated that City Signal could simply resell STS and Centrex services, Mr. Evans stated that City Signal is not interested in doing that. He explained that under those arrangements, Ameritech Michigan would continue to be the local dial tone provider. Under a resale arrangement, calls would originate and terminate on Ameritech Michigan's network and would never touch City Signal's network. Furthermore, Ameritech Michigan would charge City Signal its business rates, even though the services would be provided to residential customers. Mr. Evans concluded that Ameritech Michigan simply proposes to repackage its current products [*89] in order to sell them at a higher price to competitors. (5 Tr. 391.)

MCI witness Mr. Laub confirmed that the direct effect of using Ameritech Michigan's proposed alternatives would be to subject City Signal's operations to an anti-competitive "price squeeze." For example, Mr. Laub stated that the minimum rate for a voice grade private line circuit is $ 23 per line per month. The rates for STS include a flat rate of $ 10.71 per month and a usage-sensitive rate of $ .082 per call. The rates for the resale of Centrex are similar: $ 9.76 per line per month plus $ .082 per call. According to Mr. Laub, City Signal would have to pay Ameritech Michigan wholesale charges that are equivalent to or greater than the retail rates that Ameritech Michigan charges its end-users. Mr. Laub stated that this would result in a price squeeze because, to profit from its own sale of the services, City Signal would have to charge its end-users more than it would pay Ameritech Michigan. Mr. Laub concluded that this would make marketing the services next to impossible. (6 Tr. 712-13.) Based on this testimony, the Commission is persuaded that, despite Ameritech Michigan's constant refrain that it "supports [*90] full and fair competition in all aspects of the telecommunications marketplace," n11 its proposals would virtually eliminate City Signal's opportunity to effectively compete, contrary to the intent of Act 179.

n11 Ameritech Michigan's brief, p. 3, and exceptions, p. 1.

In conclusion, the Commission finds that Ameritech Michigan's and MECA's positions on the issue of unbundling are inherently inconsistent. On the one hand, Ameritech Michigan and MECA criticize City Signal for allegedly concentrating its marketing efforts on higher-usage customers, claiming that it constitutes cream skimming. On the other hand, Ameritech Michigan does not want to offer City Signal the unbundled loops it initially requires to provide service outside of the higher-usage area. Furthermore, it is apparent that Ameritech Michigan will offer any argument to support its position that it should not be required to provide unbundled loops in the absence of interLATA relief. As a result, the Commission can only conclude that Ameritech Michigan's position is not really about the Commission's authority under Act 179 or any unconstitutional taking of property. Rather, Ameritech Michigan's position is that [*91] it will voluntarily offer unbundled loops only when it obtains interLATA relief. Therefore, all of Ameritech Michigan's and MECA's arguments must be rejected.

Turning to the pricing of unbundled local loops, the Commission finds that Ameritech Michigan's, GTE's, and MECA's arguments should be rejected. In its September 8, 1994 order in Case No. U-10620, the Commission refined the definition of and developed a methodology to determine the long-run incremental cost for application under Act 179. The Commission found that TSLRIC is the appropriate cost floor and that it will ensure that all customers who use identical network functions are assigned the same level of cost. The Commission therefore ordered that TSLRIC be applied to determine costs for many unbundled network functions.

In this case, City Signal and the Staff were the only parties that presented testimony proposing specific prices for unbundled loops. In doing so, they effectively refuted Ameritech Michigan's contention that the provision of unbundled loop services at rates equal to TSLRIC would constitute a subsidy to City Signal. In particular, Ms. Murray testified that:

"Economic theory teaches that any rate [*92] that recovers appropriately measured long-run incremental costs is fully compensatory and is not subsidized by any other service. Therefore, City Signal's proposed rates fully meet the economic test for avoidance of cross-subsidization, with the possible limited exception of the residential loop rate. The Commission may wish to raise the residential loop rate to $ 11.25 to avoid any risk of cross-subsidization.

* * *

"Moreover, because the cost of loop services tends to decline with increasing subscriber density, it is likely that Michigan Bell's cost of unbundled loop services in Grand Rapids is lower than its statewide average cost. Therefore, provision of unbundled loop services to City Signal in Grand Rapids at a rate based on statewide average loop costs is likely to provide a contribution above Grand Rapids-specific costs to Michigan Bell." (5 Tr. 287-88.)

In fact, as indicated earlier in this order, Ameritech Michigan specifically stated that the purpose of LECs' determining long-run incremental cost is to demonstrate that services are not subsidized.

The Staff's analysis also demonstrates that City Signal's proposed rates of $ 8 and $ 11 actually exceed TSLRIC. In [*93] making its determination, the Staff developed a combined unbundled loop rate. The Staff assumed that City Signal's purchase of loops would match the existing ratio of business and residential lines in Grand Rapids, i.e., 26.5% and 73.5%, respectively. Applying that ratio to the proposed unbundled loop rates produced a combined rate of $ 10.21, which exceeds the $ 8.99 TSLRIC unbundled loop cost calculated by Ameritech Michigan. Based on Ms. Murray's testimony and the Staff's analysis, the Commission rejects the argument that City Signal's proposed rates will result in a subsidy.

The record also demonstrates that the proposed rates do, in fact, include a contribution to overheads in addition to a return on investment. In any event, as AT&T correctly points out, it is unlikely that, during the transitional period, City Signal will need a large number of loops to serve the customers it acquires in the Grand Rapids area. As a result, any positive or negative effect resulting from the prices will be limited. Moreover, Ameritech Michigan's development of its TSLRIC cost study, as required by the September 8, 1994 order in Case No. U-10620, will make it possible to address this issue [*94] more fully in a generic proceeding.

The Commission further finds that the $ 8 and $ 11 rates are based on total company costs. Consequently, if Ameritech Michigan assesses a federal EUCL charge for the unbundled loop, that charge should offset the $ 8 and $ 11 rates. Not allowing for an offset of any interstate recovery through the EUCL charge would result in a double recovery of interstate costs.

Based on the foregoing discussion, the Commission finds that City Signal's proposed pricing is reasonable on a transitional basis and, therefore, it should be adopted. In contrast, the Commission agrees with the ALJ's conclusion that Ameritech Michigan's criticism of the Staff's analysis is disingenuous because it did not offer its own analysis, despite the fact that it had the opportunity to do so. Although Ameritech Michigan explains that it did not make a presentation because it does not propose to offer unbundled loops, the company could have presented testimony on this issue and chose not to do so.

Local Number Portability

Local number portability is the ability of a customer to change basic local exchange service providers while retaining his or her local telephone number, [*95] i.e., the local telephone number is "portable" between carriers. City Signal contended that local number portability is critical to an emerging competitive basic local exchange market, because customers will be reluctant to change LECs if they have to change their telephone numbers. However, the ability to keep an existing local telephone number when transferring to another provider does not exist today as it does for 800 prefix numbers. City Signal therefore requested that the Commission require Ameritech Michigan to provide an interim solution to number portability through any technically feasible means and to develop a long-range solution such as a data base solution using Signalling System 7 (SS7) technology. n12

n12 SS7 is a network signalling system, which accommodates enhanced 800 service, widearea Centrex services, virtual private networks, and other types of advanced telecommunications services.

As an interim solution, City Signal proposed to use two services currently offered by Ameritech Michigan -- Direct Inward Dialing (DID) and Remote Call Forwarding (RCF). DID provides an alternative number portability solution for large customers or larger groups of telephone [*96] numbers. Using DID, a call comes into an Ameritech Michigan central office and is directed to a dedicated DID one-way trunk that transports the call to its final destination, which could be a City Signal central office. RCF enables a customer to remotely forward a call from one central office to another central office. City Signal further proposed that it would also provide number portability in situations in which it assigns the initial number and the customer changes its local exchange service provider.

DID and RCF were not designed to be used as number portability options and, consequently, most of the parties argued that they are fundamentally inadequate solutions on a long-term basis. Nevertheless, none of the parties objected to the use of DID and RCF to effect number portability on an interim basis. MCI, however, recommended that the Commission establish a deadline of one year for Ameritech Michigan to develop a long-term number portability solution.

The remaining issue in dispute relates to the appropriate price for DID and RCF services. City Signal proposed that, as an interim measure, the Commission require that number portability be provided without charge for policy [*97] reasons similar to those adopted in other states. More specifically, City Signal and MCI recommended that the Commission adopt a solution similar to that proposed by Rochester Telephone Company before the New York Public Service Commission. That commission allowed the additional switching and transport costs associated with the provision of number portability through DID or RCF to be recovered through a surcharge on telephone numbers, payable by each local exchange service provider based on the number of telephone numbers served by each carrier. (Case 94-C-0095, February 10, 1994.) MCI argued that this approach is premised on the assumption that there is an economic value to having number portability, whether or not a particular customer uses it.

Because cost information regarding DID and RCF was not initially available, the Staff recommended that Ameritech Michigan make those services available to City Signal at equivalent present rates during the transitional period. For DID service, based on Exhibit I-83 and City Signal's and MCI's briefs, this would equate to a rate of between $ .58 and $ .83 per telephone number per month.

The Staff further proposed that, for termination [*98] of a ported DID toll call to a City Signal end-user, Ameritech Michigan would only be able to bill an IXC for the tandem switching rate if it is applicable. On the other hand, City Signal would charge an IXC the local switching and end-office charges. According to the Staff, this will ensure that each LEC receives the appropriate portion of switched access charges with no double billing of IXCs.

For the completion of local calls using DID or RCF, the Staff also proposed that Ameritech Michigan continue to pay City Signal the $ .05 local call termination charge for calls terminated on City Signal's network. In other words, the Staff explained, termination charges should continue to apply even in situations in which DID or RCF is used by City Signal, thereby acting as an offset to DID and RCF charges.

MCI asserted that, if there are to be charges for the provision of DID and RCF, they should be set to recover Ameritech Michigan's incremental costs. Based on Ameritech Michigan's responses to MCI's discovery requests, MCI calculated the incremental costs for using DID and RCF to be approximately $ .20 and $ 1.14 per month, respectively.

Ameritech Michigan, on the other hand, contended [*99] that these services should not be offered at cost. According to Ameritech Michigan, it would be inappropriate to provide these services to City Signal at incremental cost while other customers must purchase them at tariffed rates. Ameritech Michigan witness William DeFrance, Director of Components and Interconnection for Ameritech's Information Industry Services, testified that DID is currently offered at a rate for purchasing blocks of 20 telephone numbers. However, he indicated that Ameritech Michigan would be willing to offer a per telephone number rate, which he estimated would be $ 1.50 per telephone number per month. As to RCF, Mr. DeFrance stated that the charge associated with that service is $ 20.45 per line per month, plus $ .082 per call.

Ameritech Michigan also took issue with the calculation of the incremental cost of DID and RCF. Ameritech Michigan stated that DID was developed prior to the emergence of the number portability issue and, consequently, no costs have been developed to provide DID as a number portability solution. Furthermore, Ameritech Michigan submitted that there are a number of deficiencies in the calculations performed by City Signal and MCI. [*100] Ameritech Michigan presented similar arguments relative to RCF and pointed out that the Commission's December 22, 1992 order in Case No. U-10064 found RCF to be an unregulated service. As to the recovery of costs, Ameritech Michigan argued that cost causers should pay for the price of a ported number. The company asserted that any other arrangement would create subsidies from the customers of one provider to the customers of another provider.

Ameritech Michigan also took the position that it would be irresponsible to mandate that a data base number portability solution be developed within one year from the Commission order as suggested by MCI. Ameritech Michigan stated that no evidence was produced to support such a schedule. Rather, Ameritech Michigan pointed out, evidence showed that Ameritech Michigan and AT&T have been working with the industry to develop an appropriate solution. Consequently, Ameritech Michigan submitted, it would be improper to assess a penalty against it because the industry has not as yet developed a true number portability solution. Finally, Ameritech Michigan contended that the Rochester Telephone Company case provides a poor cost model for this [*101] proceeding. According to Ameritech Michigan, that case was predicated on a settlement of overearnings involving a comprehensive agreement between Rochester Telephone Company and Time Warner, Inc., encompassing issues that are not comparable to the matters presented in this case.

GTE argued that number portability should not be required until the demand for it is clearly established. GTE also contended that the cost for number portability should be borne by those who want it, because it would be unfair to require providers and customers that have no demand for number portability to subsidize those who want that option.

MECA took the position that number portability is a national issue that must first be resolved at the federal level. MECA therefore recommended that the Commission defer this issue to the FCC.

The ALJ noted that all of the parties recognized that DID and RCF are the only currently available solutions to number portability and that, while they have some limitations, they may be used on an interim basis. The ALJ acknowledged that these services were not originally established to provide a number portability solution. However, he found that they will provide an adequate [*102] solution on a transitional basis. The ALJ further found that these services should not be provided to interconnecting carriers free of charge. He was also not satisfied that the Rochester Telephone Company settlement should be used as precedent in this case, because no details regarding the circumstances giving rise to the settlement and the agreement itself were presented.

Although the ALJ agreed with the Staff that Ameritech Michigan should make DID and RCF available to City Signal at equivalent existing rates, he found that MCI's calculation of the incremental costs for those services was reasonable. He concluded that the cross-examination relied on for those calculations supported the conclusion that they did, in fact, represent the incremental cost of the services. The ALJ also found that the Staff's proposal to prevent the double billing of IXCs for calls terminated under these interim solutions is satisfactory and, therefore, he recommended that it be adopted.

Finally, the ALJ was not persuaded that a time limit should be placed on Ameritech Michigan for the development of true number portability. He noted that the record demonstrated that Ameritech Michigan, along with [*103] the industry, is working toward development of a technically feasible number portability solution, and no evidence to the contrary was presented. The ALJ therefore concluded that MCI's proposed deadline was not justified and should be rejected.

MCI excepts to the ALJ's rejection of its proposed deadline for Ameritech Michigan to provide true number portability. According to MCI, without direction from the Commission, Ameritech Michigan will not willingly implement true number portability because it wants to keep its competitive advantages as long as possible. MCI contends that, based on past experience with Ameritech Michigan, the Commission should require Ameritech Michigan to develop a true number portability solution within one year of the Commission's order in this case.

MCI also argues that, until true number portability is implemented, the ALJ should have increased the compensation threshold to plus or minus 50%. n13 MCI points out that it proposed that threshold to recognize the need to provide incentives for Ameritech Michigan to provide true number portability. Additionally, MCI submits, until true number portability is available, it is possible that traffic flows between [*104] Ameritech Michigan and a new entrant will be unbalanced in favor of Ameritech Michigan.

n13 This is the same issue that was addressed in the section on mutual compensation.

MCI goes on to argue that the ALJ also erred in rejecting the approach used by the New York Public Service Commission in the Rochester Telephone Company case. Contrary to the ALJ's finding, MCI asserts, the record is replete with references to the circumstances giving rise to the settlement agreement and the terms of the agreement itself.

On the other hand, Ameritech Michigan argues that the ALJ erred in his recommendation regarding the pricing of both DID and RCF when those services are used for number portability. In particular, Ameritech Michigan states that no cost witness presented testimony addressing the cost of DID service when it is used as a number portability option. Ameritech Michigan submits that the Commission should focus on the policy issues related to appropriate pricing of existing services when used as an interim number portability option. Specifically, Ameritech Michigan continues, the Commission should clarify the ALJ's vague recommendation to charge "equivalent present rates" for [*105] DID with a determination that, when used as a number portability solution, DID should be priced at a level that is equivalent to the pro rata share of its current rate that represents the DID components used to provide number portability service. Ameritech Michigan also submits that the Commission should refrain from establishing a discrete price for RCF as a number portability option because no evidence was presented regarding the cost of that service when it is used for that purpose. Ameritech Michigan concludes that compelled production of a 1988 cost study, which is the most recent version of RCF costs, and MCI's faulty calculation do not provide support for the establishment of any rate.

Moreover, Ameritech Michigan continues, the Commission has no authority to require it to modify the prices it charges for RCF services because, in its December 22, 1992 order in Case No. U-10064, the Commission determined that RCF is an unregulated service.

MCI responds that its incremental cost calculations are the most accurate cost studies of DID and RCF that exist today. MCI points out that, like its position on compensation for traffic termination, Ameritech Michigan has failed to offer [*106] any contrary cost evidence or analysis on the record. Consequently, MCI argues that the ALJ properly rejected Ameritech Michigan's proposal to price DID at its pro rata share of all components used to provide the end-user service, including contribution levels in line with comparable services. According to MCI, it would be fundamentally anti-competitive to price what is a bottleneck service, but competitively essential, for competitive LECs in the same manner that Ameritech Michigan prices optional end-user basic local exchange services.

Ameritech Michigan also excepts to the ALJ's adoption of the Staff's proposal limiting the company to the assessment of a tandem switch charge for calls terminating from an IXC to a ported number. Ameritech Michigan argues that it should be allowed to continue to charge IXCs all terminating access rates as well as to receive payment from City Signal for DID and RCF. In support of its position, Ameritech Michigan argues that when DID and RCF are used, it continues to incur all of the access costs it would have incurred if the number was retained for its own customer. Specifically, Ameritech Michigan submits, it continues to incur tandem switching, [*107] local switching transport, carrier common line, and all other access costs. In contrast, Ameritech Michigan claims that competitive LECs do not incur any access costs in terminating an IXC call to a competitive LEC end-office through RCF or DID number portability arrangements. Ameritech Michigan concludes that the ALJ's recommendation is nothing more than an attempt by MCI, which made this argument, to inappropriately reduce the access charges it pays to Ameritech Michigan and to provide an advantage to a competing LEC.

MCI responds that this is completely erroneous. To the contrary, MCI submits, the competitive LEC incurs all costs of access in terminating an IXC-originated call, just as it would if the IXC could send the call directly to a NXX code resident in the competitive LEC's end-office switch. In other words, it switches the call, transports it, and terminates it to the end-user over a common line facility. Furthermore, MCI maintains that Ameritech Michigan does not incur anything approaching all the costs it claims. For example, MCI points out, Ameritech Michigan does not incur carrier common line expenses because a ported call never is switched to a local loop by [*108] the incumbent LEC. Finally, MCI argues that Ameritech Michigan is compensated for its switching functions associated with DID and RCF because it will receive the incremental costs built into the rates for those services.

AT&T agrees with MCI that Ameritech Michigan's interpretation of this issue should be rejected because it would allow Ameritech Michigan to double recover some expenses and to earn revenues when no costs are actually incurred. AT&T asserts that the ALJ correctly sought to prevent an IXC from being billed access twice when its call is ported between local carriers to achieve interim number portability. According to AT&T, IXCs should not be double-billed for access functions. Instead, AT&T submits, when numbers are ported between local carriers, Ameritech Michigan will be expected to recover some of its costs in the price it charges the new carrier for DID or RCF.

The Commission finds that the ALJ properly analyzed this issue. Given the consensus that DID and RCF are the only currently available solutions to number portability, the Commission finds that they are appropriate only on an interim basis. However, at this time, the Commission is not persuaded that [*109] a deadline should be imposed on Ameritech Michigan to develop a long-term solution. Because this is an issue that the entire industry is addressing, it is not appropriate to single out Ameritech Michigan by imposing a deadline or a penalty at this time.

Turning to the rates for DID and RCF, there appears to be some confusion among the parties regarding the ALJ's finding on this issue. To clarify, the ALJ ultimately concluded that MCI's calculation of the incremental costs of providing DID and RCF, rather than the current tariffed rates, was reasonable. The Commission finds that this conclusion is supported by the record. Cross-examination of Mr. DeFrance revealed that the existing rates for DID and RCF include functions that are not necessary for number portability. For example, Mr. DeFrance acknowledged that the price of DID includes a private branch exchange (PBX) charge of $ 10.71. Mr. DeFrance agreed that, because a PBX trunk is an outbound trunk, it is not needed to provide portability, which is an inbound service.

The Commission therefore finds that the incremental costs developed by MCI are appropriate for the pricing of DID and RCF on a transitional basis. Specifically, [*110] those rates are $ .20 per line per month for DID and $ 1.14 per line per month for RCF. Again, contrary to its contention, Ameritech Michigan had the opportunity to present options for the pricing of number portability options, but it chose not to do so. Consequently, Ameritech Michigan's criticism regarding the development of the appropriate pricing lacks merit.

The Commission also rejects Ameritech Michigan's argument that the Commission has no authority to modify the prices for RCF because it is an unregulated service pursuant to the December 22, 1992 order in Case No. U-10064. Ameritech Michigan ignores the fact that, in the November 23, 1994 order in this case, the Commission noted that, in Case No. U-10064, the RCF service at issue was an existing custom calling feature provided to end-users. In contrast, in this case, City Signal has proposed to purchase RCF (and DID) from Ameritech Michigan to effectuate number portability, which is an interconnection issue. As such, it is a regulated service and the Commission may set the price.

Turning to MCI's proposal that the costs for DID and RCF should be recovered through a surcharge on telephone customers, the Commission finds [*111] that it should be rejected. The Commission is not convinced that all customers should be assessed such a surcharge during the transitional period, or that competitive pressure will necessarily force new entrants to absorb the surcharge rather than pass it on to customers.

The Commission also is not persuaded that, until true number portability is implemented, the compensation threshold should be increased to plus or minus 50%. The Commission has already rejected that proposal earlier in this order.

Finally, the Commission finds that the ALJ properly concluded that there should be a limit on the access charges Ameritech Michigan assesses in those instances in which DID and RCF will be used. No evidence was presented to support Ameritech Michigan's assertion that it continues to incur all of the same access costs that it would incur in terminating a call to its own customers. As AT&T so aptly points out, such a scenario intuitively seems impossible given the fact that the new carrier will provide both the end-office switching function that routes the call to its final destination and the end-user loop itself.

Directory Listings

Section 305(1)(i) of Act 179 requires basic [*112] local exchange providers to provide directory listing information to all persons requesting that information, including affiliates, without unreasonable discrimination. Section 309(1) of Act 179 requires basic local exchange providers to provide their customers with an annual printed directory. Relying on those provisions, City Signal asserted that the need for common access to a data base of local telephone numbers is an interconnection issue.

City Signal took the position that there is a public need that all numbers within a given community of interest, such as the Grand Rapids District Exchange, be available in a common, centrally maintained data base. City Signal therefore proposed that each carrier be required to submit its list of customers to the data base administrator. Each local exchange provider could then access from that list the numbers needed to provide directory assistance and a complete telephone directory for distribution to its subscribers. In the future, City Signal stated, a third-party administrator may be required, but in the interim, Ameritech Michigan should provide access to this information without charge.

In support of this position, City Signal [*113] pointed out that it is consistent with the manner in which Ameritech Michigan relates to other LECs. Specifically, City Signal cited the existence of "swap agreements" whereby the LECs exchange directory listings without charge. In contrast to that situation, City Signal stated that Ameritech Michigan has proposed to require City Signal to pay Ameritech Michigan to have the numbers of City Signal's customers included in Ameritech Michigan's listings at a one-time charge of $ 8.35 per listing plus $ 1.24 per listing per month. However, City Signal requested that it be treated in the same manner as other LECs and that the Commission require Ameritech Michigan to exchange directory information at no charge.

The Staff argued that, although Act 179 does not define the scope of a printed directory, it is reasonable to assume that the scope of that directory should include the local calling area. The Staff proposed that the Commission establish the interconnection arrangements for three parts of the provisioning of directories, i.e., the listing of customer information in a data base, access to and use of that information after it is included in a data base, and the publication of the [*114] local directory itself. The Staff maintained that to the extent these services are provided among LECs today, they should be provided under the same rates, terms, and conditions to City Signal. For example, the Staff stated, if Ameritech Michigan continues to make available inclusion in, and use of, directory listing information without charge to other LECs with whom it shares local calling areas, City Signal should be treated in the same manner.

Ameritech Michigan took the position that the subject of directory listings is not an interconnection issue. It argued that Sections 305(1)(i) and 309(1) do not in any way pertain to interconnection arrangements. Rather, Ameritech Michigan argued, those sections demonstrate that the Commission does not have the authority to require Ameritech Michigan to create a common listing data base. The company contended that there is substantial competition for the development of listing information and the publishing of directories that has evolved without the creation of a common data base. Ameritech Michigan therefore asserted that the competitive market should be allowed to work in this area.

As to swap agreements, Ameritech Michigan stated [*115] that while they have existed in the past, all of them have been terminated. The company stated that it is currently negotiating with those affected LECs to determine the appropriate compensation for delivery of listing information. Ameritech Michigan further indicated that it is willing to provide City Signal with directory listings under the same terms and conditions as those listings are made available to other directory publishers. Ameritech Michigan concluded that the Commission has no authority to dictate the terms and conditions under which LECs make their listings available, as long as they do so under nondiscriminatory terms and conditions.

The ALJ agreed with Ameritech Michigan that there is nothing in Act 179 that gives the Commission the authority to require the company to create a common listing data base as proposed by City Signal. As to the swap agreements, the ALJ acknowledged Ameritech Michigan's statement that they have been terminated. He also noted Ameritech Michigan's position that it is willing to provide City Signal with directory listings under the same terms and conditions as those listings are made available to other directory publishers. The ALJ concluded [*116] that this complies with the provisions of Act 179. He therefore recommended that the Commission take no action relative to this issue.

The Staff excepts to the ALJ's finding that Ameritech Michigan's stated intention to provide City Signal with directory listings under the same terms and conditions as are available to other directory publishers complies with Act 179. To the contrary, the Staff argues, charges to other directory publishers are not relevant. The Staff points out that, in the past, rates charged other directory publishers were 13 cents to 23 cents per listing, while local listing information has been provided to other LECs free of charge. The Staff concludes that it is not acceptable under Act 179 to treat City Signal differently than other licensed LECs.

City Signal and Teleport filed similar exceptions on this issue. Teleport asserts that facilitating inclusion in, and access to, Ameritech Michigan's white pages listings by City Signal is an interconnection issue, which is necessary to equally integrate all customers into the public switched network. City Signal agrees with the Staff and Teleport and states that it will agree to terms that are consistent with [*117] those between Ameritech Michigan and other LECs.

On the other hand, the Staff agrees with the ALJ's recommendation that Ameritech Michigan should not be required to create a comprehensive data base for all local listing information. However, the Staff submits, the issue of whether such a data base already exists is still in question. The Staff points out that Exhibit S-85 indicates that independent LECs have customer information entered into a directory assistance data base without charge to them. The Staff states that it merely proposes that if such a common listing exists and is used by all LECs today in the development of local calling directories, City Signal should be permitted listings in that same data base under the same rates, terms, and conditions.

Finally, the Staff states that it agrees with the ALJ that if City Signal can reach an agreement with another entity to publish its directory, there is no issue to be resolved. However, the Staff argues that no evidence was presented regarding the extent of alternative sources for publication of such information. Because the Staff believes that an alternative must exist to enable City Signal to provide a published directory, [*118] the Staff suggests that Ameritech Michigan hold itself out to provide that service to City Signal.

In response, Ameritech Michigan and MECA state that nothing in Act 179 gives the Commission authority to dictate the terms and conditions under which LECs make their listings available, as long as they are made available under nondiscriminatory terms and conditions. According to Ameritech Michigan, the Commission has no authority to impose City Signal's obligations on Ameritech Michigan, to dictate the terms and conditions under which City Signal may choose to have Ameritech Michigan publish directories on its behalf, or to require Ameritech Michigan to create or maintain a common data base for the use and benefit of competitors. Ameritech Michigan points out that the directory information business is highly competitive and customers have many alternatives for listing information. MECA adds that if the Commission concludes that it has the requisite authority, it should also make directories available to other LECs at their option at a reasonable price.

MECA goes on to argue that the Commission should declare that the use of swap agreements in EAS areas does not constitute unreasonable [*119] discrimination under Section 305(1)(i) of Act 179. In MECA's view, the ALJ's statement regarding Ameritech Michigan's termination of swap agreements should not be construed to imply that such agreements will no longer be permissible. MECA says that although Ameritech Michigan may have currently terminated most of its swap agreements, they have not yet been replaced by new agreements. According to MECA, many of its member companies will continue to negotiate for the use of swap agreements in EAS areas. MECA requests that the Commission find that there is a rational basis to continue to allow swap agreements in EAS areas.

The Commission agrees with the ALJ that Ameritech Michigan should not be required to create a common listing data base if one does not currently exists. However, if a common listing does, in fact, exist, City Signal should be permitted listings under the same rates, terms, and conditions as other LECs. Likewise, Ameritech Michigan should provide City Signal with directory listings on the same rates, terms, and conditions as Ameritech Michigan offers to other LECs. The Commission agrees with the Staff that it is not acceptable under Act 179 to treat City Signal [*120] differently than other LECs. Toward that end, if Ameritech Michigan wishes to negotiate swap agreements, it is free to do so.

On the other hand, the Commission does not agree that, at this time, Ameritech Michigan should be required to hold itself out to provide a published directory to City Signal. Based on the record, it appears that City Signal will be able to reach an agreement with another entity to publish its directory.

Directory Assistance and Other Data Base Services

Section 102(m) of Act 179 defines local directory assistance as "the provision by telephone of a listed telephone number within the caller's area code." [MCL 484.2102(m).] Section 309(1) of Act 179 goes on to require that a provider of basic local exchange service provide local directory assistance to each customer. [MCL 484.2309(1).]

City Signal indicated that it has identified one of the various competing directory assistance service providers to provide services to it instead of contracting with Ameritech Michigan. Consequently, City Signal is not asking the Commission to establish any terms and conditions for the provision of this service by Ameritech Michigan.

On the other hand, City Signal [*121] has requested that Ameritech Michigan provide access to the Line Information Data Base (LIDB) and the 800 Data Base (800DB). n14 The Staff supported this request and proposed that interconnection to those data bases between City Signal and Ameritech Michigan occur under the same rates, terms, and conditions presently offered to other LECs.

n14 LIDB is the data base used for credit card verification and other alternate billing information. The 800DB is a data base that contains customer information regarding 800 numbers and the IXCs to which the 800 numbers are presubscribed.

Ameritech Michigan stated that it is willing to enter into negotiations with City Signal for a package of services, including access to LIDB and 800DB. If City Signal simply wishes to purchase LIDB and 800DB, Ameritech Michigan stated that it will provide those services under the rates, terms, and conditions contained in Ameritech Michigan's access tariff, plus any additional rates, terms, and conditions that are set forth in the agreements contained in Exhibits S-25, S-27, and S-33.

The ALJ found that Ameritech Michigan is willing to provide access to the data base services under the rates, terms, and [*122] conditions set forth in its access tariff. He noted that there was no showing that Ameritech Michigan intends to discriminate against City Signal in this area. The ALJ therefore recommended that the Commission not take any action on this issue. The Commission agrees with the ALJ.

Telecommunications Relay Service (TRS) and Emergency Services (9-1-1)

City Signal requested that Ameritech Michigan provide TRS and 9-1-1 services under the same terms and conditions as Ameritech Michigan provides those services to other LECs. The Staff supported this request, and Ameritech Michigan agreed to it.

The ALJ found that City Signal's proposal complies with Act 179. Because the parties were in agreement, he recommended that the Commission not take any action on this issue. The Commission agrees with the ALJ.

Assignment of NXX Codes

Ameritech Michigan serves as the Local Number Administrator for all five area codes in Michigan. City Signal requested that central office code prefixes, i.e., NXXs, be assigned to it for subsequent assignment to its customers. The

Staff, GTE, and MCI supported this request, stating that the NXX assignments should be made according to the same [*123] rates, terms, and conditions as are applied to other LEC requests for NXXs.

Ameritech Michigan explained that it assigns NXX codes in accordance with the industry's central office code assignment guidelines, which were designed to provide competitively neutral assignment of NXXs and to manage those numbers as a finite resource. Ameritech Michigan represented that it will administer the assignment of NXX codes pursuant to City Signal's request in accordance with those industry guidelines.

Again, because the parties were in agreement on this issue, the ALJ found that no action by the Commission is necessary. The Commission agrees with the ALJ.

Balloting

Balloting is the process by which customers select, or presubscribe to, a particular carrier. City Signal proposed that, within six months of the Commission issuing City Signal a license, all customers in the Grand Rapids District Exchange should receive a ballot to choose their LEC. City Signal contended that the customer inertia that benefits Ameritech Michigan should be offset by adopting a customer balloting plan similar to that adopted when the interexchange market was open to competition in the 1980s. City Signal [*124] argued that balloting may be even more important in the context of local exchange competition because the availability of alternative local exchange service providers is so new. Supported by MCI, City Signal requested that this issue at least be considered in any generic proceeding that may ensue.

The Staff, AT&T, GTE, and MECA opposed balloting for local exchange service because of potential customer confusion and cost concerns. The Staff contended that reballoting every time a new entrant is admitted to the market would further exacerbate those concerns. GTE asserted that balloting is simply a clever form of marketing whereby City Signal would use that process to garner new customers at the expense of other carriers.

Ameritech Michigan stated that balloting is not a form of interconnection or a service that is necessary to accomplish interconnection and, therefore, it has no place in this proceeding. Ameritech Michigan also agreed with the Staff and GTE that balloting is unnecessary, it causes customer confusion, and it would give City Signal a subsidized marketing device to win basic local exchange service customers without incurring any marketing cost. Ameritech Michigan [*125] pointed out that any newly licensed basic local exchange service provider has already been found to possess sufficient financial, managerial, and technical resources to provide basic local exchange service when it was issued its license. According to Ameritech Michigan, the ability to market those services to new customers is an integral part of the provision of basic local exchange service.

The ALJ found that City Signal's balloting proposal would cause customer confusion and provide City Signal with a subsidized marketing device. He also agreed with Ameritech Michigan that a newly licensed basic local exchange service provider has been found to possess sufficient financial resources to market its services to customers. The ALJ therefore recommended that City Signal's balloting proposal be rejected.

Although City Signal and MCI except to the ALJ's recommendation, the Commission finds that the ALJ properly analyzed this issue. In particular, the Commission agrees with his conclusion that balloting would cause customer confusion and provide City Signal with a subsidized marketing device. Moreover, reballoting every time a new entrant is admitted into the market would not only [*126] be very costly, it would lead to even more customer confusion. The Commission therefore rejects City Signal's proposal.

Fresh Look

City Signal stated that there are certain local exchange customers, primarily Centrex customers, that have purchased service from Ameritech Michigan under long-term contracts. According to City Signal, those customers entered into those long-term arrangements not knowing that they would have an opportunity to choose their local exchange service provider. City Signal asserted that those customers should have the opportunity to take a "fresh look" at their contracts and to change their local telephone company without incurring contract termination penalties. City Signal stated that this proposal would address contractual arrangements that currently exist between Ameritech Michigan and its local customers. City Signal clarified that it is not proposing that end-users should have a fresh look whenever a new provider enters the market.

In support of its proposal, City Signal relied on the FCC's order in CC Docket 91-131 issued June 9, 1993, in which the FCC adopted rules permitting customers to terminate term agreements with the incumbent LEC, [*127] if certain criteria applicable to expanded interconnection were met. City Signal asserted that the FCC adopted this practice in the interest of promoting competition among LECs and alternative access providers. City Signal concluded that the Commission should take similar action to promote local exchange competition.

The Staff took the position that increasing competition in the telecommunications industry should make customers aware of the risk involved in entering into long-term contracts. The Staff also expressed concerns with providing a fresh look each time a new competitor enters the market. MECA asserted that the concept of fresh look is anti-competitive in the long-run and poor public policy. GTE contended that the proposal constitutes interference with the private right of contract, thereby raising significant constitutional questions.

Like balloting, Ameritech Michigan took the position that City Signal's fresh look proposal is not an interconnection issue. Rather, Ameritech Michigan characterized it as an attempt to interfere with contractual relationships with its Centrex customers. According to Ameritech Michigan, the Commission has determined that Centrex services, [*128] with the exception of the loop portion that is regulated as basic local exchange service, are unregulated. Consequently, Ameritech Michigan argued, the rates, terms, and conditions of Centrex services, other than the loop, are not within the Commission's regulatory authority.

Furthermore, Ameritech Michigan maintained that City Signal's proposal is not analogous to the situation addressed by the FCC. Here, Ameritech Michigan pointed out, competition for business systems has been in existence for nearly two decades. According to Ameritech Michigan, every Centrex service that it has sold has been purchased by business customers that have had the opportunity to purchase an alternative service from a variety of competitive providers.

Finally, Ameritech Michigan argued that adoption of City Signal's proposal would introduce chaos into the marketplace, because each time a new basic local exchange service provider entered the marketplace, all long-term contracts would be abrogated. As a result, Ameritech Michigan concluded, no provider would be willing to offer long-term contracts, which require completion of the full term to recover all costs.

The ALJ found that no evidence was presented [*129] to support adoption of City Signal's fresh look proposal. He further found that no showing was made that the actions taken by the FCC in its interconnection order should serve as precedent for similar action by the Commission. Finally, the ALJ agreed that Commission action to abrogate long-term contracts would introduce chaos into the marketplace and constitute poor public policy. The ALJ therefore recommended that City Signal's fresh look proposal be rejected.

Although City Signal and MCI except to this recommendation, the Commission finds that City Signal's fresh look proposal should be rejected for a number of reasons. First, the Commission has serious concerns regarding the abrogation of existing contracts, especially those involving a service that is, for the most part, unregulated. Second, the Commission is persuaded that City Signal's proposal could cause chaos every time a newly licensed LEC enters the market. Although City Signal stated that it was not proposing that end-users should have a fresh look whenever a new provider enters the market, that approach would be anti-competitive and discriminatory to other newly licensed providers. Third, the Commission agrees [*130] with the Staff that, given the rapid developments in the telecommunications industry, customers should be aware of the increasing competition in the marketplace. Consequently, customers should be aware of the risk involved in entering into long-term contracts in such an environment. n15

n15 In light of the Commission's finding, Ameritech Michigan's December 1, 1994 application for leave to appeal the ALJ's ruling requiring the disclosure of the terms and conditions of Ameritech Michigan's Centrex service contracts is moot.

Tariffing of Services

In Case No. U-10064, the Commission established the regulatory status of services tariffed as of December 31, 1991, under newly enacted Act 179. As a result, the Staff submitted that the services being reviewed in this proceeding and required for local interconnection either were not tariffed at the time of the earlier proceeding or were not offered for the purpose of local interconnection.

The Staff took the position that the interconnection arrangements established in this case constitute access services under Act 179. In support of that position, the Staff relied on Section 102(a) of Act 179, which provides that:

"'Access' [*131] means the provision of access to a local exchange network for the purpose of enabling a provider to originate or terminate telecommunications service within the exchange." [MCL 484.2102(a).]

In the Staff's view, the tariffed interconnection arrangements should include use of essential facilities or services required of basic local exchange service providers that are not broadly available from other service providers and should be provided without unreasonable discrimination. The Staff stated that the end-user regulatory status of a service is not relevant to use of the service for purposes of access. Rather, the Staff argued, once these services have been proposed as components of an access arrangement, they are access services under Act 179. For example, the Staff pointed out that AT&T's interLATA directory assistance service to end-users is not a regulated service, but AT&T's interconnection with Ameritech Michigan to provide that service is regulated.

The Staff acknowledged that the availability of interconnection services from other providers was not definitively discussed in this proceeding. Although several parties agreed that most interconnection services at issue in [*132] this proceeding should be offered under tariff, a difference of opinion existed primarily because the competitive availability of all interconnection services has not as yet been explored. Consequently, the Staff proposed that if a further proceeding on these matters is conducted, information on the availability of alternative essential services should be explored further. The Commission could then deregulate any local interconnection services that it determines to be competitively offered if the public interest will continue to be protected. However, in the interim, the Staff requested that the Commission find that all local interconnection services are access services. Those services would then be tariffed specifically or, if under contract, generally tariffed and regulated pursuant to Section 310 of Act 179. Finally, the Staff proposed that if additional LECs are licensed to provide basic local exchange service while permanent interconnection arrangements are still pending, the rates, terms, and conditions of the transitional arrangements established in this case should be available to those LECs.

Ameritech Michigan argued that the Staff's proposal presents a subject that [*133] is outside the scope of this case, is premised on an unreasonable interpretation of Act 179, and calls for an unprecedented and unlawful expansion of the Commission's authority over services that were expressly deregulated by Act 179 and subsequently acknowledged as unregulated services in the Commission's December 22, 1992 order in Case No. U-10064. Ameritech Michigan asserted that no evidence was presented by any party on the regulatory status or treatment of these services under Act 179 other than in response to the Staff's discovery requests. The company further asserted that, pursuant to Section 401(2) of Act 179, the Commission does not have any authority over the provision of many of these services beyond the non-discrimination prohibition in Section 305(i) of Act 179.

Ameritech Michigan also stated that none of the services in question matches the definition of access in Section 102 of Act 179, and a request for those services by another competing basic local exchange provider does not change that. The company pointed out that, indeed, many of those services are expressly identified by Act 179 as services distinct from access, such as directory assistance, TRS, and 9-1-1. [*134]

The ALJ was persuaded that the record in this case was not sufficient to merit adoption or rejection of the Staff's proposal. Instead, he concluded that the issue needs to be addressed to a greater degree to permit a properly considered decision. The ALJ therefore recommended that the Commission defer consideration of this matter to a subsequent proceeding.

The Staff excepts to the ALJ's recommendation, arguing that a decision is necessary at this time. The Staff argues that delaying a decision on this matter until the subsequent proceeding may result in discrimination in the interconnection arrangements provided to other newly licensed LECs or require the filing and resolution of separate interconnection cases for each provider licensed during the transitional period. AT&T supports the Staff's position.

In response, Ameritech Michigan reiterates the arguments presented in its briefs. The company adds that tariffing these services would completely eliminate negotiated, mutually agreeable, contractual arrangements among competing providers. According to Ameritech Michigan, that result directly contradicts the clear intent of Section 303(2) of Act 179, which encourages negotiated [*135] arrangements between interconnecting providers. In fact, Ameritech Michigan asserts, tariffing these services could stifle the very form of business relationships that are the hallmark of full and effective competitive markets. Moreover, Ameritech Michigan continues, tariffing these services would inappropriately put the Commission in a position to regulate the provision of these services between LECs, which is something that the Commission has never done over the several decades that such services have been provided under mutually agreeable contracts between Ameritech Michigan and the other LECs. Ameritech Michigan concludes that there is nothing in the record in this proceeding or in Act 179 that supports the Staff's position that any and all services should be tariffed as access when sold to a competing LEC.

Although the Commission agrees with the ALJ that this issue needs to be addressed in more depth, a preliminary decision regarding the status of the services at issue must be made at this time to ensure that other newly licensed LECs are treated in a nondiscriminatory manner. Contrary to Ameritech Michigan's characterization, the interconnection arrangements include essential [*136] services that can only be obtained from Ameritech Michigan. Thus, it is critical that they be tariffed and subject to Commission regulation until it can be shown that they should be reclassified as competitive services. The Commission therefore finds that, on a transitional basis, the interconnection arrangements established in this order are access services.

Because the interconnection arrangements established in this order are between Ameritech Michigan and City Signal, the Commission finds that a contract that embodies those arrangements is permissible. Pursuant to Section 202(c) of Act 179 and the Commission's December 22, 1992 order in Case No. U-10064, if a contract is used, a summary of the services included in the contract, the term of the contract, and the prices in the contract must be included in the intrastate access tariff. If additional telecommunications providers are licensed to provide basic local exchange service while permanent interconnection arrangements are being finalized, the terms and rates of the transitional interconnection arrangements will be available to those newly licensed LECs. This will eliminate the need for the filing and resolution of separate [*137] interconnection cases for each provider licensed during the transitional period.

In making this determination, the Commission rejects Ameritech Michigan's argument that this is an unlawful expansion of the Commission's authority over services that were specifically determined to be unregulated in Case No. U-10064. The fact that services were deemed unregulated because they were provided to end-users does not lead to the conclusion that they are unregulated for all purposes. To the contrary, the Commission agrees with the Staff that, when those services are used as components of an access arrangement, they are access services under Act 179. As discussed earlier in this order, this conclusion is consistent with the Commission's November 23, 1994 order in this case.

The Commission also rejects Ameritech Michigan's argument that tariffing these access services would eliminate negotiated contractual arrangements among competing providers because that argument misses the point. Section 310(8) of Act 179 provides that:

"A provider of access, whether under tariff or contract, shall offer such services under the same rates, terms and conditions, without unreasonable discrimination, [*138] to all providers and customers." [MCL 484.2310(8).]

Thus, once interconnection arrangements, which are access services, have been either negotiated by the parties or established by the Commission, subsequent interconnection arrangements cannot unreasonably discriminate against a new provider.

In conclusion, the Commission emphasizes that its determination regarding the regulatory status of the interconnection arrangements established in this order will be reevaluated in a generic proceeding. During that proceeding, additional information on this issue will be explored, and the Commission can deregulate any interconnection service it determines is competitively offered.

Generic Proceeding

The Staff took the position that, because of the numerous complex issues that had to be addressed under the time constraints of Act 179, the interconnection arrangements adopted by the Commission should be transitional. The Staff proposed that the Commission initiate a subsequent proceeding to establish more permanent interconnection arrangements as well as to explore other related issues. The Staff stated that the issues to be addressed in more detail include further unbundling, alternative [*139] number portability solutions, alignment of other rates with local access rates, tariffing of local access contracts with MECA companies, imputation and resale, all as more fully set forth on Exhibit S-95. The Staff proposed that the generic proceeding begin on June 1, 1995 and be completed consistent with Commission guidelines. This would allow for the transitional arrangements established in this case to remain in effect for approximately one year.

City Signal supported the Staff's proposal as long as the Commission's order in this case resolves all of the issues necessary to enable City Signal to offer a truly competitive alternative to Ameritech Michigan as soon as City Signal commences operations. Toward that end, City Signal stated that the crucial issues of unbundling, mutual compensation, and number portability must be resolved. City Signal further stated that the experience it gains from competing in the Grand Rapids District Exchange will prove valuable in examining the issues to be addressed in a generic proceeding. City Signal also agreed with the Staff's presentation of the issues to be addressed in such a proceeding, but also proposed to include consideration of [*140] a long-term resolution of the directory data base and fresh look issues.

Teleport and AT&T also supported the Staff's proposal. AT&T recommended that the proceeding address issues that are key to local exchange competition, including the following: the full extent of network unbundling; the non-discriminatory pricing of interconnection to those unbundled components; non-discriminatory, tariffed compensation arrangements applicable to all call types and all classes of providers; number portability; data base access; arrangements for the provision of related local services, such as directory listings, 9-1-1, and relay services; unrestricted resale; access pricing; and imputation.

MCI also supported the Staff's proposal, but argued that the proceeding could begin before June 1, 1995. MCI also referenced four specific areas it believes merit special attention in a follow-up proceeding. The first area is identifying and removing support for universal service from its present hidden position inside incumbent LEC rate structures, and placing it into an independent fund that is "competitively neutral" both in how it is funded and how funds are distributed from it. The other areas are [*141] true number portability, further unbundling, and the elimination of protectionism for incumbent LECs while ensuring the establishment of non-discriminatory access to bottleneck facilities.

Ameritech Michigan also supported a generic proceeding. The company argued that it is essential that the Commission carefully address public policy issues relating to local competition, such as universal service, carrier-of-last-resort obligations, infrastructure, and technological convergence.

MECA asserted that the Staff's proposal for a generic proceeding should be rejected because it does not meet the requirements of Act 179. MECA stated that any proceeding beyond this one would violate the 210-day requirement of Section 203(4) of Act 179. Moreover, MECA argued that there is no need for a future case unless a dispute arises that cannot be resolved through negotiation.

The ALJ was persuaded that the Staff's proposal for a subsequent proceeding has merit and should be adopted. He disagreed with MECA that such a proceeding would circumvent the 210-day requirement of Act 179 because there is nothing in Act 179 that prohibits the Commission from conducting a comprehensive review of the interconnection [*142] arrangements established in this case. Additionally, the ALJ rejected MCI's recommendation to commence this proceeding prior to June 1, 1995. The ALJ found that the additional time will be beneficial because it will give all of the parties time to carefully consider the Commission's order in this case and to prepare for a subsequent proceeding. He also found that it will allow for the gathering of additional data from City Signal's experience in basic local exchange competition with Ameritech Michigan.

The Commission finds that the ALJ properly concluded that a subsequent proceeding is needed to provide a broader forum for consideration of the many interconnection issues that are generic to basic local exchange competition. As the ALJ correctly noted, while the record is sufficient to support an order in this case that provides for a transitional interconnection arrangement, this proceeding garnered the participation of a large and diverse number of parties who jointly raised a large number of complex issues. As a result, a subsequent proceeding should be commenced to further explore many of those issues on a permanent basis. In doing so, the Commission rejects MECA's contention [*143] that a subsequent proceeding would violate the 210-day requirement of Act 179. Today's order in this case constitutes a final order for purposes of Section 203(4) of Act 179.

This case highlighted the difficulties of numerous parties litigating complex issues within narrow time constraints. The Commission agrees with the ALJ that more time is necessary to allow the parties to give careful consideration to this order as well as to gather additional information based on City Signal's experience. Furthermore, completion of the generic proceeding within nine months of June 1, 1995 is appropriate and within the Commission's guideline for the completion of cases.

Additionally, contrary to MECA's assertion, conducting a generic proceeding will be a better use of the Commission's and the parties' resources than litigating interconnection arrangements every time a newly licensed LEC seeks those arrangements. Based on the conduct of this case, it appears unlikely that future interconnection arrangements will be established solely through negotiation between the parties. The Commission therefore rejects MECA's contention that there is no need for a future case unless there is a dispute [*144] in the future that cannot be resolved by negotiations.

The Commission also rejects MCI's proposal to begin the generic proceeding prior to June 1, 1995. Contrary to MCI's contention, the time between issuance of this order and commencement of the generic proceeding can be used by the parties to begin informal discussions in an effort to narrow the issues as well as to coordinate their participation in that proceeding.

Having found that a generic proceeding should be commenced, the Commission directs that the scope of the proceeding must be limited to those issues that can be adequately considered and resolved in the context of a nine-month proceeding. This must necessarily exclude the issues raised by Ameritech Michigan and MCI. As formulated by Ameritech Michigan, most of its issues are so broad and vague that they are not capable of being resolved in such a proceeding. For example, Ameritech Michigan posits the question, "[i]s regulatory involvement necessary or appropriate in disaster recovery, redundancy, network testing, or other quality of service issues impacted by local competition?" (9 Tr. 1611.) Among other things, it is unclear what disaster recovery has to do with [*145] the establishment of permanent interconnection arrangements in a competitive basic local exchange service market. In addition, MCI's proposed issues, such as universal service and elimination of protectionism for incumbent LECs, are beyond the scope of such a proceeding.

In contrast, the Staff's proposed issues are clear, concise, and directly relevant to establishing permanent interconnection arrangements. Accordingly, the Commission finds that the scope of the generic proceeding shall be limited to the following issues:

A. Local Interconnection

1. Unbundling

a. What is the appropriate long-term pricing for an unbundled loop, including consideration of the types of loops and zone pricing?

b. What further unbundling of the remaining local network is required at this time and what are the appropriate prices for those unbundled services?

c. What process should be followed in the future to address additional requests for unbundling? Should procedures differ between large and small LECs?

2. Mutual Compensation

a. What is the appropriate long-term structure and pricing for local access services including Feature Group A and other jointly provided services?
[*146]

b. Is "bill-and-keep" appropriate under any circumstances?

c. Which services are new and which services that are already offered to other customers/providers would be used for local interconnection as well? If existing services are needed, is there justification for pricing the same service differently for different users?

3. Number Portability

a. What are the short-term and long-term alternatives for number portability?

b. What is the appropriate pricing for the short-term number portability alternatives?

c. How should long-term number portability options be implemented? National basis, regional basis, or state basis?

4. What are the appropriate arrangements for industry data base access and white page listings between LECs?

5. What 9-1-1 and relay interconnection issues, if any, need to be addressed?

6. Should local interconnection services be available to any customer or provider?

B. Other Tariff Restructuring

1. Should MECA interconnection contracts be tariffed? Should MECA interconnection parameters and competitive LEC local interconnection tariffs be aligned? If so, how and when?

2. Should toll access tariffs and any other similar offerings [*147] be aligned with competitive LEC local interconnection tariffs? If so, how and when? Can toll access prices, based on the FCC's fully allocated cost methodologies, be reconciled with the intrastate costing requirements specified in Act 179 and Case No. U-10620?

3. Do the imputation requirements of Section 311 of Act 179 require the pricing of other services to be altered?

4. Due to the tariffing of local interconnection arrangements, must resale restrictions remaining in existing tariffs be altered in order to comply with Section 311 (3) of Act 179?

5. Are transitions to new prices for other services appropriate? In what context should these proposals be considered?

To facilitate the completion of the generic proceeding in an orderly and timely manner, the Commission adopts the following schedule:

June 1, 1995	- Newspaper Notice
June 15, 1995	- Prehearing Conference
July 24, 1995	- File Direct Testimony
September 8, 1995	- File Rebuttal Testimony
September 25- October 3, 1995	- Cross-examination of Direct and Rebuttal Testimony
October 27, 1995	- Briefs
November 6, 1995	- Reply Briefs
December 18, 1995	- Proposal for Decision
January 8, 1996	- Exceptions
January 19, 1996	- Replies to Exceptions
March 1, 1996	- Commission order

[*148]
All licensed LECs should coordinate, and share the cost of, publishing notice of the generic proceeding in newspapers of general circulation.

As alluded to earlier, the Commission encourages the parties to begin informal discussions in an effort to further narrow the foregoing issues. The Commission also encourages parties with similar positions to coordinate the presentation of their witnesses, thereby minimizing redundant testimony and arguments.

III.

CONCLUSION

In granting City Signal a license to provide basic local exchange service, the Commission recognized that the time has come for competition in the local exchange market. As a result, the granting of that license represented the next logical step in the transition to a more fully competitive telecommunications market. Similarly, today's order represents a significant step toward establishing interconnection arrangements between competing LECs and, consequently, a framework for competition in the basic local exchange service market. In making the transition to competition, the Commission believes that the transitional interconnection arrangements established in this order will not result in competitive handicapping, [*149] cream skimming, or subsidization, as feared by some of the parties. Rather, those arrangements are a step toward the development of a network that will be open and accessible to all competitors on the same basis. Although the Commission again emphasizes that many of the issues addressed in this order will be explored further in the generic proceeding, the guiding principle in developing permanent interconnection arrangements must be the recognition that all licensed providers of basic local exchange service have equal status as competitors in the local exchange market.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, R 460.17101 et seq.

b. Physical interconnection arrangements between City Signal and Ameritech Michigan should be on the same terms and conditions as interconnection arrangements between Ameritech Michigan and adjacent LECs.

c. Mutual compensation, unbundling, and number portability are necessary to effective competition and, therefore, they are an integral part of the interconnection arrangements between City Signal and [*150] Ameritech Michigan.

d. The Staff's proposal for mutual compensation, as modified by this order, represents a reasonable middle ground and, therefore, it should be adopted on a transitional basis.

e. City Signal's proposal for the pricing of unbundled loops and the Staff's analysis of that proposal are reasonable and, therefore, they should be adopted on a transitional basis.

f. The use of DID and RCF to effect number portability on an interim basis is appropriate.

g. Ameritech Michigan should make DID and RCF available to City Signal at their incremental cost, as calculated by MCI, during the transitional period.

h. Ameritech Michigan should offer directory listings to City Signal on the same rates, terms, and conditions as it offers that service to other LECs.

i. City Signal's balloting and fresh look proposals are not in the public interest and, therefore, they should be rejected.

j. The transitional interconnection arrangements established in this order should be tariffed generally as access services. If additional telecommunications providers are licensed to provide basic local exchange service while permanent interconnection arrangements are being finalized, the [*151] rates, terms, and conditions of the transitional interconnection arrangements established in this order should be available to those newly licensed providers.

k. A generic proceeding should be initiated to address, on a permanent basis, the issues set forth on pages 89-91 of this order.

l. Any exceptions or arguments inconsistent with this order and not specifically addressed or determined are rejected.

THEREFORE, IT IS ORDERED that:

A. Physical interconnection between City Signal, Inc., and Ameritech Michigan shall be on the same terms and conditions as interconnection between Ameritech Michigan and adjacent local exchange carriers, as more fully described in this order.

B. The Commission Staff's proposal for mutual compensation, as modified by this order and described on pages 28-29 of this order, is adopted on a transitional basis.

C. Ameritech Michigan shall unbundle its local loops.

D. On a transitional basis, the pricing of unbundled local loops shall be $ 8 per month per business line and $ 11 per month per residential line, consistent with the Commission's finding relative to the federal end-user common line surcharge set forth on page 57 of this order.

E. [*152] As an interim solution to number portability, Ameritech Michigan shall make available to City Signal, Inc., direct inward dialing and remote call forwarding at rates set at their incremental cost, as described on page 67 of this order.

F. Ameritech Michigan shall offer directory listings to City Signal, Inc., on the same rates, terms, and conditions as it offers that service to other local exchange carriers.

G. City Signal, Inc.'s balloting and fresh look proposals are rejected.

H. The transitional interconnection arrangements established in this order shall be tariffed generally as access services and filed no later than 30 days after issuance of this order. If additional telecommunications providers are licensed to provide basic local exchange service while permanent interconnection arrangements are being finalized, the rates, terms, and conditions of the transitional interconnection arrangements established in this order shall be available to those newly licensed providers.

I. A generic proceeding shall be initiated to address, on a permanent basis, the issues delineated on pages 89-91 of this order. The schedule for that proceeding, as set forth on page 91 of this order, [*153] is adopted.

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

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

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1. Staff's Proposed Rule

Section XXX.5 Applicability

a) This Part shall apply to any telecommunications carrier, as defined in Section 13-202 of the Public Utilities Act ("Act") (Ill. Rev. Stat. 1991, ch. 111 2/3, par. 13-202, as amended by P.A. 87-856, effective May 14, 1992) [220 ILCS 5/13-202] providing local exchange telecommunications service as defined in Section 13-204 of the Act or interexchange telecommunications service as defined in Section 13-205 of the Act. In addition, this Part shall apply to any entity certificated by the Illinois Commerce Commission ("Commission") under Section 13-403 or Section 13-405 of the Act.

b) This Part shall not apply to any telecommunications carrier that is subject to 83 Ill. Adm. Code 760, "Cellular Radio Exclusion."

2. Positions of the [*6] Parties

Illinois Bell and GTE both suggested changes to this section of the proposed rules that, in effect, exempt these two companies from the rules until they are permitted to enter the interMSA long distance business. To support its argument that interMSA relief must be tied to presubscription, Illinois Bell states that the Staff-proposed rule, without the tie it advocates, is unbalanced, asymmetric and asynchronous.

Illinois Bell and GTE asserted that this was so because those two firms are precluded from competing effectively in the interMSA market due to provisions in their respective consent decrees with the U. S. Department of Justice ("Justice"). The restrictions to which they refer prohibit each from competing in the interMSA market, although to different degrees. These restrictions, coupled with a study that seems to indicate a tendency of consumers to one-stop shop, are cited by these two companies as the reason they cannot compete effectively in the intraMSA market without the ability to also offer interMSA services. Both GTE and Illinois Bell provided studies that inferred the existence of a desire of customers to obtain services from a single provider.

Additionally, [*7] Illinois Bell stated that it expected to experience losses in the residential market that mirrored its losses in the WATS and 800 markets when those two markets were opened to competition. It stated that it would not be able to meet its investment commitments nor make any additional investments in the state's infrastructure if it suffered these types of revenue losses. Finally, it stated that regulatory constraints only on firms such as Illinois Bell would prevent it from raising rates to recover lost revenue, causing it not to meet its investment commitments.

GTE contends that the record supports a conclusion that intraMSA presubscription will provide only marginal net benefits to consumers. It contends that the only cost-benefit analysis on this issue was performed by its witnesses Mr. Perry and Dr. Tardiff and that those studies showed that customers would benefit only in the range of 14~ to 27~ per customer per month.

GTE points out that it is regulated under traditional rate of return rules. Accordingly, it asserts that loss of GTE market share in intraMSA toll will require its basic service rates to be higher than would otherwise be necessary in order to earn its allowable [*8] rate of return. In its Brief on

Exceptions GTE maintains that the Proposed Orders, which reject linkage, raise serious concerns under the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 2 & 15 of the Illinois Constitution, which proscribe confiscation of GTE's property without just compensation.

GTE also challenges the notion that intraMSA presubscription will provide customer benefits through increased competition. According to GTE, AT&T and other IXCs have raised their toll rates several times in the past eighteen months. It asserts that, although IXCs may provide discounted toll services to large users, residential and small business customers are not the beneficiaries of this discounting and in fact are paying higher rates.

Finally, GTE contends that 10XXX dialing permits IXCs to provide the same quality of service as LECs. There also is evidence in the record which shows that IXCs encourage their business customers to use auto-dialers and other devices to eliminate any alleged perception of inconvenience associated with dialing five extra digits. According to GTE, AT&T's recent promotional effort in the residential and [*9] small business segment has resulted in a dramatic increase in the 10XXX traffic AT&T receives. Even though the IXCs' portion of the total intraMSA business may be small, GTE contends that they are clearly able to provide quality service and to make competitive inroads using 10XXX access code dialing.

Staff asserted its belief that this section of the rule, as originally written, should be adopted, and that the Commission should proceed to implement this rule without waiting for Illinois Bell and GTE to obtain relief from their respective consent decrees. Staff cited the consumer benefits it expected to flow from implementation of intraMSA presubscription, including greater consumer choice, lower prices, and innovative products and services in its list of expected consumer benefits. Staff noted that if the Commission were to wait for all of the issues suggested by GTE and Illinois Bell, then competition and its benefits to consumers would be further delayed. Staff also criticized the studies presented by these companies as the types of surveys that were not very reliable in predicting consumer behavior.

MCI characterized the tie of application of these rules to interMSA relief [*10] for Illinois Bell and GTE as illogical and beyond the scope of this proceeding. AT&T, Sprint and LDDS agreed with the MCI position. MCI supported its belief that the tie was illogical by stating that the correct prerequisites for Illinois Bell and GTE interMSA relief are found in those parties' respective consent decrees. Along with AT&T and Sprint, it further argued that the Consent Decrees entered into between Justice and GTE as well as Illinois Bell, both of which were subsequently approved by U.S. District Court Judge Harold Greene, were entered voluntarily by GTE and Illinois Bell.

MCI cited Sprint as a company that was, and continues to be, an interMSA/interLATA long distance provider; that was purchased by GTE after its consent decree; and that was subsequently sold to United Telephone Company. Therefore, MCI argues, GTE is free to provide long distance service today, albeit through a separate subsidiary. MCI presented evidence showing that GTE actually provides such service today in a number of states through a separate subsidiary.

In answer to the one-stop shopping argument raised by Illinois Bell and GTE, AT&T and MCI both stated their belief that no vendor will be [*11] capable of providing services immediately in all three jurisdictions - local, intraMSA toll and interMSA toll -- for all customers. AT&T additionally noted many advantages of the incumbent LEC that, according to AT&T, make the LEC a formidable contender in the intraMSA toll market. These advantages were listed as 1) being the sole dial tone provider, 2) being the first point of contact for customers new to an area, 3) being providers of repair service to customers and 4) beginning the intraMSA equal access process with 100% of the customers. MCI opined that this last attribute allows the LEC to benefit from customer inertia - the propensity of a customer to stay with his current provider of service.

MCI shared its belief that market losses in a competitive environment should not be allowed to be recovered from increases in the bottleneck monopoly service ratepayers' rates. MCI claimed that Illinois Bell's potential losses of revenue in the intraMSA toll market under presubscription depends in part on the competitive actions and reactions of Illinois Bell, noting that if it does nothing to promote and/or price its services competitively, it deserves to fail. MCI alleges that [*12] even if Illinois Bell were to suffer the losses it claims, the only regulatory principle that keeps Illinois Bell from raising rates was entered voluntarily by virtue of the fact that Illinois Bell filed for an alternative form of regulation with the full knowledge that its residential local rates would be frozen. Finally, MCI stated that any reasonable business would react to competitive threats by investing in the infrastructure that allows it to compete successfully.

As to the need for increasing the competition in the interMSA market, MCI alleges that the competition among the IXCs alone is more fierce and rivalrous than anything GTE has ever experienced. MCI asserts that GTE North's entry into the interMSA market will cause negligible, if any, increase in competition if GTE sets rates consistent with Illinois' imputation standard and does not leverage the monopoly power it has in the local exchange market to compete unfairly in the interexchange market.

ICTC maintained that the rule should not be implemented in MSA 8 unless the Primary Toll Carrier ("PTC") plan is simultaneously terminated and other regulatory issues are considered and resolved, including toll rate deaveraging, [*13] obligation to serve and carrier-of-last-resort. It cites language in the Commission's Order in Docket 88-0091 in support of that proposition:

The Commission's conclusion that current dialing arrangements be maintained is supported by evidence which demonstrates that changes in dialing arrangements can not be implemented in isolation. The record indicates that changes in dialing arrangements may require corresponding adjustments in a variety of interrelated regulatory policies, such as the PTC system, inter-company compensation arrangements, MSA-wide rate averaging, the obligation to serve, and carrier of last resort designations. The record further indicates that absent such adjustments, implementation of intraMSA equal access could cause unintended adverse impacts on consumers and carriers alike. Finally, the record contains evidence that such policy adjustments could themselves have potentially disruptive effects on the provision of local telephone service in Illinois.

3. Conclusion

The linkage issue was discussed extensively in the context of our Order in Docket 94-0096, and we incorporate by reference the evidence and arguments of the parties, and our conclusions in that [*14] docket, regarding this matter.

In summary, the Commission concludes that Illinois Bell and GTE have not provided sufficient reasons for the Commission to delay implementation of intraMSA presubscription. Illinois Bell, in its "Customers First" tariff application, claims that intraMSA presubscription is in the public interest and is a logical step in opening its markets to competition. Similarly, even GTE, in its consumer study presented in this docket, found that Illinois consumers expect to gain benefits from being able to choose an intraMSA toll provider. We agree. We do not, however, find that it is necessary to grant Illinois Bell and GTE protection from further competition until such time as it obtains relief from its decree restrictions. To do so would indefinitely deny consumers the benefits that we believe intraMSA presubscription and its accompanying competition will bring to all Illinois consumers.

We also note that we find the arguments of GTE regarding linkage to be particularly disingenuous. GTE's interLATA restriction is based on a consent decree entered with Justice as a condition of being allowed to acquire Sprint. GTE has divested itself of that holding for [*15] some years now. It would appear to have a good argument for modification or removal of the restriction. Nevertheless, GTE's witnesses were unaware of any such GTE request in the past, and were also unaware of any plans to make a request. Under the circumstances, adopting GTE's linkage argument and delaying implementation of presubscription would amount to providing GTE with an "option" on the implementation of Commission policies intended to provide public benefit by enhancing competition. This the Commission cannot tolerate.

We also do not find ICTC's arguments persuasive. The language in Docket 88-0091 identified issues potentially implicated by a change in dialing arrangements. It did not state, and it is not the Commission's intention, that a complete resolution of all of these issues is a prerequisite to a change in dialing arrangements. Elsewhere, we determine to open a proceeding to address issues related to elimination of PTC arrangements, including toll rate deaveraging. We also intend to open dockets concerning universal service and carrier of last resort. It is quite possible that the issues ICTC refers to will be sufficiently resolved before implementation [*16] of the rule.

B. Section XXX.10 Definitions

1. Staff's Proposed Rule

Section XXX.10 Definitions

"Bona fide request" is a written request submitted to a local exchange carrier ("LEC") by an interexchange carrier ("IXC"), in which the IXC requests that the LEC provide presubscription consistent with this Part to customers within an exchange(s) and states that it intends to offer intra-Market Service Area ("MSA") usage services utilizing presubscription to customers in the exchange(s) within six months after the bona fide request, or within one year after the effective date of this Part, whichever is later.

"Customer" means a subscriber to a LEC switched network access service, either a bundled network access line or trunk or an unbundled port.

"Equal access" has the meaning given it in Appendix B of the Modification of Final Judgment ("MFJ") entered by the United States District Court on August 24, 1982 in United States v. Western Electric, Civil Action No. 82-0192 (D.D.C. 1982), as amended by the court in its orders issued prior to the effective date of this Part.

"Equal access exchange" means an exchange in which the LEC has complied with and implemented federal equal [*17] access requirements. "Incumbent local exchange carrier" or "incumbent LEC" means a LEC that provided facilities-based local exchange telecommunications services within an exchange as of December 31, 1993.

"Interexchange carrier" or "IXC" means a telecommunications carrier under the Act that provides interexchange telecommunications services as defined in Section 13-205 of the Act. A telecommunications carrier is both an IXC and a LEC if it provides both interexchange and facilities-based local exchange telecommunications services.

"Local exchange carrier" or "LEC" means a telecommunications carrier under the Act that provides facilities-based local exchange telecommunications services. A telecommunications carrier is both an IXC and a LEC if it provides both interexchange and facilities-based local exchange telecommunications services.

"Modified 1-PIC" is a presubscription method in which a customer's interMSA calls are carried by an IXC of the customer's choice and its intraMSA presubscription calls are carried, at the customer's choice, by either the LEC (or a primary toll carrier ("PTC")) or by the IXC chosen to carry interMSA calls, without the use of access codes.

"New [*18] local exchange carrier" or "new LEC" means a LEC that did not provide facilities-based local exchange telecommunications services within a specified geographic area as of December 31, 1993.

"Presubscription" is a procedure by which a customer can predesignate one or more IXCs to access for its presubscribed switched intraMSA and interMSA calls, without dialing an access code.

"Primary interexchange carrier" or "PIC" means a presubscribed IXC that carries presubscribed calls, without the use of access codes, for a customer following equal access or presubscription implementation.

"Primary toll carrier" or "PTC" means the carrier that was made responsible for intraMSA toll rates, intraMSA compensation, and coordination of the intraMSA toll network by the Sixteenth Interim Order, July 2, 1985, and the Twenty-Fifth Interim Order, July 23, 1986, in Commission Docket 83-0142.

"1-PIC" is a presubscription method in which a customer's presubscribed calls are carried by the IXC of the customer's choice, without the use of access codes.

"2-PIC" is a presubscription method in which a customer's interMSA calls are carried by an IXC of the customer's choice and its intraMSA presubscribed [*19] calls are carried, at the customer's choice, by the LEC (or a PTC), by the IXC chosen to carry interMSA calls, or by another IXC, without the use of access codes.

2. Positions of the Parties

There was minor disagreement with the Staff's definitions. Illinois Bell proposed several non-substantive changes that clarify the definitions of "bona fide request" "new LEC," and "equal access exchange." Additionally Illinois Bell suggests several additions to the definitions of "presubscription" and "PIC."

AT&T recommended the following three definitions of "Local Service", "Non-presubscribed Calls", and "Presubscribed Calls":

"Local service" means usage for calls originated and terminated within the serving wire center of the LEC providing dial tone to the caller. This usage may also be tariffed in combination with access to the telephone network.

"Non-presubscribed calls" refers to calls which will not be subject to intraMSA equal access and includes calling for: directory assistance (411), repair service (611), emergency assistance (911), operator services using (0-), and pay-per -call services (976).

"Presubscribed calls" refers to calls subject to equal access including: (a) [*20] outbound calls in every exchange which are originated over switched access for which timed usage charges apply, to both business and residential customers, according to the applicable tariff or the LEC providing local service to customers on the effective date of these rules, (b) calls dialed "0+", and (c) those calls which the Commission determines in any individual exchange, following the procedures set forth in Section XXX.120, should be provided on a presubscribed basis.

AT&T maintained that clear definitions for use in the rule which reflect the nature of the call by its physical routing would not be dependent upon current definition of local calling areas. AT&T further stated that these definitions would differentiate what traffic could be subject to a waiver request and would spell out in the rule which types of calls are potentially subject to the benefits of competition via presubscription.

IITA vigorously opposed AT&T's proposed changes, stating that it was far too confining in its definition of local service and was an obvious attempt by AT&T to maximize the market available to it. Staff also objected to the inclusion of these definitions on the basis of disparate use [*21] of the term "local calling area".

3. Conclusion

The Commission adopts the Staff's definitions with the changes to "new LEC," and "equal access exchange" suggested by Illinois Bell. The addition of the words "LEC and/or" to the definition of "presubscription" is redundant and adds nothing to the understanding and meaning in the text. The Commission will not make these changes.

We will not adopt the changes suggested by AT&T for the reasons expressed by Staff and IITA.

C. Section XXX.100 Obligation to Provide Presubscription

1. Staff's Proposed Rule.

Section XXX.100 Obligation to Provide Presubscription

a) Each LEC shall provide presubscription consistent with this Part upon the LEC's own initiative or upon a bona fide request, using the 2-PIC method.

b) Each LEC providing presubscription within an exchange(s) using the 1-PIC method as of December 31, 1993 is exempted from the requirements of this Part as long as it continues to provide 1-PIC presubscription.

c) Presubscription shall be provided consistent with this part and in accordance with the Federal Communications Commission's ("FCC") Memorandum Opinion and Orders in CC Docket No. 83 -1145, Phase I.

2. Positions [*22] of the Parties.

There are three types of intraMSA presubscription arrangements which were discussed in this Docket. The three options are:

The 1-PIC arrangement, where all of the customer's "non-local" n1 calls are carried by the IXC of the customer's choice without the use of an access code;

The 2-PIC method, where a customer makes two different choices, one for interMSA calls and one for non-local intraMSA calls. The non-local intraMSA calls are carried, at the customers choice, by the LEC (or PTC), by the IXC chosen to carry interMSA calls or by another IXC, without the use of an access code; and

The Modified 1-PIC arrangement (also called modified 2 -PIC), where the customer selects either a single IXC to carry both the interMSA and non-local intraMSA calls, or the customer maintains the status quo where the LEC (or PTC) carries intraMSA calls and the IXC carries interMSA calls.

n1 Staff objects to the use of the term "local calling area" and prefers the term "calls not subject to presubscription." We believe its concern is largely one of semantics and the former term aids understanding as we initiate presubscription. Accordingly, we will use these terms interchangeably. [*23]

Under each of the arrangements, certain calls will continue to be carried by the LEC as they are today. These calls are referred to as "local" calls or "calls not subject to presubscription".

Staff argued that it considered costs, customer choice, and potential effects on LECs in recommending the type of presubscription to be implemented. It asserted that while a 1-PIC method has the surface appeal of eliminating MSA boundaries in Illinois, it also appears to be less expensive than other options. However, Staff rejected the 1-PIC method partly because it would not allow current dialing arrangements to be maintained, in particular, the use of the PTC for non-local intraMSA calling. Staff raised the concern that if customers are forced to switch from the status quo, the current disparity between PTC and short-haul IXC rates could mean automatic rate increases unless IXCs respond with immediate rate reductions.

Staff's proposed rule implicitly allows use of the 1-PIC method only by Moultrie Independent Telephone Company, which chose not to enter into a PTC agreement and has been allowing its customers to access IXCs for all interexchange calls through what is essentially a 1-PIC [*24] arrangement.

Under the prescription rule as originally proposed by Staff, Illinois LECs would have been permitted to implement intraMSA presubscription using either the Modified 1-PIC method or the 2-PIC method. In its surrebuttal testimony, Staff determined that the 2-PIC method is preferable for several reasons: (1) the cost factor is less than originally thought because, for some companies, the cost difference may not exist (e.g., Centel); (2) the cost difference may be less than originally estimated for Illinois Bell and, in any event, is extremely small when put on a per-minute of use basis; (3) the implementation time differences are not as significant as initially believed; (4) the modified 1-PIC approach limits customer choice relative to the 2-PIC method; and (5) LECs which are not the PTC could not compete for presubscribed intraMSA traffic, even for their own local exchange customers.

Staff asserted that the only carriers that a customer could choose to provide intraMSA presubscribed traffic would be the IXC chosen for presubscribed interMSA service and the company identified in the past as the PTC for that customer's exchange. Thus, contrary to Staff's recommendation [*25] that PTC arrangements be replaced upon implementation of intraMSA presubscription, the modified 1-PIC method would perpetuate the PTC structure in Illinois indefinitely. Staff also noted a national trend to choose the 2-PIC approach. Based on these factors, Staff determined that the presubscription rule should adopt the 2-PIC method as the presubscription method of choice and allow waivers using the modified 1-PIC method only upon a LEC showing that the 2-PIC method is not economically or technically feasible.

According to the Staff proposal, a LEC can seek a waiver pursuant to Section XXX.130(a) from the 2-PIC requirement if it can demonstrate that the 2-PIC method is not technically feasible or that the costs of 2-PIC implementation are expected to exceed the anticipated benefits substantially, in which case the Modified 1-PIC method would be permitted.

Staff proposed that its presubscription rule apply to all incumbent LECs regardless of size, and to new LECs consistent with the market principle that regulatory requirements should not differ among carriers in general. While MFS took the position that the rule should apply to incumbent LECs only, MFS stated that it will offer [*26] its customers the ability to presubscribe to multiple IXCs in order to meet market demand. No other potential market entrant opposed presubscription requirements.

Illinois Bell stated a preference for modified 1-PIC and supported the original Staff proposal. It claims to be in the process of implementing modified 2-PIC in all of its Illinois switches as part of its Customer First Filing. It claims that it will realize substantial savings if it is allowed to implement modified 1-PIC instead of 2-PIC. Illinois Bell's witness testified that the cost of implementing the Modified 1-PIC solution exceeds $ 2 million, while the cost of implementing the 2-PIC solution is almost $ 10 million. n2 He explained that these substantial cost savings are possible in Illinois Bell's case because Modified 1-PIC will be implemented by means of switch translation modifications rather than by means of vendor software upgrades.

n2 Illinois Bell originally claimed proprietary treatment for its cost for intraMSA presubscription implementation. In its Initial Brief, MCI attempted to preserve the confidentiality of the total cost data by using comparative ratios. Unfortunately, the ratios disclosed enough information to make it possible to solve for the approximately total cost figures algebraicly. Illinois Bell subsequently submitted a draft order which included the data without a proprietary designation. The Commission concludes that Illinois Bell has waived proprietary treatment of the information. [*27]

Illinois Bell also explained that Modified 1-PIC is much quicker to implement than 2-PIC because 2-PIC requires Illinois Bell to purchase, install and test software packages which, in many instances, have not been developed by the switch vendor. According to Illinois Bell, the earliest it could implement 2-PIC statewide is 1997 or 1998. Modified 1-PIC, on the other hand, can be implemented in early 1995 because Illinois Bell has begun implementation through software translations. According to Illinois Bell, it is on target for implementation of Modified 1-PIC in early 1995 -- assuming that interMSA relief is granted. Contrary to Staff's position, Illinois Bell contends that time is of the essence because Judge Greene or Congress could lift the interMSA restriction in 1995. Staff's prediction that a 2-PIC solution available in early 1996 will not delay the implementation of intraMSA presubscription could therefore prove to be wrong.

Illinois Bell and Sprint/Centel also dispute that 2-PIC offers "more choice" to customers. Any additional choice is negligible and illusory. These companies claim that 2-PIC merely provides a customer the ability to choose three carriers (a local [*28] carrier, an intraMSA carrier and an interMSA carrier) versus two carriers (a local carrier and a carrier for all other traffic). In their view, this additional choice merely will lead to customer confusion and ultimately will be counter-productive.

Finally, Illinois Bell disputes Staff's contention that Modified 1-PIC will perpetuate the PTC structure. Staff's concern is that the existing PTC will be the only alternative to the IXC for handling intraMSA presubscribed traffic. Illinois Bell believes that any LEC which is not the PTC could petition to withdraw from the PTC agreement and could arrange to provide intraMSA presubscribed service to its own customers. In Illinois Bell's view, there is nothing about Modified 1-PIC which prevents LECs from dropping out of the PTC agreement, as they can today. Finally, Illinois Bell contends that any national trend to 2-PIC is irrelevant because those states did not have the option of implementing presubscription using switch translations.

Sprint/Centel points out that the continuing existence of MSA boundaries is open to question. If and when those boundaries are eliminated, presubscription to multiple IXCs would no longer serve any [*29] realistic purpose.

MCI supported 2-PIC intraMSA presubscription rather than allowing the LEC to choose between modified 1-PIC and 2-PIC. MCI proposed striking Staff's original words "either the modified 1-PIC method or 2-PIC method" in paragraph a) of Staff's original version and adding the following paragraph in that same subsection:

The Commission, after giving notice to the local exchange carrier, the interexchange carrier providing the bona fide request, and all other carriers providing interMSA service in the exchange, and allowing them an opportunity to comment, may order the modified 1-PIC or the 1-PIC presubscription methods if it is shown that the carrier cannot implement full 2-PIC presubscription because of insurmountable technical and economic reasons.

MCI recommended these changes because it claimed that full 2-PIC provides the consumers with the widest range of options and choices for intraMSA calling rather than restricting the choices to the PTC and the interMSA carrier. Additionally, MCI asserted that if modified 1-PIC were deployed, the PTC is advantaged when compared to all other interexchange carriers in that the PTC is the only carrier with access to 100% [*30] of the customer base. According to MCI, all other IXCs are relegated to access only their portion of the presubscribed interMSA market.

MCI also claimed that both Illinois Bell and Centel had indicated that they would provide modified 2-PIC in at least some switches by using full 2-PIC software, thus incurring all of the costs of full 2-PIC with none of the attendant benefits to consumers. MCI cautioned that leaving the option to LECs could mean the LECs would utilize the option that best fit the toll marketing strategy they intended to pursue. MCI also alleged that the 2-PIC method was emerging as the nationwide industry standard for implementation of intraMSA equal access, citing several state decisions as its evidence.

MCI claims that the costs Illinois Bell used for 2-PIC implementation were overestimated by some$ 7.2 million. According to MCI, Siemens has in the past quoted a price of $ 7,444 per switch to South Central Bell for 2-PIC software and MCI contends that the same price should be available to Illinois Bell. MCI further reasons that if Siemens can offer 2-PIC software at that price, Northern Telecom and AT&T also should be able to offer software at that price. [*31] Based on this reasoning, MCI argues that there is no real cost advantage to Modified 1-PIC over 2-PIC. It claimed that when this amount is spread over the number of minutes subject to the equal access recovery charge, the rate per minute difference in the two numbers is inconsequential.

Illinois Bell responds by pointing out that the only price that Siemens quoted to Illinois Bell and the only price which Illinois Bell and the Commission can use for planning purposes is $ 80,000 per switch. Illinois Bell contends that there is no direct, reliable evidence in the record to establish that Siemens in fact sold 2-PIC software to South Central Bell for the price of $ 7,444. Even if that were the case, Illinois Bell argues, that this preferential price may have been offered to South Central Bell for reasons which are simply not present here -- such as the resolution of a separate dispute between those two companies. Illinois Bell also contends that there is no basis to assume that AT&T and Northern Telecom would sell 2-PIC software at the same price as Siemens, no matter how low the Siemens price allegedly was.

Sprint, citing Illinois Bell's cost figures, agreed with Illinois Bell [*32] on this issue, and supports modified 1-PIC. GTE supports the 2-PIC method, which requires more expensive software upgrades, and argued that the modified 1-PIC method using switch transactions is not a viable option for GTE. Centel preferred the modified 1-PIC method using vendor software upgrades.

IITA advocated that carriers serving fewer than 25,000 access lines should be allowed to provide an extended 1-PIC option in which the customer's interMSA carrier also would become the customer's intraMSA carrier. This section of the rules provides for the grandfathering of any such proposals that were effective as of December 31, 1993. IITA would allow this practice without limitation at the LEC's option.

MFS contends that the intraMSA presubscription rule should not apply to new LECs such as MFS and Teleport. According to MFS, it would be a burdensome and costly requirement to impose upon new LECs at a time when they are just beginning to emerge. Despite this assertion, MFS indicated that competition would force it to offer presubscription to multiple carriers.

No other party supports MFS' view. Staff, AT&T, MCI, Sprint/Centel, Illinois Bell and others contend that the rule should [*33] apply to all LECs, including new LECs. Staff responded that it found this MFS position curious and noted that no other potential entrant had raised this issue. Sprint/Centel explained that intraMSA presubscription allows a customer to choose between several different carriers for intraMSA calling without using access codes. Since customers are typically served by only one carrier, customers are denied "equal access" capabilities if a new LEC is not required to provide intraMSA presubscription.

3. Conclusion

In its Exceptions, Illinois Bell indicated that it is not opposing the 2-PIC method of presubscription. At the same time, Illinois Bell offers to provide the Commission with a six month progress report on implementing 2-PIC technology. The Commission accepts Illinois Bell's proposal.

We do not agree that the record supports a conclusion that Illinois Bell's cost figures are overstated. There is insufficient information in the record regarding the SW Bell/Siemens transaction to permit us to infer that this reflects the actual market price for 2-PIC software. We will accept Illinois Bell's data as accurate. We also conclude that implementation of 2-PIC would delay implementation [*34] of presubscription in some cases. However, we do not believe that the selection of presubscription approaches should be based merely on a consideration of which approach is least expensive and quickest to implement. We must select a presubscription approach which is sustainable for the future and consistent with other changes to the regulatory environment we are making, or will make, in the future. Under the modified 1-PIC method, LECs which are not the PTC could not compete for presubscribed interMSA traffic, even for their own local exchange customers. A customer could choose only between a presubscribed interMSA service provider and the PTC. This would foreclose a significant source of competition and perpetuate the PTC system. That would be inconsistent with the second market principle we adopted in Docket 94-0096 which is that the Public Switched Telephone Network should minimize artificial geographic boundaries. The 2-PIC method affords customers additional choice, and opens the market to more participants. This is a benefit which is not easily quantified. We particularly disagree with the arguments of several of the parties that additional choice for consumers may [*35] be too confusing for them to understand. Choice is at the heart of any reasonable definition of competition.

Moreover, the additional flexibility does not come at a significantly greater expense. There is no dispute that the additional cost of 2-PIC is small on a per minute basis. Illinois Bell certainly will be permitted to recover the additional costs incurred as a result of our selection of the 2-PIC method. The Commission also will permit Illinois Bell to apply the additional $ 8 million toward the commitment it made in Docket 92-0448 to spend $ 3 billion on growth and modernization of the telecommunications infrastructure.

Finally, we agree with Staff that there is a national trend toward selection of the 2 -PIC approach. We therefore approve Staff's current proposal regarding Section XXX.100 b).

IITA's proposal to allow small LECs the option to implement extended 1-PIC will not be granted. Consistent with Staff's original proposal, we will not require any LECs already providing this form of intraMSA presubscription to change, but have concerns that such a practice bars participation by Illinois Bell and GTE in the intraMSA market. We believe that the waiver process [*36] in XXX.130 adequately addresses IITA's concerns. The Commission also will adopt the position of Staff that these rules apply to all LECs -- both incumbent and new. The Commission does not find persuasive MFS' argument that the customer notification procedures place an undue burden on new carriers or that presubscription is somehow inappropriate for customers of new LECs because the new LECs lack market power.

D. Section XXX.110 Implementation

1. Staff's Proposed Rule

Section XXX.110 Implementation

a) Each incumbent LEC shall, within 120 days after receiving a bona fide request, file intrastate tariffs to provide presubscription consistent with this Part in its equal access exchanges within six months after receiving the bona fide request or within one year after the effective date of this Part, whichever is later.

b) For each incumbent LEC exchange that was not an equal access exchange as of the effective date of this Part, the incumbent LEC shall file intrastate tariffs to provide presubscription consistent with this Part effective at the time that equal access is implemented within the exchange.

c) Each new LEC shall, within 120 days after receiving a bona fide request, [*37] file intrastate tariffs to provide presubscription consistent with this Part effective within six months after receiving the bona fide request or within one year after the effective date of this Part, whichever is later.

d) Each LEC may negotiate implementation schedules that differ from the requirements in this section, with the agreement of all IXCs that make bona fide requests within 60 days of the first bona fide request.

2. Positions of the Parties

MCI proposed changing the first paragraph in this subsection of the rules as follows:

Each incumbent LEC shall, within 120 days after receiving a bona fide request pursuant to this rule, file intrastate tariffs to provide presubscription consistent with this Part in its equal access exchanges within six months after receiving the bona fide request.

Additionally, MCI proposed similar changes for the third paragraph dealing with new LECs. The reason provided by MCI for these changes was its assertion that the timelines necessary for implementation of intraMSA presubscription could be met within six months of the effective date of these rules.

ITA, IITA, Illinois Bell, GTE and ICTC all disagreed, stating their belief that [*38] more time than six months was necessary to implement this feature. Illinois Bell, Sprint/Centel and ICTC all support the one-year time period because it will take a substantial amount of time and effort to purchase, install and test the required software (if 2-PIC is ordered) and to make the necessary administrative and billing changes. ICTC expected that it would not even be able to obtain the necessary software within this time frame, let alone have it installed, tested, and working.

MCI responded that ICTC reasonably could anticipate the effective date of these rules as they go through their first and second notice periods and begin the process of ordering and planning for their effectiveness. Further, MCI stated, the LECs not able to meet the six-month implementation deadline in this subsection of the rules could either negotiate an extension with any parties submitting bona fide requests, pursuant to the fourth paragraph above, or apply for a waiver pursuant to section XXX.130 below.

Illinois Bell responds that LECs should not be obligated to do any pre-planning because it is difficult and risky to base present action on predictions about the outcome of future regulatory [*39] proceedings. Without a firm and final rule, LECs should not be required to begin implementation. Illinois Bell points to its own experience in which it has implemented Modified 1-PIC in many of its switches, only to find that Staff has changed its position and is now recommending 2-PIC.

Several parties noted discrepancies between the deadlines in this section and section XXX.170, proposing either that the six-month deadline in this section be lengthened or the six-month deadline in section XXX.170 be shortened. Parties typically used the same arguments as to whether the change should be made here or in section 170 as they used in arguing for six months or a longer period of time for implementation in general.

GTE testified that its three remaining 2 EAX switches are scheduled to be converted to digital switches, one in 1996 and two in 1998 pursuant to its modernization plan presented in Docket 93-0301/94-0041. The cost of developing software for 2-PIC for 2-EAX switches is estimated at nearly $ 3 million. GTE requests that the Commission provide in any Order that intraMSA presubscription need not be implemented in the exchanges served by each of these three switches until following [*40] its replacement with a digital switch.

3. Conclusion

The Commission is of the opinion that the time frames proposed by Staff reflect a reasonable balance between the various positions advocated by the parties. This schedule has the advantage of bringing the benefits of presubscription to consumers more quickly than the longer timelines advocated by the LECs. The Commission is aware that there may be some instances in which legitimate delays prevent LECs from providing intraMSA presubscription within the timelines in this rule. We expect all parties to this rulemaking to utilize the negotiations provisions of paragraph d) in this rule in an attempt to arrive at mutually agreeable dates for the conversion to intraMSA presubscription. Only if those negotiations fail, and the parties seek this Commission's intervention, should the waiver process be utilized.

We approve as reasonable GTE's request for a waiver to exempt exchanges served by each of the three GTE 2EAX switches identified by GTE in its testimony until the earlier of 1) the replacement of the switch or 2) the dates set forth by GTE for the replacement of the switch, for each respective switch.

E. Section XXX.120 [*41] IntraMSA Calls Not Subject to Presubscription

1. Staff's Proposed Rule

Section XXX.120 IntraMSA Calls Not Subject to Presubscription

a) In its intrastate presubscription tariff, each LEC shall specify which intraMSA switched calls are not subject to presubscription for each of its exchanges.

b) For each incumbent LEC exchange, intraMSA calls shall not be subject to presubscription if they originate and terminate within the geographic area within which the LEC provides calling through one or more of the following: flat rate service, residence untimed calling and usage-measured service bands that do not exceed 15 miles from the exchange wire center, and/or flat rate or measured Extended Area Service, as defined in the LEC's tariffs.

c) The following intraMSA calls shall not be subject to presubscription: local directory assistance (e.g., 411), local repair (e.g., 611), emergency (911), 0- operator services, and local pay-per-call (e.g., 976) calls. Calls using the 500, 700, 800, or 900 service access codes shall be routed in accordance with the North American Numbering Plan.

d) For incumbent LECs, 0+ calls shall not be subject to presubscription if they originate and terminate [*42] within the geographic area described in Section XXX.120(b).

e) All intraMSA switched calls not subject to presubscription and dialed without the use of access codes shall be carried by the LEC. Those calls dialed using a 500, 700, 800, or 900 service access code shall be routed in accordance with the North American Numbering Plan.

2. Positions of the Parties.

There were several contested issues within this subsection of the rules. Under Section XXX.120 an incumbent LEC's intraMSA calls are not subject to presubscription if they originate and terminate within a flat rate service area, a residence untimed calling area, a usage-measured service band that does not exceed 15 miles from the exchange wire center, or a flat rate or measured EAS area, as defined in the LEC's tariff. The limitation does not apply to new LECs. The rule also provides that local directory assistance, local repair, emergency, local pay-per-call and operator calls (0-) are not subject to presubscription.

Staff's definition of the local calling area is based on three pertinent concerns. First, LEC rates for short haul interexchange calls tend to be substantially lower than rates of IXCs, and consumers should [*43] be protected from those higher rates. Second, a smaller local calling area could have an adverse financial impact on the LEC by subjecting more of its revenues to potential loss. Third, Staff noted that legislatively mandated untimed calling areas which are not subject to an imputation test can create a difficult competitive situation for IXCs. Staff explained that calls in the first two bands of Illinois Bell's usage-sensitive service were priced below an imputed cost floor. For this reason, and because no competitor reasonably could price its own services below this level, staff proposed to exclude calls from these bands from the presubscription process.

Centel and Illinois Bell agreed with Staff that the 16-mile radius was more appropriate than the eight mile radius proposed by MCI, although Illinois Bell did point out that its Band B mileage stopped at 15-miles. Centel provided several community of interest standards in use in the Chicago metropolitan area that were more closely aligned with the larger radius.

IITA claimed that the one-size-fits-all approach taken in Staff's first draft would result in serious confusion and disruption in the more rural areas of the state. [*44] IITA showed that there would be at least four separate calling areas in many of its exchanges: the local/EAS area, in which service would be provided by the LEC; intraMSA interexchange non-EAS calling within 16 miles that would continue to be provided by the PTC; intraMSA interexchange calling outside the 16-mile band that would be provided by a new PIC; and, interMSA calling, which would be provided by the current PIC. IITA argued for language that leaves it to the LEC to define the local calling scope in its local exchange tariff.

MCI agreed with IITA that the local calling exchange definition proposed by Staff did not fit the downstate LECs and asserted its belief that MCI's proposal would achieve the same result as would IITA's, at least for the independent telephone companies in IITA.

MCI agreed and further feared that the proposed definition did not accomplish the degree of market-opening that had been intended by Staff with its intraMSA presubscription rules. MCI expressed its desire to use a two-part definition for local exchange, bifurcating the definition into one that applies to exchanges in MSA 1 and another for the rest of the state. It supported this definition [*45] first, by citing Illinois Bell responses to data requests for the proposition that all of MSA 1 is considered by Illinois Bell and Centel to be one large EAS area. Second, MCI stated its belief that in the remaining areas of the state, the EAS areas were more likely to reflect true community of interest standards. Third, MCI asserted its belief that Centel's MSA 1 flat-rate calling area would be of a more limited geographic size than the entire Chicago exchange as a result of Centel's most recent rate case, but opted to limit its size via the mileage portion of the rule.

For all of these reasons MCI proposed the following changes to paragraph b):

b) In its intrastate presubscription tariff, each incumbent LEC shall provide that, for each exchange:

1) in MSA 1 (the Chicago MSA), the local calling area is the geographic area within which the LEC provided calling as of July 31, 1994 through one or more of the following: flat rate service within eight miles of the exchange wire

center or residence untimed calling.

2) in all MSAs except MSA 1, the local calling area is the geographic area within which the LEC provided calling as of December 31, 1993 through one or more of the following: [*46] flat rate service, residence untimed calling, and/or Extended Area Service.

3) Calls within the local calling areas defined in XXX.120 b) 1) and 2) are not subject to presubscription pursuant to this rule.

Because of the clarity contained in the proposed definition in Section XXX.10, AT&T proposed that Section XXX.120 be deleted and replaced with the following section to provide additional flexibility for developments in technology, rate settings and the shifting nature of exchange boundaries:

Section XXX.120 Calls Subject to Presubscription

In its intrastate presubscription tariff, each LEC shall specify which intraMSA presubscribed calls, as defined in Section XXX.10, are currently available for presubscription. The LEC must provide notice to all other carrier providing service to that exchange and to the local exchange company(ies) providing the service in question on a non-presubscribed basis.

AT&T did not believe that Staff was able to substantiate the reasons for expanding the area not subject to presubscription from 8 to 15 miles, or to justify the exclusion of traffic types as the best way to meet public interest needs.

Illinois Bell notes that the rule does not define [*47] the local calling area for newly-certificated LECs, such as MFS and TCG. It believes that the local calling area of new LECs should be identical to the local calling area of incumbent LECs. Staff believes that the local calling area for new LECs can be examined at the time they file tariffs for local exchange service.

The next issue regarding Staff's proposed rules is found in paragraph c). MCI suggested adding to the list of calls not subject to the presubscription rules, calls that use the 500, 700, 800, or 900 service access codes (for instance, calls that are dialed 1-800-NXX-XXXX.) MCI further proposed to make these calls exceptions to the list of calls that are not subject to presubscription and automatically carried by the LEC as listed in paragraph e). Staff agreed with this proposed modification.

Illinois Bell opposes this request and argues that this issue should not be addressed in the rules. Instead, these calls should be routed under the North American Numbering Plan. Illinois Bell explains that some of these calls, e.g., 700 calls, are already routed to the presubscribed carrier under the North American Numbering Plan. Others, such as 800, are not. In view [*48] of this complexity, Illinois Bell contends that the best approach is to allow these calls to be routed as they are today without changing the proposed rules.

Illinois Bell objected to MCI's request that directory assistance calls to 555-1212 be subject to intraMSA presubscription. Illinois Bell opposes this request because 555-1212 rather than 411 is used in many areas of the country to reach local directory assistance. Since directory assistance calls are not subject to presubscription under the rule, 555-1212 should be treated the same. At some point in the future, LECs in Illinois may want to provision local directory assistance using the 555-1212 dialing arrangement. To preserve that capability, Illinois Bell argues that no rules should be promulgated which would require that 555-1212 be subject to intraMSA presubscription.

AT&T proposed that a new subsection be added here to provide for intraMSA presubscription for LEC payphones. It stated that today payphones are presubscribed for interMSA non-sent paid calling. It stated that this rule was necessary to maintain consistency between the interMSA and intraMSA markets and to expand the scope of calling subject to the benefits [*49] of competition.

Illinois Bell and Staff disagreed, noting that, absent the consent decree restriction on Illinois Bell, it would have the option of presubscribing its payphones on an interMSA basis. They noted that all other payphone providers have the authority to determine which carrier or carriers will handle the payphone's traffic.

The next issue involves AT&T's proposal that selection of the intraMSA PIC at LEC payphones be made by the premises owner or agent, and not by the LEC. AT&T reasons that such a requirement would make PIC selection consistent for both intraMSA and interMSA calling. Illinois Bell opposes this requirement as both unnecessary and punitive.

3. Conclusion

The Commission agrees that Staff's proposal regarding calling areas subject to presubscription appropriately balances the interests of all parties by opening up a substantial amount of traffic to competition, while protecting end users until the prices of short-haul traffic decrease. It has the additional advantage of moderating the impact of presubscription on those LECs who are subject to restrictions on the provision of interLATA services.

We agree with IITA that we should clarify the rule by [*50] expressing our intention that for companies who serve 25,000 or fewer access lines (other than Moultrie) the calling subject to the initial presubscription process is the interexchange switched calling originating from these companies currently being handled by the Primary Toll Carrier Plan.

The issue regarding 500, 700, 800 and 900 calls was appropriately resolved by amending paragraphs c) and d) to provide that these calls shall be handled in accordance with the North American Numbering Plan. This provision maintains the status quo with respect to these types of calls.

We will not adopt AT&T's proposal regarding payphones for the reasons expressed by Illinois Bell and Staff.

Finally we believe that the issue of new LEC calling areas can be considered when they actually have filed their tariffs for local service, or alternatively, in the proceeding we have initiated to examine appropriate regulatory requirements for new LECs.

F. Section XXX.130 Waivers and Extensions

1. Staff's Proposed Rule

Section XXX.130 Waivers and Extensions

a) A LEC may petition for a waiver of the requirement to provide presubscription consistent with Section XXX.100 on the basis that the 2-PIC [*51] method is not technically feasible or that under current conditions the costs are expected to exceed reasonably anticipated benefits substantially. The Commission, after hearing, shall grant a waiver and shall allow the modified 1-PIC method to be used upon a showing that the 2-PIC method is not technically feasible or that its costs are expected to exceed reasonably anticipated benefits substantially.

b) A LEC may petition for an extension of the timing requirements in Section XXX.110 on the basis that presubscription cannot reasonably be provided within the given exchange(s) within the required time frame. The Commission, after hearing, shall grant an extension to a specified date upon a showing that presubscription cannot reasonably be provided within the given exchange(s) within the time frame required by Section XXX.110 and that the date specified in the extension can reasonably be met.

c) Any LEC or IXC may petition for a waiver of the requirements in Section XXX.120 on the basis that the requirements regarding calls not subject to presubscription do not meet customers' calling needs and/or do not preserve or promote effective competition. The Commission, after hearing, [*52] shall grant a waiver upon a showing that the requirements regarding calls not subject to presubscription do not meet customers' calling needs and/or do not preserve or promote effective competition, and after considering the financial impact and the technical feasibility of alternatives.

2. Positions of the Parties

Illinois Bell stated its disagreement with this rule because of its limitation of the issues that could be raised in the course of an LEC pursuing a waiver of any part of this rule. Under Staff's proposal, there are only two factors which the Commission can consider in resolving a petition to expand or contract the area of "calls not subject to presubscription": customer calling needs and promotion of effective competition. Illinois Bell argues that this is an inordinately narrow range of facts and, if adopted, would unreasonably restrict the Commission's ability to consider all relevant factors in resolving such petitions. Illinois Bell proposes that the waiver provision be expanded to permit consideration of technical feasibility, economic feasibility and the overall public interest. It argues that Staff conceded on cross-examination that financial and technical [*53] feasibility would be relevant to some types of proposals to change the area of "calls not subject to presubscription". Staff suggested that its rule be modified to include the words "and after considering the financial impact and the technical feasibility of alternatives".

Additionally Illinois Bell and IITA both claimed that the rule as written was unworkable and/or confusing. Other LECs supported Illinois Bell, while most of the remaining parties supported the original Staff rule on this issue.

Staff asserted that this section allows waivers or extensions of time from various presubscription requirements to provide the needed flexibility and to recognize variations in different LECs' circumstances. Staff recognized Illinois Bell's contention that this section is unworkable because it limits the issues that could be considered in ruling on a waiver request. Staff responded that this waiver provision must be designed to minimize excessive and/or frivolous waiver requests, and that the revised waiver language protects the integrity of the rule while allowing the important facts to be taken into consideration when looking at customer needs or the promotion of competition. Further, [*54] Staff asserts that it changed the language in paragraph c) regarding the criteria for assessing alternatives to address this concern.

Centel suggested that there be a three-year stabilization period during which there could be no change in the size of the local calling areas defined in this rule.

MCI, AT&T and IITA disagreed, stating that any party that finds that conditions have changed enough to warrant changing the local calling area to either a larger or smaller area ought not to be bound by an artificial three-year waiting period. MCI, consistent with its position in Section XXX.100, provided alternate language for this Section of the rules. The positions of the other parties on MCI's proposed change here was the same as their positions on MCI's proposal to require 2-PIC.

AT&T suggested that streamlining the regulatory process and accelerating the introduction of competition would result if paragraph a) of this section of the rules were to be changed by deleting the phrase "after hearing" and replacing it with "upon investigation and receipt of written statements (e.g., affidavits) by interested parties." There was little comment on this proposal.

3. Conclusion

The Commission [*55] will not adopt Centel's calling area stabilization proposal, for the reasons advanced by MCI, AT&T and IITA. We are reluctant to set an arbitrary period of time during which parties cannot petition for changes to the local calling area. We also note our agreement with IITA that it is our intention that LECs (both incumbent and new) and IXCs may, at any time both prior to and after the initial presubscription process apply to the Commission to alter, by either expanding or contracting, the local calling area; i.e. the calls not subject to presubscription. The party applying for any alteration should carry the burden of proof. We are particularly persuaded by the testimony on this point of IITA witness Zimmerman, who noted that the community of interest relevant in rural areas may be altered for many reasons, such as a change in school district boundaries.

We also believe that Staff adequately addressed Illinois Bell's concerns regarding the issues which can be raised during a waiver hearing by adding to paragraph c) the phrase, "and after considering the financial impact and the technical feasibility of alternatives." The use of a standard such as "otherwise not in the public [*56] interest", as Illinois Bell suggests, is overly broad and should generally be avoided if more specific standards are available. We also are concerned that it would invite too many waiver applications.

G. Section XXX.140 Customer Notification and Presubscription Changes

1. Staff's Proposed Rule

Section XXX.140 Customer Notification and Presubscription Changes

a) For each incumbent LEC exchange that was an equal access exchange as of the effective date of this Part, and for each new LEC, the LEC shall provide written notice to its customers of the availability of presubscription, as follows:

1) The notice shall be provided to existing customers at least 30 days prior to the implementation of presubscription consistent with this Part.

2) The notice shall be provided to new customers who request network access service between the time the notice is distributed and the date presubscription is implemented consistent with this Part, at the time they request service.

3) The notice shall describe presubscription, the customers' choices, how to select among the presubscription choices, and any related charges in a manner that does not attempt to influence customers regarding their [*57] selections.

b) For each incumbent LEC exchange that was not an equal access exchange as of the effective date of this Part, balloting shall be required for both interMSA and intraMSA usage, as follows:

1) Balloting shall be in accordance with the FCC's Memorandum Opinion and Orders in CC Docket No. 83-1145, Phase I, and balloting shall include both interMSA and intraMSA choices.

2) Customers' intraMSA usage subject to presubscription shall not be allocated, and shall continue to be provided by the incumbent LEC (or PTC) until the customer selects a different intraMSA presubscription choice.

c) For new customers requesting network access service after presubscription consistent with this Part is implemented in an exchange, the LEC or other carrier receiving the request shall inform the customer, when service is requested, of its presubscription choices and shall provide the following information before either asking for the customer's presubscription selections and/or marketing its own interexchange services:

1) The customer service representative shall inform the new customer that the customer can select from a number of IXCs for presubscribed interexchange service, and shall [*58] describe the available presubscription choices in a manner that does not attempt to influence customers regarding their selections.

2) The representative shall offer to provide the names of IXCs serving that office in random order as well as the telephone numbers of the IXCs.

If the customer indicates its selections, the representative shall not solicit the customer further for the carrier's interexchange services.

d) Customers shall retain their existing intraMSA dialing arrangements as of the effective date of this Part until they make presubscription selections, and may change their selections at any time, subject to charges specified in Section XXX.160. Procedures for intraMSA and interMSA selection changes shall be in accordance with the FCC's Memorandum Opinion and Orders in CC Docket No. 83-1145, Phase I and 47 CFR Part 64.1100.

2. Positions of the Parties.

One issue which received considerable attention was Staff's proposal to regulate customer contact which a LEC may have with new customers requesting network access service. Illinois Bell agrees that some regulation in this area is appropriate, and there appear to be only two issues of disagreement between Staff and [*59] Illinois Bell. First, Staff argues that LECs must read to every new customer a list of carriers serving an end office. Illinois Bell contends that Staff's proposal would require this even if the customer did not request the information. Illinois Bell maintains this requirement is unnecessary and that it should be required only to ask each customer whether he would like the list to be read. According to Illinois Bell, customers already may have decided on a carrier or may not wish to sit through a lengthy recitation of PIC selections.

Second, Staff takes the position that the obligation to read the list should continue indefinitely. Illinois Bell contends that the obligation should last only for a one-year transitional period because the IXCs, such as AT&T, MCI, and Sprint, are sophisticated corporations that are well-versed in reaching customers through extensive television and print media campaigns. Illinois Bell argues that, in the face of the IXCs' substantial advertising and marketing expertise, customers will be informed fully and effectively of their intraMSA PIC choices after the one-year transitional period expires.

AT&T and MCI responded that, by advocating this change, [*60] Illinois Bell was attempting to leverage its generally first point of contact with a consumer for local telephone service into an unfair and unearned advantage for Illinois Bell's long distance business.

Staff asserted that paragraph c) requires that each LEC (or any other carrier receiving a request for new network access service) inform each new customer, in a neutral manner, of available presubscription choices before marketing its own interexchange choices. Staff asserted that failure by the LEC to disclose the range of presubscription options fully at the time network access is ordered would be detrimental to both customers and the development of effective competition.

Staff defended its rule in paragraph c) by noting that this section was designed to provide all future customers with the information necessary to make an informed choice. It asserts that since LECs may compete for presubscribed intraMSA and (potential interMSA) traffic, it is important that they provide accurate information to both new and existing customers regarding presubscription options. Staff stated that this section leaves many details to the LEC's discretion and, in Staff's opinion, is not overly [*61] burdensome. At the same time, if an IXC, Staff, or other party believes that a LEC is behaving anti-competitively, Staff believes this section provides an avenue for corrective Commission action.

AT&T proposed changes in paragraph c) by deleting the phrase "or marketing its own interexchange services" and by deleting the single sentence that followed sub paragraphs 1) and 2) and replacing that sentence with the following:

If customers do not indicate their selection of an intraMSA PIC following 1) and 2), the representative shall advise the customers that they can expect to be contacted by the LEC marketing department and/or IXCs as well about making a PIC selection. Until such time as an affirmative selection is made, the LEC can arrange for service by a carrier selected at random. Names of new service connects shall be made available upon request to IXCs for use in their marketing efforts. Names of unlisted customers can only be used for marketing purposes for a period of 180 days following service connection.

AT&T claimed that this modification was intended to reduce any undue competitive advantage which the LEC would have as a result of its monopoly position in the local [*62] exchange market. GTE and Illinois Bell opposed this position, stating that it unfairly singled out the marketing position of only one competitor. It further argued that it may not always be the first point of contact for a customer's service in an exchange. Staff and Illinois Bell maintain that it would be confusing for customers to have a new carrier foisted upon them, especially since IXC rates for intraMSA services are substantially higher than LEC rates. They contend that AT&T's random assignment proposal would leave customers with unintended and undesired rate increases.

For new LECs and for each incumbent LEC exchange where interMSA presubscription already is available, Staff proposed that written notice be provided to all existing customers at least 30 days prior to the implementation of intraMSA presubscription, in a neutral manner that does not attempt to influence customers regarding their choices. Staff opposed a second balloting in such exchanges for several reasons.

For each incumbent LEC exchange where interMSA presubscription is not yet available, Staff recommended that intraMSA presubscription choices be included in the balloting process which the FCC requires [*63] when an exchange converts to equal access. In a departure from the FCC's interMSA approach, customers who do not choose an intraMSA carrier during the balloting process would retain their current intraMSA dialing arrangements rather than being allocated to an intraMSA carrier. Staff opposed allocation of intraMSA usage on the basis that it probably would increase customer confusion and could result in unintended and undesirable rate increases. Staff recommended that, if the Commission were to decide to require intraMSA allocation, it should be limited to allocation between interMSA IXC and the LEC/PTC, in order to minimize customer confusion.

Staff contended that Paragraph d) sets forth the methods by which customers' presubscribed carriers can be changed; in all instances, customers would retain their current intraMSA dialing patterns unless they make an affirmative choice of a different arrangement. This section of Staff's proposal adopts the FCC's anti-slamming rules.

3. Conclusion

The modifications suggested by Illinois Bell will not be adopted. We are particularly puzzled by Illinois Bell's argument that, "LECs must read a list of carriers serving an end office to every [*64] customer, regardless of whether the customer requests the information or not." Section XXX.140(c)(2) clearly states that "The representative shall offer to provide the names of IXCs serving that office in random order . . ." (emphasis added)

We believe that Staff's proposal provides fair and reasonable guidelines for customer marketing while avoiding micro-management of a company's internal procedures. Since the LECs in particular will continue to be the first point of contact for many customers, a continuing customer education process is needed. We do not believe that the need for this process will change after merely one year.

We also reject AT&T's proposals for customer allocation. Imposing a carrier on a customer, particularly when that allocation is likely to lead to an increase in a customer's bills, is heavy-handed and is likely to result in customer complaints.

H. Section XXX.150 Interexchange Carrier Participation

1. Staff's Proposed Rule

Section XXX.150 Interexchange Carrier Participation

Carriers may carry presubscribed intraMSA calls if they have effective intrastate tariffs to provide such services and if they have made the necessary arrangements with [*65] the LEC.

2. Positions of the Parties

Illinois Bell proposed to delete the word "Interexchange" from the title of Section XXX.150 and add language to clarify that both LECs and IXCs are carriers which may carry presubscribed calls. It notes that both LECs and IXCs are permitted to carry presubscribed calls if they are properly certificated under the Act.

3. Conclusion

Although the change is not strictly necessary in view of the definition of IXC and LEC in Section XXX.10, we believe the change is a useful clarification and we shall adopt it.

I. Section XXX.160 Presubscription Charges and Cost Recovery

1. Staff's Proposed Rule

Section XXX.160 Presubscription Charges and Cost Recovery

a) Each LEC shall allow customers to change presubscription selections at no charge once within six months following implementation within an exchange of presubscription consistent with this Part, and shall allow each new customer to select presubscription arrangements at no charge at the time network access service is initiated. At other times, each LEC may impose a reasonable, tariffed charge for changes in a customer's presubscription selections.

b) Each LEC may seek to recover reasonable [*66] separated intrastate costs limited to initial incremental expenditures related directly to the provision of presubscription that would not be required absent the provision of presubscription consistent with this Part.

c) In determining presubscription cost recovery, each LEC shall amortize all separated intrastate presubscription costs over at least a three-year period.

d) Each LEC that provides noncompetitive services and is not an average schedule company shall use the following procedures for recovery of intrastate presubscription costs:

i) A tariffed presubscription cost recovery charge shall be applied to all switched originating intraMSA intrastate minutes of use subject to presubscription and originated by the LEC's customers, whether carried by the LEC or another IXC. If the LEC is a PTC, such charges shall not apply to customers of other LECs with which the LEC has a PTC arrangement.

ii) The LEC shall submit the proposed presubscription cost recovery charge and full cost documentation as part of its tariff filing made to implement presubscription consistent with this Part.

iii) In non-equal access exchanges where both inter- and intraMSA equal access are implemented [*67] concurrently, LECs should develop separate inter- and intraMSA cost recovery charges, consistent with FCC requirements and this Part. e) Each LEC that is an average schedule company shall, through its concurrence in the Illinois Small Company Exchange Carrier Association (ISCECA) intrastate switching tariffs, use the following procedures for recovery of intrastate presubscription costs:

i) An addition to the local switching rates shall be applied to all switched intrastate minutes of use subject to presubscription and originated by the LEC's customers.

ii) ISCECA shall submit the proposed addition to its local switching rates and full cost documentation through a tariff filing made to recover intrastate presubscription costs consistent with this Part.

iii) The addition to the local switching rates shall apply for the amortization period only. At the end of the amortization period, ISCECA shall file the appropriate local switching tariff reflecting the removal of such addition to its local switching rates.

2. Positions of the Parties

With respect to paragraph a) Illinois Bell objected to the provision of one free PIC change within six months of conversion of an end office to [*68] presubscription, citing the costs it would incur as these types of changes are made. MCI countered that IXCs had not pushed for balloting in order to save time and to avoid unsupported claims from the LECs regarding customer confusion. MCI claimed that this was done despite the huge benefits likely to accrue to the IXCs if balloting had been done. MCI claimed this would have benefited the PTC that will start the process with 100% of the presubscribed customers.

Centel proposed that the incumbent LEC allow one free change of PIC in the first six months following the initial availability of intraMSA presubscription, explaining that this solution allows all competitors to vie for customers on an even footing. Staff, AT&T and Sprint agreed with this position.

Staff asserted that its proposed rule include these provisions to allow customers a reasonable time period in which to make presubscription selections, to protect the LECs from an unreasonable financial burden, and to prevent the institutionalization of a discriminatory presubscription policy.

With respect to paragraph b) Staff stated that its proposal would allow all LECs to recover separated intrastate costs limited to initial [*69] incremental expenditures which are directly related to the provisioning of intraMSA presubscription that would not be required absent the provisioning of intraMSA presubscription. The purpose of this, Staff asserted, is to prevent double recovery of costs and to be consistent with FCC treatment of equal access costs and with the Commission's order in Docket No. 92-0211.

Most of the parties supported recovery of incremental expenditures related to intraMSA presubscription. However, MCI proposed adding language to this section which would preclude LECs such as Illinois Bell that operate under a price cap regime (alternative regulation plan) from recovering their intraMSA presubscription costs.

Specifically, MCI argued that since Illinois Bell wanted and was granted pure price cap status in its Alternative Regulation Docket No. 92-0448, with no adjustments for exogenous cost factors, Ameritech should not now claim that it should be allowed to recover additional charges caused by unanticipated additional costs. MCI believes that Illinois Bell should not be able to recover any of the costs of presubscription. To accomplish this MCI suggested the following change to paragraph b): [*70]

b) Each LEC may seek to recover reasonable separated intrastate costs limited to initial incremental expenditures related directly to the provision of presubscription that would not be required absent the provision of presubscription consistent with this part provided the LEC is not subject to price cap regulation that provides for no exogenous cost adjustments. LECs subject to price caps with no exogenous cost factor adjustments are not eligible for any cost recovery.

Staff took the position that intraMSA presubscription should be treated as a new service option and receive separate cost treatment, and therefore, Staff rejected MCI's position on this point.

GTE also listed additional trunking costs involved with intraMSA equal access. MCI replied that these charges are not part of the incremental costs that the Commission needs to examine in order to determine the public policy of implementing intraMSA equal access. MCI continued that these trunking charges already are covered by the access tariffs of GTE and every other LEC in this state.

It was AT&T's position that to clarify the nature of costs subject to recovery it would appear desirable to reword paragraph b) as follows: [*71]

b) Each LEC may seek to recover reasonable separated intrastate costs limited to initial incremental expenditures related directly to the provision of presubscription that do not add other service capabilities absent the provision of presubscription.

AT&T asserted that this proposed change relating to the equal access cost recovery plan ensures that only relevant costs are recovered, so that an incumbent LEC, such as Ameritech, does not receive unfair advantages solely as a result of its incumbent position.

With respect to paragraph c), Staff's proposed rule allows LECs seeking to recover their intraMSA presubscription costs to amortize such costs over a period of not less than three years. The intent is to allow LECs some flexibility in setting their intraMSA presubscription cost recovery charges and reducing the likelihood that ratepayers would be unduly burdened by increases in rates for toll calls. It also was Staff's position that a three year recovery period will not cause rate shock.

AT&T and MCI opposed Staff's amortization period. MCI argued that late market entrants might receive a "free ride" from the earlier market participants. AT&T recommended an alternative [*72] recovery period of five to eight years. Staff's response to these arguments was that its proposed rule ensures that all toll providers share equally in the recovery of presubscription costs on a per Minute Of Use ("MOU") basis and that the cost recovery charges will not discriminate between carriers or handicap smaller IXCs which may wish to compete in the intraMSA toll market. Staff also contended that it is likely that the former PTCs will carry most of the intraMSA toll traffic following prescription, at least initially. Therefore, Staff asserted that these incumbent LECs, and/or their customers, would incur most of the intraMSA presubscription costs themselves. The majority of parties supported Staff's position.

With respect to paragraph d) , Staff asserted that this section describes the parameters within which Illinois' LECs, excluding average schedule companies, must design their intraMSA presubscription cost recovery charges. First, it specifically states that the tariffed charges will apply to all switched MOUs whether carried by the LEC (acting as a toll carrier) or by another IXC and that charges will be applied to those MOUs which are subject to presubscription (i.e., [*73] intraMSA MOUs). Staff asserted that this section implicitly contains three rate design parameters that incumbent LECs should use in designing the recovery charges: (1) all intraMSA toll providers should share in the costs of intraMSA presubscription; (2) charges should be assessed on a per MOU basis; and (3) charges should be assessed on intraMSA toll minutes only.

There was widespread support for making the intraMSA presubscription charges applicable to all providers in the toll markets. Similarly, most of the parties in this proceeding supported recovery as a surcharge on switched MOUs. GTE argued that costs should be recovered only from those companies that provide intraMSA toll services and are not prohibited from providing interMSA toll services, and that those costs should be recovered on a percentage of presubscribed lines basis. Staff felt this proposal was self-serving and opposed it.

Staff's position was that costs would be incurred to provide intraMSA presubscription and that rates designed to recover those costs should be applied only to presubscribed intraMSA MOUs. Staff stated that it would consider supporting a broader recovery mechanism if it were shown that [*74] intraMSA MOUs as a basis for recovery would be impracticable for cost or technical concerns.

The next issue is whether the presubscription surcharge should apply only to non-local intraMSA minutes or should apply to all non-local intrastate MOUs. Illinois Bell contends that the surcharge should be imposed on all non-local intrastate switched MOUs because this will put the costs primarily on those carriers which benefit from intraMSA presubscription, i.e., IXCs. Illinois

Bell is willing to include its own non-local intrastate switched MOUs in that calculation and to pay its fair share of implementation costs. However, Illinois Bell does not believe that it should pay the lion's share of implementation costs, and this would be the result if the cost recovery surcharge is limited to non-local intraMSA MOUs.

Illinois Bell also argues that it cannot assess the surcharge on intraMSA minutes because it does not track intraMSA and interMSA minutes separately which originate and terminate exclusively on its own network. According to Illinois Bell, it would require substantial reprogramming of its billing systems and substantial coordination with other carriers in order to track this [*75] information. In Illinois Bell's view, the expense of these efforts is not justified given the relatively small cost of implementing presubscription.

Staff prefers to assess the surcharge on non-local intraMSA calls on the theory that it is these customers who benefit from presubscription. In other words, Staff's proposal focuses on customers rather than carriers. Staff also argues that there may be IXCs which do not offer intraMSA services who should not be forced to bear the cost of intraMSA presubscription. Illinois Bell responds that it knows of no such carriers; all of the major interMSA carriers have stated in this proceeding that they will pursue intraMSA usage services aggressively.

Illinois Bell also proposed that the presubscription surcharge not be imposed on PTCs, but rather that it be directly recovered from the LEC's end users. Illinois Bell contends that the relationship between the LEC and PTC is not the same as that of an LEC and an IXC. According to Illinois Bell, under the PTC arrangement the LEC always bills its customer for the PTC toll calls pursuant to its concurrence in the PTC's tariff. Accordingly, it would be much more efficient for the LEC to recover [*76] the presubscription surcharge directly from its end users who make PTC toll calls rather than have the PTC incorporate the presubscription surcharge into its toll rates.

In response, Staff argued that presubscription charges were designed to allow each LEC to recover all of its intraMSA presubscription costs in an efficient manner which would not discriminate between PTCs and IXCs. Staff argued further that treating IXCs and PTCs differently would create an unnecessary advantage for the PTCs as they compete against the IXCs in the intraMSA toll markets. That is, in both cases it should assess a cost recovery surcharge on each switched access minute of use. Therefore, Staff opposed Illinois Bell's proposal regarding recovery of intraMSA presubscription costs.

With respect to paragraph d)i), AT&T asserted that for clarification, the phrase "switched intrastate minutes" should be substituted with "switched originating intraMSA minutes" and that it also would be desirable to add the following two subsections to paragraph d):

iii) In non-equal access exchanges where both inter- and intraMSA equal access are being implemented concurrently, LECs should develop a separate inter- and [*77] intraMSA cost recovery charge to be applied to the respective originating minutes of use.

iv) All LEC equal access cost recovery plans shall be tariffed and submitted to the Commission for review and approval.

IITA suggested that the independent telephone companies ("ICOs") be allowed to recover their intraMSA equal access costs through an end office switching surcharge. MCI agreed with IITA that they should be able to recover their costs consistent with the rules, and that the small ICOs should be able to adjust their end office rate for the period of time over which the costs are recovered rather than implementing a new element. MCI stated that the costs recovered by these LECs should be consistent with those costs identified by AT&T -- that is, limited to those costs that are solely related to, and a result of, presubscription.

With respect to paragraph e), Staff asserts that it provided that average schedule companies will increase their local switching rates for the specified amortization period in order to recover their intraMSA presubscription costs through their concurrence in the ISCECA tariffs. Staff asserted that its rule does not force average schedule companies [*78] into the same "mold" or operating procedures as the larger companies, because doing so likely would be burdensome and costly for average schedule companies. Staff further asserted that this section of the rule would allow average schedule companies to recover their intrastate presubscription costs in a manner which is consistent with their present method of recovering intrastate, interLATA presubscription costs.

3. Conclusion.

The Commission concludes that the provisions of Section XXX.160 a) are appropriate. Permitting carriers to charge their customers for initial PIC changes creates an obvious disincentive for customers to make a change in carriers. It serves no apparent legitimate purpose. We also note that LECs are not precluded from including initial PIC change costs in the intraMSA presubscription costs that are recovered as described in this section. Section XXX.160 b) permits recovery of costs incremental to the provisioning of intraMSA presubscription. This approach is consistent with the FCC's treatment of equal access costs and with our cost of service rule adopted in Docket 92-0211. We therefore reject the more narrow language proposed by AT&T. Section XXX.160 [*79] as proposed by Staff is reasonable. We are not persuaded that the "free ride" problem identified by MCI is of a sufficient potential magnitude to warrant a change in the amortization period.

We reject Illinois Bell's proposed changes to the cost recovery provisions in paragraph d). Staff witness Gasparin's testimony (Staff Ex. 6.02 at 4) and the cross-examination of Illinois Bell witness Kocher (Tr. at 1454) disprove Illinois Bell's argument that it is not technically feasible to measure and bill intraMSA MOUs separately from interMSA MOUs. Furthermore, Illinois Bell's approach would create a subsidy from the interMSA toll market to the intraMSA toll providers like Illinois Bell. It is the Commission's opinion that Staff properly focuses on the customers that benefit from presubscription, rather than the companies that initially incur the costs.

J. Section XXX.170 Information Requirements

1. Staff's Proposed Rule

Section XXX.170 Information Requirements

a) Within 15 days after receiving a bona fide request, a LEC shall notify all IXCs currently purchasing Feature Group D access service ("FGD service") from the LEC in the affected exchange(s) of the bona fide request. [*80]

b) Each LEC shall provide the following information to all IXCs purchasing FGD service or which place orders for FGD service from the LEC in each exchange where presubscription consistent with this Part is to be implemented:

i) Presubscription conversion schedules, to be provided at least three months prior to the cutover date.

ii) Ordering procedures, terms, and conditions for the IXC to be eligible for customer presubscription to the IXC, to be provided at least three months prior to the cutover date.

iii) Customer lists, within 15 business days of receipt of a written request from an IXC that has made a bona fide request or otherwise has established eligibility for customer presubscription, to be used by the IXC only in connection with presubscription solicitation. Customer lists shall be provided upon request for a period of six months prior to and six months after the implementation of presubscription in an exchange.

c) Each LEC shall serve all presubscription tariff filings, waiver petitions, and extension of time petitions on all IXCs currently purchasing FGD service from the LEC in the affected exchange(s) and on all other entities that have requested such service. [*81]

2. Positions of the Parties

With respect to paragraph a), Staff asserts that this section describes the information that is needed from the LECs to allow intraMSA presubscription to be implemented in an orderly and equitable fashion. Staff changed the rule in its rebuttal testimony, in part to take care of a timing inconsistency between Sections XXX.170b) and XXX.110a).

With respect to paragraph b), MCI recommended that the six-month notification in Staff's original Section XXX.170b) i) and ii) be reduced to four months. AT&T recommended that the notification be shortened by about two weeks. Staff's position was that while MCI and AT&T want as much notification as possible, that three months was reasonable because it would balance the interests of the incumbent LECs who need time to develop conversion schedules with the IXCs' need to make their own plans for conversion schedules. ICTC witness Pence testified that ICTC could comply with the three month notice requirement.

Section b) iii) addresses the conditions under which LECs should provide customer lists to IXCs and proved contentious. Staff recommended that customer lists be provided upon request for a period of six months [*82] prior to and six months after the implementation of presubscription in an exchange. Staff asserted that, as written, the rule does not address either charges for customer lists or the treatment of unpublished and unlisted numbers. Staff stated that a LEC could propose customer list charges if it believed them to be appropriate. Staff noted that the Commission may wish to require that LECs be prohibited from using unpublished and unlisted telephone numbers in marketing their own interexchange services, unless such numbers are provided in the customer lists made available to IXCs.

In addition, AT&T recommended adding the following sentence to Subpart b)iii):

The names and telephone numbers of customers with unlisted telephone service shall only be used during a 180 day period following the implementation of equal access in an exchange or the customer's obtaining new service in an exchange which has equal access.

AT&T asserts that this modification would serve to mitigate privacy concerns and still extend to customers the benefits of competition.

Illinois Bell argued that the availability of customer lists from the LEC should be curtailed after one year, claiming that perpetuating [*83] this requirement after one year is tantamount to requiring the LECs to assist the IXCs in marketing their services. MCI argued that Illinois Bell was attempting to leverage the information it has solely as a result of being in a bottleneck monopoly position into an unearned advantage in other markets. MCI further claimed that this was evidence that the market protections it advocated were needed.

Illinois Bell states that it is willing to include "nonpublished" customer information in its customer lists for a one-year transitional period, provided that IXCs agree to use the information only for the purpose of soliciting customers for interMSA services subject to presubscription. Centel, does not believe that it should be required to disclose the telephone numbers of its "nonpublished" customers at all, and notes that during the balloting process for interMSA presubscription it did not provide unpublished or unlisted telephone numbers to participants in the presubscription process.

AT&T requests that any charge for customer lists be tariffed. Illinois Bell argues that customer lists are a non-telecommunications service which should not be tariffed. According to Illinois Bell, [*84] it voluntarily provides customer lists under contract today, and has agreed to continue to do so for at least a one-year transitional period for intraMSA presubscription. Under these circumstances, Illinois Bell contends that a tariffing requirement is unnecessary.

CUB recommended that the Commission restrict LEC use of customer information obtained due to the LEC's position as the incumbent monopoly provider. CUB asserted that this information is private and should not be sold for commercial use nor exploited by Illinois Bell for competitive purposes or any other purposes other than the provision of local telephone service.

CUB further argues that this section of the rule should be modified to specifically state that carriers receiving customer lists shall not contact customers with non-listed or non-published telephone numbers by telephone. It argues that customers who have non-listed or non-published numbers have paid a premium for privacy, and their privacy should be respected by the carriers, and in Commission rules.

Staff recognized that the rule does not address either charges for customer lists or the treatment of nonpublished and nonlisted numbers. However, Staff stated [*85] that it prefers that such issues not be specified in the rule to allow the issues to be revisited if the need arises.

3. Conclusion

The Commission concludes that the final draft of this section attached to the surrebuttal testimony of Staff should be adopted. The LEC notice to IXCs was changed to three months to avoid the conflict between this notice and the one contained in Section XXX.110. The other notice schedules are also reasonable.

The Commission does not believe that a broad prohibition against the dissemination of customer information is appropriate at this time. As noted by Staff, the limited availability of the customer information required by Section XXX.170 is needed to allow intraMSA presubscription to be implemented in an equitable fashion. In the Commission's opinion, both the scope of the information and the duration of its availability are carefully and prudently limited in the proposed rule.

We do, however, find generally persuasive CUB's argument regarding the appropriate manner of contacting customers with non-published or non-listed numbers. Those customers have paid a premium for privacy, and it is the Commission's intention that presubscription solicitations [*86] for those customers should not include telephone contacts initiated by telecommunications carriers or their agents. We believe that this intention is adequately reflected in the rule by specifically defining the scope of the information to be included in the customer lists provided for under the rule.

For the reasons set forth by Illinois Bell, we reject AT&T's proposals regarding tariffing of customer information.

J. PTC Arrangements

Staff witness TerKeurst recommended elimination of the PTC arrangement upon implementation of intraMSA presubscription. She proposed the following:

1) the PTC should become the default provider of intraMSA toll service.

2) the LEC should provide billing and collection service for the PTC if the PTC desires.

3) LECs need no longer concur in PTC toll rates.

4) Current contractual netting arrangements and provisioning agreements should be replaced with tariffed access services.

5) The PTC and LECs would no longer be joint providers of intraMSA toll service.

Ms. TerKeurst recognized that the record in this proceeding may not be sufficient to permit the Commission to make a final determination as to how to replace the PTC arrangement.

Centel [*87] and IITA maintain that there are a number of issues relating to the provisioning of private line services which need to be resolved before the PTC arrangement can be eliminated. Sprint points out that LECs which are not PTCs are in fact part of the PTC arrangement, but no consideration has been given in these proceedings to what alternatives will be available to non-PTC LECs for participation in the intraMSA toll business in the absence of PTCs.

ICTC identified a number of changes needed to implement termination of the PTC system. These include elimination of the netting arrangements, mandatory concurrence in intraMSA toll tariffs, and ICTC-LEC joint provision of toll service in MSA 8, all of which are characteristics of the PTC system. In addition, ICTC witness Pence proposed that intraMSA toll service should be declared competitive in MSA 8, and after notice and a transition period, ICTC should be permitted to withdraw as a toll provider when another carrier is providing toll service.

Conclusion

No party has taken the position that the PTC arrangements should not be eliminated. The PTC system has served Illinois well, but is apparently inconsistent with intraMSA presubscription. [*88] The record establishes that there are some remaining issues to be resolved. Accordingly, we will initiate a proceeding to consider issues associated with the termination and replacement of the PTC arrangements.

The Commission, having considered the entire record, and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the parties hereto and the subject matter hereof;

(2) the recitals of fact set forth in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact;

(3) the proposed rule, 83 Ill. Adm. Code XXX, Presubscription, as set forth in the attached Appendix A, should be submitted to the Secretary of State for publication in the Illinois Register, thereby initiating the first notice period under Section 5-40 of the Illinois Administrative Procedure Act; and

(4) all objections, petitions or motions in this proceeding which remain unresolved should be considered resolved consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that the proposed 83 Ill. Adm. Code XXX, as set forth in the attached Appendix A, shall be submitted to the [*89] Secretary of State for publication in the Illinois Register, thereby initiating the first notice period required by Section 5-40 of the Illinois Administrative Procedure Act and that all other submissions necessary for compliance with the Illinois Administrative Procedure Act be made.

IT IS FURTHER ORDERED that the documents and information designated by the Hearing Examiners as confidential and proprietary are hereby afforded proprietary status and motions to that effect are hereby granted.

IT IS FURTHER ORDERED that all objections, petitions or motions in this proceeding which remain unresolved are hereby resolved consistent with the ultimate conclusions contained in this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is not final and is not subject to the Administrative Review Law.

APPENDIX A

TITLE 83: PUBLIC UTILITIES

CHAPTER I: ILLINOIS COMMERCE COMMISSION

SUBCHAPTER f: TELEPHONE UTILITIES

PART 773

PRESUBSCRIPTION

Section

773.5 Applicability

773.10 Definitions

773.100 Obligation to Provide Presubscription

773.110 Implementation

773.120 IntraMSA Calls Not Subject [*90] to Presubscription

773.130 Waivers and Extensions

773.140 Customer Notification and Presubscription Changes

773.150 Interexchange Carrier Participation

773.160 Presubscription Charges and Cost Recovery

773.170 Information Requirements

AUTHORITY: Implementing Section 13-403 and authorized by Section 10-101 of the Public Utilities Act [220 ILCS 5/13-403 and 10-101].

SOURCE: Adopted at Ill. Reg. , effective .

Section 773.5 Applicability

a) This Part shall apply to any telecommunications carrier, as defined in Section 13-202 of the Public Utilities Act ("Act") [220 ILCS 5/13-202] providing local exchange telecommunications service as defined in Section 13-204 of the Act or interexchange telecommunications service as defined in Section 13-205 of the Act. In addition, this Part shall apply to any entity certificated by the Illinois Commerce Commission ("Commission") under Section 13-403 or Section 13-405 of the Act.

b) This Part shall not apply to any telecommunications carrier that is subject to 83 Ill. Adm. Code 760, "Cellular Radio Exclusion."

Section 773.10 Definitions

"1-PIC" is a presubscription method in which a customer's presubscribed calls are carried by the [*91] interexchange carrier (IXC) of the customer's choice, without the use of access codes.

"2-PIC" is a presubscription method in which a customer's inter-market service area (MSA) calls are carried by an IXC of the customer's choice and its intraMSA presubscribed calls are carried, at the customer's choice, by the local exchange carrier (LEC) (or a primary toll carrier (PTC)), by the IXC chosen to carry interMSA calls, or by another IXC, without the use of access codes.

"Bona fide request" is a written request submitted to a LEC by an IXC, in which the IXC requests that the LEC provide presubscription consistent with this Part to customers within an exchange(s) and states that it intends to offer intraMSA usage services utilizing presubscription to customers in the exchange(s) within six months after the bona fide request, or within one year after the effective date of this Part, whichever is later.

"Customer" means a subscriber to a LEC switched network access service, either a bundled network access line or trunk or an unbundled port.

"Customer list" means an identification of the name, billing address and listed or published telephone number of each customer. It does not include [*92] an unpublished or unlisted telephone number.

"Equal access" has the meaning given it in Appendix B of the Modification of Final Judgment entered by the United States District Court on August 24, 1982 in United States v. Western Electric, Civil Action No. 82-0192 (D.D.C. 1982), as amended by the court in its orders issued prior to the effective date of this Part.

"Equal access exchange" means an exchange in which the LEC has complied with and implemented federal equal access requirements.

"Incumbent local exchange carrier" or "incumbent LEC" means a LEC that provided facilities-based switched local exchange telecommunications services within an exchange as of December 31, 1993.

"Interexchange carrier" or "IXC" means a telecommunications carrier under the Act that provides interexchange telecommunications services as defined in Section 13-205 of the Act. A telecommunications carrier is both an IXC and a LEC if it provides both interexchange and facilities-based local exchange telecommunications services.

"Local exchange carrier" or "LEC" means a telecommunications carrier under the Act that provides facilities-based local exchange telecommunications services. A telecommunications [*93] carrier is both an IXC and a LEC if it provides both interexchange and facilities-based local exchange telecommunications services.

"Modified 1-PIC" is a presubscription method in which a customer's interMSA calls are carried by an IXC of the customer's choice and its intraMSA presubscription calls are carried, at the customer's choice, by either the LEC (or a PTC) or by the IXC chosen to carry interMSA calls, without the use of access codes.

"New local exchange carrier" or "new LEC" means a LEC that did not provide facilities-based switched local exchange telecommunications services within a specified geographic area as of December 31, 1993.

"Presubscription" is a procedure by which a customer can predesignate one or more IXCs to access for its presubscribed switched intraMSA and interMSA calls, without dialing an access code.

"Primary interexchange carrier" or "PIC" means a presubscribed IXC that carries presubscribed calls, without the use of access codes, for a customer following equal access or presubscription implementation.

"Primary toll carrier" or "PTC" means the carrier that was made responsible for intraMSA toll rates, intraMSA compensation, and coordination of the [*94] intraMSA toll network by the Sixteenth Interim Order, July 2, 1985, and the Twenty-Fifth Interim Order, July 23, 1986, in Commission Docket 83-0142.

Section 773.100 Obligation to Provide Presubscription

a) Each LEC shall provide presubscription consistent with this Part upon the LEC's own initiative or upon a bona fide request, using the 2-PIC method.

b) Each LEC providing presubscription within an exchange(s) using the 1-PIC method as of December 31, 1993 is exempted from the requirements of this Part as long as it continues to provide 1-PIC presubscription.

c) Presubscription shall be provided consistent with this Part and in accordance with 47 CFR Section 64.1100 (October 1994 Edition) and the following Federal Communications Commission ("FCC") Orders: Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase I, Memorandum Opinion and Orders, 101 FCC 2d 911 (1985); 101 FCC 2d 935 (1985); and Mimeo No. 6714, released August 30, 1985; and Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992), Erratum, DA 92-101, released February 4, 1992. No other amendment or edition of the foregoing [*95] rules or Orders are incorporated in this Part.

Section 773.110 Implementation

a) Each incumbent LEC shall, within 120 days after receiving a bona fide request, file intrastate tariffs to provide presubscription consistent with this Part in its equal access exchanges within six months after receiving the bona fide request or within one year after the effective date of this Part, whichever is later.

b) For each incumbent LEC exchange that was not an equal access exchange as of the effective date of this Part, the incumbent LEC shall file intrastate tariffs to provide presubscription consistent with this Part effective at the time that equal access is implemented within the exchange.

c) Each new LEC shall, within 120 days after receiving a bona fide request, file intrastate tariffs to provide presubscription consistent with this Part effective within six months after receiving the bona fide request or within one year after the effective date of this Part, whichever is later.

d) Each LEC may negotiate implementation schedules that differ from the requirements in this Section, with the agreement of all IXCs that make bona fide requests within 60 days of the first bona fide request. [*96]

Section 773.120 IntraMSA Calls Not Subject to Presubscription

a) In its intrastate presubscription tariff, each LEC shall specify which intraMSA switched calls are not subject to presubscription for each of its exchanges.

b) For each incumbent LEC exchange, intraMSA calls shall not be subject to presubscription if they originate and terminate within the geographic area within which the LEC provides calling through one or more of the following: flat rate service, residence untimed calling and usage measured service bands that do not exceed 15 miles from the exchange wire center, and/or flat rate or measured Extended Area Service, as defined in the LEC's tariffs.

c) The following intraMSA calls shall not be subject to presubscription: local directory assistance (e.g., 411), local repair (e.g., 611), emergency (911), 0- operator services, and local pay-per-call (e.g., 976) calls. Calls using the 500, 700, 800, or 900 service access codes shall not be subject to this Part.

d) For incumbent LECs, 0+ calls shall not be subject to presubscription if they originate and terminate within the geographic area described in Section 773.120(b).

e) All intraMSA switched calls not subject to [*97] presubscription and dialed without the use of access codes shall be carried by the LEC. Those calls dialed using a 500, 700, 800, or 900 service access code shall not be subject to this Part.

Section 773.130 Waivers and Extensions

a) A LEC may petition for a waiver of the requirement to provide presubscription consistent with Section 773.100 on the basis that the 2-PIC method is not technically feasible or that, under current conditions, the costs are expected to substantially exceed reasonably anticipated benefits. The Commission, after hearing, shall grant a waiver and shall allow the modified 1-PIC method to be used upon a showing that the 2-PIC method is not technically feasible or that its costs are expected to substantially exceed reasonably anticipated benefits.

b) A LEC may petition for an extension of the timing requirements in Section 773.110 on the basis that presubscription cannot reasonably be provided within the given exchange(s) within the required time frame. The Commission, after hearing, shall grant an extension to a specified date upon a showing that presubscription cannot reasonably be provided within the given exchange(s) within the time frame required by [*98] Section 773.110 and that the date specified in the extension can reasonably be met.

c) Any LEC or IXC may petition for a waiver of the requirements in Section 773.120 on the basis that the requirements regarding calls not subject to presubscription do not meet customers' calling needs and/or do not preserve or promote effective competition. The Commission, after hearing, shall grant a waiver upon a showing that the requirements regarding calls not subject to presubscription do not meet customers' calling needs and/or do not preserve or promote effective competition. In determining whether to grant the waiver, the Commission shall consider the financial impact and the technical feasibility of alternatives.

Section 773.140 Customer Notification and Presubscription Changes

a) For each incumbent LEC exchange that was an equal access exchange as of the effective date of this Part, and for each new LEC, the LEC shall provide written notice to its customers of the availability of presubscription, as follows:

1) The notice shall be provided to existing customers at least 30 days prior to the implementation of presubscription consistent with this Part;

2) The notice shall be provided [*99] to new customers who request network access service between the time the notice is distributed and the date presubscription is implemented consistent with this Part, at the timethey request service;

3) The notice shall describe presubscription, the customers' choices, how to select among the presubscription choices, and any related charges in a manner that does not attempt to influence customers regarding their selections.

b) For each incumbent LEC exchange that was not an equal access exchange as of the effective date of this Part, balloting shall be required for both interMSA and intraMSA usage, as follows:

1) Balloting shall be in accordance with the FCC's Memorandum Opinion and Orders in CC Docket No. 83-1145, Phase I, and balloting shall include both interMSA and intraMSA choices;

2) Customers' intraMSA usage subject to presubscription shall not be allocated, and shall continue to be provided by the incumbent LEC (or PTC) until the customer selects a different intraMSA presubscription choice.

c) For new customers requesting network access service after presubscription consistent with this Part is implemented in an exchange, the LEC or other carrier receiving the request [*100] shall inform the customer, when service is requested, of its presubscription choices and shall provide the following information before either asking for the customer's presubscription selections and/or marketing its own interexchange services:

1) The customer service representative shall inform the new customer that the customer can select from a number of IXCs for presubscribed interexchange service, and shall describe the available presubscription choices in a manner that does not attempt to influence customers regarding their selections;

2) The representative shall offer to provide the names of IXCs serving that office in random order as well as the telephone numbers of the IXCs.

If the customer indicates its selections, the representative shall not solicit the customer further for the carrier's interexchange services.

d) Customers shall retain their existing intraMSA dialing arrangements as of the effective date of this Part until they make presubscription selections, and may change their selections at any time, subject to charges specified in Section 773.160. Procedures for intraMSA and interMSA selection changes shall be in accordance with 47 CFR Section 64.1100 (October [*101] 1994 Edition) and the following Federal Communications Commission ("FCC") Orders: Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase I, Memorandum Opinion and Orders, 101 FCC 2d 911 (1985); 101 FCC 2d 935 (1985); and Mimeo No. 6714, released August 30, 1985; and Policies and Rules Concerning Changing Long Distance Carriers, CC Docket No. 91-64, Report and Order, 7 FCC Rcd 1038 (1992), Erratum, DA 92-101, released February 4, 1992. No other amendment or edition of the foregoing rules or Orders are incorporated in this Part.

Section 773.150 Carrier Participation

Carriers (including LECs and IXCs) may carry presubscribed intraMSA calls if they have effective intrastate tariffs to provide such services and if they have made the necessary arrangements with the LEC.

Section 773.160 Presubscription Charges and Cost Recovery

a) Each LEC shall allow customers to change presubscription selections once at no charge within six months following implementation within an exchange of presubscription consistent with this Part, and shall allow each new customer to select presubscription arrangements at no charge at the time network access service is initiated. At [*102] other times, each LEC may impose a reasonable, tariffed charge for changes in a customer's presubscription selections.

b) Each LEC may seek to recover reasonable separated intrastate costs limited to initial incremental expenditures related directly to the provision of presubscription that would not be required absent the provision of presubscription consistent with this Part.

c) In determining presubscription cost recovery, each LEC shall amortize all separated intrastate presubscription costs over at least a three year period.

d) Each LEC that provides noncompetitive services and is not an average schedule company shall use the following procedures for recovery of intrastate presubscription costs:

1) A tariffed presubscription cost recovery charge shall be applied to all switched originating intraMSA intrastate minutes of use subject to presubscription and originated by the LEC's customers, whether carried by the LEC or another IXC. If the LEC is a PTC, such charges shall not apply to customers of other LECs with which the LEC has a PTC arrangement;

2) The LEC shall submit the proposed presubscription cost recovery charge and full cost documentation as part of its tariff filing [*103] made to implement presubscription consistent with this Part;

3) In non-equal access exchanges where both inter- and intraMSA equal access are implemented concurrently, LECs should develop separate inter- and intraMSA cost recovery charges, consistent with FCC requirements and this Part.

e) Each LEC that is an average schedule company shall, through its concurrence in the Illinois Small Company Exchange Carrier Association (ISCECA) intrastate switching tariffs, use the following procedures for recovery of intrastate presubscription costs:

1) An addition to the local switching rates shall be applied to all switched intrastate minutes of use subject to presubscription and originated by the LEC's customers;

2) ISCECA shall submit the proposed addition to its local switching rates and full cost documentation through a tariff filing made to recover intrastate presubscription costs consistent with this Part;

3) The addition to the local switching rates shall apply for the amortization period only. At the end of the amortization period, ISCECA shall file the appropriate local switching tariff reflecting the removal of such addition to its local switching rates.

Section 773.170 Information [*104] Requirements

a) Within 15 days after receiving a bona fide request, a LEC shall notify all IXCs currently purchasing Feature Group D access service ("FGD service") from the LEC in the affected exchange(s) of the bona fide request.

b) Each LEC shall provide the following information to all IXCs purchasing FGD service or which place orders for FGD service from the LEC in each exchange where presubscription consistent with this Part is to be implemented:

1) Presubscription conversion schedules, to be provided at least three months prior to the cutover date;

2) Ordering procedures, terms, and conditions for the IXC to be eligible for customer presubscription to the IXC, to be provided at least three months prior to the cutover date;

3) Customer lists, within 15 business days of receipt of a written request from an IXC that has made a bona fide request or has otherwise established eligibility for customer presubscription, to be used by the IXC only in connection with presubscription solicitation. Customer lists shall be provided upon request for a period of six months prior to and six months after the implementation of presubscription in an exchange.

c) Each LEC shall serve all [*105] presubscription tariff filings, waiver petitions, and extension of time petitions on all IXCs currently purchasing FGD service from the LEC in the affected exchange(s) and on all other entities that have requested such service.

84TH DECISION of Level 1 printed in FULL format.

PUBLIC UTILITIES REPORTS - FOURTH SERIES

TEXAS

Re MFS Communications Company, Inc.

PUC Docket No. 16189 PUC Docket No. 16196 PUC Docket No. 16226

Texas Public Utility Commission

SLIP OPINION

November 07, 1996

SYNOPSIS:

ARBITRATION AWARD I. INTRODUCTION A. PROCEDURAL BACKGROUND

The federal Telecommunications Act of 1996 n1 (FTA96) requires that when an incumbent local exchange carrier (ILEC) and a new local service provider (LSP) are unable to negotiate the terms and conditions of interconnection agreements, either of the negotiating parties "may petition a State commission to arbitrate any open issues." FTA96 @251(b)(1). The Public Utility Commission of Texas (the Commission) is the state commission responsible for arbitrating disputes under FTA96. n2 The Commission anticipated it would be called upon to resolve disputes under FTA96, and promulgated a dispute resolution rule that established procedures for conducting arbitration proceedings. n3

Several LSPs have petitioned the Commission to resolve their disputes with Southwestern Bell Telephone Company (SWBT). Pursuant to FTA96 @252(g), the Commission ordered that five of the SWBT arbitration petitions be consolidated. n4 The petitioning companies in this consolidated proceeding are American Communications Services, Inc. (ACSI), AT&T Communications of the Southwest (AT&T), MCI Telecommunications Corporation/MCIMetro Access Transmission Services, Inc. (MCI), MFS Communications Company, Inc. (MFS), and Teleport Communications Group, Inc. (TCG) (collectively, "the Petitioners").

The Commission's arbitration panel in these dockets is composed of the three Commissioners: Chairman Pat Wood, III, Commissioner Robert W. Gee, and Commissioner Judy Walsh (the Arbitrators). The members of the panel were sworn in as arbitrators and, with the assistance of Commission staff advisors, conducted the consolidated arbitrations in accordance with the Commission's dispute resolution rules.

FTA96 @252(b)(4) limits the issues that may be decided in arbitration to those set forth by the parties. During the course of the consolidated arbitration proceeding, parties were advised repeatedly to identify issues that required decisions by the Arbitrators. If parties did not include an issue on the "Decision Points Lists" developed during the proceeding, the Arbitrators did not include the issue in the list of those requiring a decision. All of the decisions rendered in Section III of this Award are intended to resolve disputed open issues identified by the parties to this proceeding. If an issue was stipulated by the parties during the course of the proceeding, or otherwise eliminated from the list of issues in dispute, a decision on the issue is not included in this Arbitration Award.

This Arbitration Award resolves the disputed issues presented for arbitration, and sets the stage for completion of interconnection agreements between SWBT and ACSI, AT&T, MCI, MFS, and TCG. The parties' interconnection agreements shall be presented to the Commission for approval, as required by FTA96 @252(e), according to the schedule established in Section IV of this Award. B. STRUCTURE OF THE AWARD

This Award is organized as follows. A list of the stipulations reached during the arbitration proceeding is provided in Section II. The stipulations represent the parties' settlements of issues that were initially brought before the Arbitrators for arbitrated resolutions. Copies

of the stipulations are included in the Award as Appendix A.

The Arbitrators' decisions on the disputed issues presented for arbitration are found in Section III of the Award. Four appendices referenced in Section III are incorporated as part of the Arbitrators' Award: Appendix B, the Avoided Cost Discount spreadsheet; Appendix C, the Depreciation Rates spreadsheet; Appendix D, the 2-wire/4-wire descriptive diagram; Appendix E, the document entered into the record as AT&T Exhibit 15A, entitled "Electronic Pre-Order and Ordering and Provisioning Availability."

A schedule for implementation of the terms and conditions of the Arbitration Award by the parties is set forth in Section IV. Finally, the Arbitrators' conclusion is stated in Section V. II. STIPULATED ISSUES

An arbitration award is not required for issues resolved by agreement of the parties. During the course of the arbitration proceedings, the parties have continued to work to resolve disputed issues, and have filed numerous stipulations reflecting resolution of their disputes. The terms of these stipulations are incorporated by reference in the Arbitrators' Award regarding the relevant Petitioners. The following stipulations between SWBT and the individual Petitioners have been filed with the Arbitrators.

Unbundled Elements

1. ACSI Ex. 5: "Agreement Concerning Co-Carrier Cross Connect."

2. ACSI Ex. 6: "Agreement Concerning ADSL and HDSL."

3. MCI Ex. 21: "Stipulation Concerning ADSL and HDSL."

The substantive terms of ACSI Ex. 6 and MCI Ex. 21 are identical.

Interconnection/Collocation

4. MCI Ex. 22: "Interconnection/Collocation."

5. AT&T Ex. 6: "Stipulation Regarding AIN SCP Access Issue."

6. AT&T Ex. 7: "Stipulation on Collocation Of Remote Switching Module Equipment."

7. AT&T Ex. 9: "Stipulation on Poles, Ducts, Conduits, and Rights-of-Way."

8. MCI Ex. 17: "Stipulation on Poles, Ducts, Conduits, and Rights-of-Way."

The substantive terms of AT&T Ex. 9 and MCI Ex. 17 are identical.

9. AT&T Ex. 59: "Stipulation on Intervals for Commitments on Make-Ready Work for the Placing of AT&T Facilities."

10. MCI Ex. 23: "Stipulation on Intervals for Commitments on Make-Ready Work for the Placing of AT&T Facilities."

The substantive terms of AT&T Ex. 59 and MCI Ex. 23 are identical.

11. AT&T Ex. 60: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Installation of Inner-Duct by AT&T."

12. MCI Ex. 26: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Installation of Inner-Duct by MCI."

In most respects, the substantive terms of AT&T Ex. 60 and MCI Ex. 26 are identical.

13. AT&T Ex. 61: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Availability of Unassigned Inner Ducts."

14. AT&T Ex. 62: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Immediate Availability of Unassigned Ducts."

15. MCI Ex. 18: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Immediate Availability of Unassigned Ducts."

The substantive terms of AT&T Ex. 62 and MCI Ex. 18 are identical.

16. AT&T Ex. 63: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Just and Reasonable Rates."

17. MCI Ex. 20: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Just and Reasonable Rates."

The substantive terms of AT&T Ex. 63 and MCI Ex. 20 are identical.

18. AT&T Ex. 64: "Stipulation Between SWBT and AT&T Regarding Time Frames Within Which Space on SWBT's Poles, Ducts, Conduits and Rights-of-Way Can Be Reserved for Future Use."

19. AT&T Ex. 65: "Stipulation As To The Degree To Which SWBT Should Modify Its Outside Plant Facilities To Accommodate New LSP's Space Requirements Before Declaring Space Unavailable."

20. MCI Ex. 25: "Stipulation As To The Degree To Which SWBT Should Modify Its Outside Plant Facilities To Accommodate New LSP's Space Requirements

Before Declaring Space Unavailable."

The substantive terms of AT&T Ex. 65 and MCI Ex. 25 are identical.

21. AT&T Ex. 66: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Removal of Retired or Inactive Cables."

22. MCI Ex. 19: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Removal of Retired or Inactive Cables."

The substantive terms of AT&T Ex. 66 and MCI Ex. 19 are identical.

23. AT&T Ex. 67: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Repair/Maintenance/Emergency Duct."

24. AT&T Ex. 68: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Access To Public and Private Rights-of-Way."

25. AT&T Ex. 70: "Stipulation on Collocation Use of Electrical Power."

26. MCI Ex. 16: "Stipulation on Collocation Use of Electrical Power."

The substantive terms of AT&T Ex. 70 and MCI Ex. 16 are identical.

27. AT&T Ex. 71: "Interconnection Stipulation Regarding SWBT Providing Two-Way Trunks."

28. AT&T Ex. 73: "Stipulation on Poles, Ducts, Conduits and Rights-of-Way Infrequent Construction Techniques And Connectivity Solutions."

Resale

29. SWBT Ex. 9: "Stipulation Regarding Resale Services." (AT&T and MCI)

Numbering Issues

30. AT&T Ex. 58: "Stipulation Regarding Certain Numbering Issues."

Operational and Technical Issues

31. SWBT Ex. 15: "Stipulation Regarding Certain Operational And Technical Issues." (AT&T)

32. AT&T Ex. 17: "Stipulation Regarding Branding and Customized Routing for Operator Services and Directory Services."

33. MCI Ex. 24: "Stipulation Regarding Branding and Customized Routing for Operator Services and Directory Services."

The substantive terms of AT&T Ex. 17 and MCI Ex. 24 are identical. III. DECISIONS ON ISSUES PRESENTED FOR ARBITRATION

The following decisions represent the Arbitrators' resolution of the issues presented for arbitration by SWBT, ACSI, AT&T, MCI, MFS, and TCG. The Arbitrators find that the following decisions, and the conditions imposed on the parties by these decisions, meet the requirements of FTA96 @251, and any applicable regulations prescribed by the Federal Communications Commission (FCC) pursuant to FTA96 @251. The following decisions establish rates for interconnection, services, and network elements according to the standards set forth in FTA96 @252(d). A schedule for implementation of the terms and conditions of this Award by the parties is described in the following decisions, and set forth in full in Section IV of this Award. FTA96 @252(c).

At the end of each decision, the Arbitrators have included a reference to (1) the section of FTA96 on which the decision is based; and (2) the identity of the Petitioner(s) seeking an arbitrated resolution of the issue. A. UNBUNDLED ELEMENTS

1. SWBT must provide access to the following unbundled network elements without restriction. LSPs may not be required to own or control any of their own local exchange facilities before they can purchase or use unbundled elements to provide a telecommunications service. (1) local loop; (2) network interface devices; (3) local switching; (4) tandem switching; (5) interoffice transport; (6) signaling and call-related databases; (7) operations support systems; (8) operator services and directory assistance; and (9) cross-connect from SWBT main distribution frame (MDF) to an LSP's collocation space. SWBT must offer unbundled local loops with and without automated testing and monitoring services. If an LSP uses its own testing and monitoring services, SWBT still must treat the test reports as its own for purposes of procedures and time intervals for clearing trouble reports.

FTA96 @251(c)(3). (ACSI, AT&T, MCI, MFS)

2. SWBT is not required to provide space on its Network Interface Devices (NIDs) to LSPs. FTA96 @251(c)(3). (AT&T, MCI)

3. The unbundled local loops provided by SWBT are not required to be capable of delivering optical levels of signaling, including Synchronous Optical Network (SONET) private line service. SWBT must offer SONET private line service for resale at a wholesale discount. FTA96 @251(c)(3). (MCI)

4. SWBT must provide dark fiber in the feeder segment of the loop as an unbundled network element under the following conditions: SWBT must offer its dark fiber to LSPs, but may offer it pursuant to agreements that would permit revocation of an LSP's right to use the dark fiber upon twelve (12) months' notice by SWBT. To exercise its right of revocation, SWBT must demonstrate that the subject dark fiber is needed to meet SWBT's bandwidth requirements or the bandwidth requirements of another LSP. An LSP may not, in a twenty-four (24) month period, lease more than 25% of SWBT's excess dark fiber capacity in a particular feeder segment. If SWBT can demonstrate within a twelve (12) month period after the date of a dark fiber lease that the LSP is using the leased dark fiber capacity at a level of transmission less than OC-12 (622.08 million bits per second), SWBT may revoke the lease agreement with an LSP and provide the LSP a reasonable and sufficient alternative means of transporting the traffic. The Arbitrators find this requirement is necessary to ensure efficient use of dark fiber spectrum by various LSPs and SWBT. FTA96 @251(c)(3). (AT&T, MCI)

5. SWBT is not required to allow Signaling System 7 (SS7) advanced intelligent access from MCI's Service Control Point (SCP). When industry

standards are established concerning connectivity of ILEC switches with LSP SCPs, parties may petition the Commission to require SWBT to provide such connectivity. This issue will be a subject of the review of interconnection issues to be conducted by the Commission on June 13, 1997. FTA96 @251(c)(3). (MCI)

6. SWBT must provide dark fiber in the dedicated interoffice transport segment of the network as an unbundled network element under the following conditions: SWBT must offer its dark fiber to LSPs who have collocation space in a SWBT tandem or end office, but may offer it pursuant to agreements that would permit revocation of an LSP's right to use the dark fiber upon twelve (12) months' notice by SWBT. To exercise its right of revocation, SWBT must demonstrate that the subject dark fiber is needed to meet SWBT's bandwidth requirements or the bandwidth requirements of another LSP. An LSP may not, in a twenty-four (24) month period, lease more than 25% of SWBT's excess dark fiber capacity in a particular dedicated interoffice transport segment. If SWBT can demonstrate within a twelve (12) month period after the date of a dark fiber lease that the LSP is using the leased dark fiber capacity at a level of transmission less than OC-12 (622.08 million bits per second), SWBT may revoke the lease agreement with the LSP and provide the LSP sufficient alternative means of transporting the traffic. The Arbitrators find this requirement is necessary to ensure efficient use of dark fiber spectrum by various LSPs and SWBT. FTA96 @251(c)(3). (AT&T, MCI)

7. SWBT must provide access to Digital Cross Connect Systems (DCS) functionality as an unbundled network element. SWBT is not required to install the unbundled DCS in an LSP's physical collocation space, but must allow virtual collocation of DCS as an unbundled network element. As an unbundled network element, prices for DCS functionality shall be based on TELRIC; prior to the setting of permanent rates, SWBT may charge FCC tariffed rates. FTA96 @251(c)(3). (MCI)

8. SWBT must provide subloop elements as unbundled network elements in the following manner. (1) Distribution: SWBT must offer as an unbundled element the segment of the local loop extending between a remote terminal (RT) site (located in a hut, CEV, or cabinet) and the end user premises. SWBT is not required to offer the segment of the loop between a Feeder Distribution Interface (FDI) and the RT site, or the FDI and the end user premises, as a separate unbundled network element. (2) Feeder: in the feeder segment of the loop, only the dark fiber and the 4-wire copper cable that is conditioned for DS-1 must be offered as unbundled network elements. (3) Digital Loop Carrier: the DLC must be offered as an unbundled network element, but SWBT is not required to offer further unbundling of the DLC. The issue of the technical feasibility of further unbundling at the FDI will be a subject of the review of interconnection issues to be conducted by the Commission on June 13, 1997.

FTA96 @251(c)(3). (AT&T, MCI)

9. SWBT is not required to include in its interconnection agreement with MCI the request stated in MCI Ex. 1 (Cullather Testimony), Attachment III, Section 15.1.2.1. SWBT must offer unbundled local loops with and without automated testing and monitoring services. If an LSP's testing produces incorrect information which results in SWBT dispatching a repair crew unnecessarily, then the LSP must pay SWBT the cost of the unnecessary trip. FTA96 @251(c)(3). (AT&T, MCI) B. INTERCONNECTION/COLLOCATION

Methods of Interconnection.

10. Where the parties cannot reach agreements regarding space, the determination will be made by a third party engineer. The costs of the engineer's services will be paid jointly by SWBT and the LSP. SWBT must provide collocation at CEVs, huts, and cabinets (1) that serve as remote terminal sites and house SWBT network facilities such as loop concentrators or multiplexers; and (2) house interoffice network facilities, in the following manner: physical collocation must be provided on a first come, first served basis, provided there is space available for collocation and for reasonable security arrangements. If space is not available, SWBT must provide virtual collocation. SWBT is required to permit interconnection of an LSP's copper and coaxial cable only where the LSP can demonstrate that interconnection of its copper/coaxial facilities would not impair SWBT's ability to serve its own customers or subsequent interconnectors. FTA96 @251(c)(6). (AT&T, MCI)

11. SWBT is required to provide collocation space to LSPs only for equipment used for the purposes of interconnection or access to unbundled network elements. Equipment used for interconnection and access to unbundled network elements includes, but is not limited to (1) transmission equipment such as optical terminating equipment and mutliplexers; and (2) equipment being collocated to terminate basic transmission facilities pursuant to the FCC's expanded interconnection requirements (@@64.1401 and 64.1402) as of August 1, 1996, and the Texas expanded interconnection rule (P.U.C. Substantive Rule @23.92). SWBT is not required to permit collocation of equipment used to provide enhanced services because such equipment is not necessary for interconnection or access to unbundled network elements pursuant to FTA96 @251(c)(6). (AT&T, MCI)

Terms and Conditions.

12. SWBT must provide interconnection to LSPs at any technically feasible point with SWBT's network with quality at least equal to that which SWBT provides itself, its subsidiaries or affiliates, or any other party. At a minimum, SWBT must provide interconnection at the following points: (1) the line-side of the local switch; (2) the trunk-side of the local switch; (3) the trunk interconnection points for a tandem switch; (4) central cross-connect points; (5) out-of-band signaling transfer points; and (6) the points of access to unbundled elements. LSPs may test their interconnections rather than have SWBT perform that function; however, under this arrangement SWBT still must treat the test reports as its own for purposes of procedures and time intervals for clearing trouble reports. If an LSP's testing produces incorrect information which results in SWBT dispatching a repair crew unnecessarily, the the LSP must pay SWBT the cost of the unnecessary trip. FTA96 @251(c)(2). (AT&T, MCI, TCG)

13. SWBT must tariff the rates, terms, and conditions for physical collocation, rather than requiring negotiation of each collocation arrangement on an individual case basis. The Arbitrators order SWBT and the affected Petitioners to submit, by December 31, 1996, a mutually agreed upon list of central offices and other SWBT premises where physical collocation should be offered. If parties are unable to develop such a list, the affected Petitioners are ordered to designate, by December 31, 1996, the largest 100 central offices for purposes of collocation based on publicly available information such as access lines from the Access Lines Report. Unless an affected Petitioner indicates otherwise, all tandem offices including those connected to the designated central offices shall be tariffed for physical collocation, if

physical collocation is determined to be technically feasible at these premises. In addition, CEVs, huts, and cabinets (serving as RT sites) located in the geographic area served by the designated central offices, as well as those housing interoffice facilities, shall also be tariffed for collocation, provided physical collocation is determined to be technically feasible at these premises. SWBT shall file tariffs for the designated central offices, including tandem offices and other SWBT premises mentioned above, by February 15, 1997. The effective date for such tariff fillings shall be not later than 30 days after the filing date, unless suspended. For purposes of establishing rate elements such as central office space, power, cable space, cable placement/removal, and cross connects, SWBT may group central offices or other SWBT premises by exchange, LATA or some other reasonable criteria. The Arbitrators order the affected Petitioners to designate additional SWBT premises for purposes of collocation by June 30, 1997. SWBT shall file tariffs for such premises by August 15, 1997, with the effective date for these tariffs being no later than 30 days after the filing date, unless suspended. If a Petitioner is interested in collocating at any SWBT premise not identified by June 30, 1997 (the due date for the second list of potential collocation premises), the affected Petitioner shall negotiate with SWBT collocation at such premise. If such negotiations fail to produce an agreement, the Commission shall arbitrate the disputed issue. FTA96 @251(c)(6). (AT&T, MCI, TCG)

Access to Poles, Ducts, Conduits and Rights-of-Way.

14. SWBT must allow LSPs to select the space they will occupy on poles or in conduit systems based upon the same criteria SWBT applies to itself. To facilitate non-discrimination in the LSP's selection of space, SWBT must provide information to LSPs about the network guidelines and engineering protocols used by SWBT in determining the placement of facilities on poles and conduits. In addition, the facilities shall be placed (on poles, ducts, and conduits), constructed, maintained, repaired, and removed consistent with the criteria and procedures in current (as of the date when such work is performed) editions of the following publications: (a) the Blue Book Manual of Construction Procedures, Special Report SR-TAP-001421, published by Bell Communications Research, Inc. (Bellcore), and sometimes referred to as the "Blue Book"; (b) the National Electrical Safety Code (NESC), published by the Institute of Electrical and Electronic Engineers, Inc. (IEEE); (c) the National Electrical Code (NEC), published by the National Fire Protection Association (NFPA); (d) federal requirements such as those imposed by the Federal Energy Regulatory Commission (FERC) and Occupational Safety and Health Administration (OSHA); and (e) applicable state and local requirements. FTA96 @224(f)(1) and @251(b)(4). (AT&T, MCI)

15. The Arbitrators conclude that in situations where LSP personnel, certified based on industry standards, perform installation, maintenance and similar routine work at SWBT sites, SWBT should be given 48 hour notice so that SWBT may, at its option, send one or more employee to review such work. The LSP is not required to provide the 48-hour notice in case of emergencies; however, the Arbitrators expect such emergencies to be very infrequent. The affected LSP and SWBT shall share the cost of a single SWBT employee reviewing the work during emergency and non-emergency situations. SWBT will not be compensated by the LSP for any additional employees reviewing the work. The SWBT employees assigned for review and inspection of LSP personnel work must be available during all normal business hours for such assignments to minimize inconvenience to the LSP. If the work at SWBT sites is performed by a contractor agreed upon

by the LSP and SWBT, SWBT shall be responsible for the costs of its employees sent to inspect the contractor's work. However, if the LSP personnel perform work at the site of an interconnection point where the participation of SWBT personnel is integral for the successful completion of the work, the LSP is responsible for paying the costs of SWBT personnel reasonably needed for such work. FTA96 @224(f)(1) and @251(b)(4). (AT&T, MCI)

16. SWBT may recover the costs of modifying its outside plant facilities for LSP space requirements. SWBT may not require that all costs of the modification be paid up-front before work commences. The Arbitrators find that it is commercially reasonable for contractors to be paid half of their compensation at 50% completion of work, and half at 100% completion. To facilitate the sharing of costs by all parties benefiting from the modification, SWBT must establish a methodology whereby the LSP initiating the modification is charged for the work, and then reimbursed on a pro rata basis for any portion of the facility later used by SWBT or another LSP. FTA96 @224(f)(1) and @251(b)(4). (AT&T, MCI)

17. The Arbitrators note their concern that the 15-step process proposed by SWBT for administrative approval of LSP requests for pole attachments and conduit space may unnecessarily delay the fulfillment of valid LSP requests. The Arbitrators do not endorse the process proposed by SWBT; neither do they prohibit its use. The SWBT administrative approval process will be a subject of the June 13, 1997 review of interconnection issues conducted by the Commission. The Arbitrators encourage the parties to provide more streamlined alternatives to the 15-step approval process at the time of the six-month review. SWBT may charge reasonable, cost-based ancillary fees to recover administrative costs incurred in processing LSP requests for pole attachments and conduit space. If SWBT chooses to charge such fees, it must provide cost justification for the fees, consistent with the costing standards adopted in this proceeding. FTA96 @224(f)(1) and @251(b)(4). (AT&T, MCI) C. RESALE

18. SWBT may retain the continuous property tariff restriction for Plexar and STS services, which has been found reasonable by the Commission. SWBT may not retain the limitation on aggregation for purposes of the resale of volume discount offers. Additional tariff restrictions, other than the cross-class restriction allowed by FTA96 @251(c)(4)(B), are presumptively unreasonable. FTA96 @251(c)(4)(B). (AT&T, MCI)

19. SWBT is not required to provide a fresh look opportunity for its customers currently under term plans.

FTA96 @251(b) and (c). (AT&T, MCI)

20. SWBT must give an LSP notice of new promotions or products at the time a Preliminary Rate Authority (PRA) is transmitted, or, in situations where a PRA would not be issued, within 90 days (45 days for price changes) of the expected change in services or operations that would affect the LSP. FTA96 @251(c)(4) and (5). (AT&T, MCI)

21. SWBT is not required to provide a wholesale discount to LSPs for promotions of 90 days or less. SWBT must, however, offer the promotion for resale. For promotions of more than 90 days, SWBT shall make the promotion available for resale at a wholesale discount according to the specific percent discount for the service as applied directly to the value of the promotional rate. FTA96 @251(c)(4) and (5). (AT&T, MCI) D. NUMBERING ISSUES

22. SWBT is not required to make Route Index-Portability Hub (RI-PH) or Directory Number-Route Index (DN-RI) available to LSPs. SWBT shall test RI-PH and DN-RI for technical feasibility. SWBT shall attempt to obtain the testing protocols used by other RBOCs, such as Ameritech and BellSouth. SWBT shall attempt to obtain LSPs' agreement as to the appropriate testing protocols. If SWBT and an LSP cannot agree to the testing protocols, either party may petition the Commission for arbitration without waiting 135 days, as might otherwise be required under FTA96. SWBT shall attempt to obtain LSPs' agreement as to the results of the testing and whether RI-PH or DN-RI has been shown to be technically feasible. If SWBT and an LSP cannot agree to the results or the conclusion regarding technical feasibility, either party may petition the Commission for arbitration without waiting 135 days, as might otherwise be required under FTA96. FTA96 @251(b)(2). (AT&T, MCI)

23. SWBT and each LSP shall absorb its own costs of providing Interim Number Portability (INP). FTA96 @251(e)(2). (ACSI, AT&T, MCI, MFS, TCG)

24. SWBT and the LSP must implement a meet-point billing arrangement under which the forwarding carrier is allowed to retain any applicable terminating transport fees but no other portion of the switched access charges (such as Carrier Common Line and switching-related charges). FTA96 @252(d). (AT&T, MCI)

E. OPERATIONAL AND TECHNICAL ISSUES

Support Functions and Implementation Issues.

25. SWBT must provide real-time electronic interfaces that allow LSPs to perform preordering, ordering, provisioning, maintenance and repair, and billing for resale services and unbundled network elements. The interfaces must be provided on a non-discriminatory basis, and must be capable of performing the relevant functions in the same time intervals that SWBT performs similar functions for itself. SWBT must provide the items listed in AT&T Exhibit 15A (attached as Exhibit E) and the interfaces necessary for the preordering, ordering, provisioning, maintenance and repair, and billing for unbundled network elements, by the earlier of: (1) the availability dates listed in AT&T Exhibit 15A, Column entitled "SWBT Availability" (whether designated "commitment" or "target" in AT&T Exhibit 15A); or (2) June 1, 1997. SWBT must file monthly progress reports with the Commission that update the progress of implementation. Petitioners may file responses to SWBT's progress reports, if necessary. The first report shall be due January 15, 1997. On February 28, 1997, SWBT and the Petitioners will report to the Commission on the status of development and implementation of electronic interfaces. The development and implementation of electronic interfaces will also be a subject of the Commission's June 13, 1997 review of the implementation of the Arbitration Award.

FTA96 @251(c)(3). (AT&T, MCI)

26. The Commission will consider SWBT's progress on development and implementation of electronic interfaces a factor in evaluating SWBT's compliance with the requirements for providing in-region interLATA service under FTA96 @271(c).

27. The record evidence indicates that the requested databases called "Centrex Business Group Information," "Intercept Information," "Operator Reference Information," and "Plant Inventory Data" do not exist. For "CMDS,"

SWBT must provide information to LSPs for which SWBT serves as host. The access requested to the other databases is denied. The Arbitrators have ordered provision of real-time electronic interfaces that will adequately serve the functions sought by MCI. Until the electronic interfaces are available, SWBT must provide information to MCI through a modified "Customer Record Information System" (CRIS) format in the same format it has agreed to provide to AT&T. FTA96 @251(c)(3). (MCI)

28. An LSP may require that, at the end of the first year of implementation of its interconnection agreement, SWBT submit to an audit or examination of services performed under the interconnection agreement. Subsequent to the first year of implementation, the LSP may require that audits or examinations be performed if: (1) the LSP can show cause that it has a commercially reasonable basis to seek an audit or examination; and (2) the request for audit or examination specifically defines the particular services that it seeks to audit or examine. All audits requested by the LSP shall be conducted at its expense. The dispute resolution provisions of the relevant LSP/SWBT interconnection agreement shall be used to resolve disputes arising concerning requests for audits or examinations, or the results of the audits or examinations. FTA96 @251(c)(3). (MCI)

29. At an LSP's request, SWBT must: (1) maintain data that compares the installation intervals and maintenance/service response times experienced by the requesting LSP's customers to those experienced by SWBT customers and the customers of other LSPs; and (2) provide the comparative data to the LSP on a regular basis. If an LSP requests comparative data from SWBT in its interconnection agreement, the LSP must make a reasonable effort to define the specific data that it seeks to receive from SWBT. SWBT shall not levy a separate charge for provision of the requested information to the LSP. FTA96 @251(c)(3). (MCI)

30. The record reflects agreement by all parties that a CABS-like billing system is the best long run solution for SWBT/LSP billing. SWBT is ordered to implement a CABS-like billing system as soon as possible after the Ordering and Billing Forum (OBF) issues its final CABS release. If the OBF CABS release is not issued by May 1, 1997, MCI may, as part of its interconnection agreement, demand immediate action toward implementation of a CABS-like billing system for SWBT/MCI billing. Until CABS-like billing systems are available, SWBT must provide LSPs with CRIS data in a format that will allow the LSPs to audit and manipulate the data. FTA96 @251(c)(3). (MCI)

31. SWBT must notify AT&T and MCI of maintenance work in the following situations: (1) when maintenance activity is planned; (2) when there are unexpected major outages. When a network element is dedicated to one LSP, SWBT must work with that LSP to schedule the maintenance activity. SWBT must make reasonable accommodations to the LSP when scheduling the maintenance of the dedicated network element. FTA96 @251(c)(3). (AT&T, MCI)

Directory and Operator Services / Branding Issues.

32. The record evidence supports SWBT's position that the branding requested is technically infeasible at the present time. SWBT must: (1) unbrand through live operators for all LSPs in the same manner it has agreed to unbrand for AT&T (see AT&T Exhibit 17); and (2) undertake an expedited installation schedule for provision of software modifications that will allow rebranding for automated

systems to be completed by June 1, 1997. FTA96 @251(c). (AT&T, MCI)

33. When a SWBT employee visits the premises of an LSP customer, the SWBT employee must inform the customer that he or she is there on behalf of the customer's provider. Materials left at the customer premises (e.g., door hanger notifying the customer of the service visit) must also inform the customer that SWBT was on their premises on behalf of the customer's provider. FTA96 @251(c). (AT&T, MCI)

34. LSPs may negotiate with SWBT to brand the cover of the white pages telephone directory. This issue will be a subject of the review of interconnection issues to be conducted by the Commission on June 13, 1997. FTA96 @251(b)(3). (AT&T, MCI, TCG)

35. SWBT is not required to comply with rebranding requests not discussed in this Award.

Performance Standards and Penalties.

36. The Arbitrators find that monetary penalties for below standard performance are appropriate. The record evidence shows that SWBT's liquidated damages proposal is reasonable, and should serve as the standard monetary penalties language to be included in Petitioners' interconnection agreements. However, SWBT's proposal must be clarified to ensure that LSPs shall not be required to indemnify SWBT for SWBT's failure to meet its performance standards, whether or not such failures are intentional or unintentional. In the TCG/SWBT agreement, the Arbitrators order that the "Sole remedy" provision proposed by TCG be included in the agreement. FTA96 @252(c). (AT&T, MCI, TCG)

37. The Arbitrators find that the liability provisions proposed by SWBT are reasonable. SWBT is not required to accept TCG's proposed indemnity provisions, but must in all cases exclude from the indemnity provisions gross negligence and willful or intentional conduct by SWBT.

FTA96 @252(c). (AT&T, MCI, TCG)

Telephone Directories.

38. LSPs are not required to pay a separate charge for inclusion of their customers' subscriber list information in SWBT white page directories. FTA96 @251(b)(3). (MCI, TCG)

39. The Arbitrators find that it is reasonable for LSPs to share costs related to the production of white pages telephone directories. The Arbitrators order that costs associated with the production of white pages telephone directories shall be shared among LSPs and SWBT, on a flat-rate, per directory basis as described in Paragraph 80 of this Award. FTA96 @251(b)(3). (MCI, TCG)

40. SWBT is not required to make directory distribution options available at no charge to LSPs and their customers.

FTA96 @251(b)(3). (MCI, TCG)

41. The Arbitrators find that it is reasonable for LSPs to share costs related to the distribution of white pages telephone directories. The

Arbitrators order that costs associated with the distribution of white pages telephone directories shall be shared among LSPs and SWBT, on a flat-rate, per directory basis as directed by paragraph 80 of this Award. FTA96 @251(b)(3). (MCI, TCG)

42. The Arbitrators conclude that the number of informational pages available to LSPs should equal the number of informational pages available to SWBT. The charge per page shall be calculated as described in Paragraph 80 of this Award. FTA96 @251(b)(3). (MCI, TCG)

43. SWBT must provide nondiscriminatory access to all published subscriber listings, regardless of the underlying carrier. FTA96 @222(e) and @251(b)(3). (AT&T)

44. SWBT is not required to pay compensation to LSPs for providing LSP subscriber list information to SWBT. If SWBT sells an LSP's subscriber list information, the LSP is entitled to a pro rata share of the compensation SWBT receives, based on the proportion of the LSPs' listings to the total number of listings for which SWBT receives compensation. FTA96 @251(b)(3). (AT&T, MCI)

Emergency Services.

45. SWBT must provide MCI's 9-1-1 trunks the same level of priority service restoration as it affords its own 9-1-1 trunks. FTA96 @251(c)(2). (MCI)

46. MCI and other LSPs must be allowed access to systems used in populating and editing the 9-1-1 database, but SWBT is not required to provide such access until the additional hardware and software systems are installed that are necessary to make such access technically feasible. SWBT must notify MCI when the systems vendor has provided SWBT an expected date of availability of the necessary hardware/software. If the hardware/software solutions are not implemented by June 1, 1997, this issue will be a subject of the review of interconnection issues to be conducted by the Commission on June 13, 1997. FTA96 @251(c)(2). (MCI)

Access to Customer Payment History

47. The Arbitrators find that customer payment history is not Customer Proprietary Network Information (CPNI). CPNI is defined in FTA96 @222, and is limited to "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service..." Credit information is not included in the CPNI definition. The Arbitrators find that, in a competitive environment, customers should have the right to authorize release of their credit history information to an LSP. Therefore, SWBT is required to provide credit history information to MCI only upon receipt of an affirmative request by an end-user customer that MCI be provided the information. FTA96 @251(c) (MCI) F. AVOIDED COST DISCOUNT

Choice of Avoided Cost Methodology.

48. An aggregate avoided cost methodology should be adopted. The Arbitrators' examination of the SWBT service-by-service avoided cost study and comparison with the parties' calculations (including SWBT) of aggregate avoided cost factors demonstrates that an aggregate methodology should be used for determining avoided costs in this proceeding. FTA96 @251(d)(3). (AT&T, MCI)

49. The evidence demonstrates that the SWBT service-by-service study raised four areas of serious concern: (1) widely divergent avoided cost estimates between services; (2) an extremely low average avoided cost that is well below the bottom of the range estimated by the FCC; (3) individual service discounts that differ greatly from the discounts developed in other state proceedings; and (4) the asymmetric information inherent in the particular design of the SWBT cost study makes an informed review of the study difficult for parties.

Of the twenty-five separate discounts originally calculated, twelve are negative or below 2 percent and five are above 10 percent.

If SWBT's service-by-service discounts were to be weighted and averaged together the overall discount would be less than 5 percent. This result is far below that predicted by the FCC. By way of comparison, in the FCC 96-98 Order, the FCC allows states to select a default discount between a range from 17 to 25 percent until the state adopts an avoided cost study (P932) . The FCC thoroughly reviewed the avoided cost model submitted to the FCC by MCI. After making some modifications to the MCI model, the FCC calculated a 20.11 percent aggregate discount for Southwestern Bell Corporation using 1995 data (P930).

The extremely low level of certain business services discounts is troubling. According to the FCC, states that have set wholesale pricing standards similar to the standards in section 252(d)(3) of the FTA96 have the following business discounts:

** See Table in Original. **

SWBT has not prepared its service-by-service avoided cost study in a manner that is conducive to review of the study by the parties to the arbitration. SWBT's cost study presents only those costs that it expects to avoid by selling services on a wholesale basis. Unfortunately, by only presenting the costs SWBT expects to avoid, and because other parties do not have access to the full range of service costs, the onus is upon parties to guess if there might be other costs that could also reasonably be avoided. An alternative method that could have been used by SWBT would have been to present the universe of costs associated with a service, and then point out the set of costs SWBT would avoid. Other parties would then be able to propose other costs in the universe that might be avoided. SWBT admitted that its service-by-service study relies on employees' expectations that the company's operating expenses will not decrease. However, the appropriate test is what operating expenses should be avoided in a wholesale environment.

Conversely, in an aggregate approach, all parties have equal access to the ARMIS data. SWBT, AT&T and MCI have submitted different estimates of the avoided cost discount based on the same underlying cost data. These estimates, and the specific methodology used to develop them, can be compared and contrasted with each other.

Because the service-by-service avoided cost estimates, on their face, are so inconsistent with the experiences of the FCC and other states, and because the cost studies were conducted in a manner that makes review by other parties exceedingly difficult, the aggregate avoided cost methodology is the appropriate method to determine avoided cost discounts in this proceeding. FTA96 @252(d)(3). (AT&T, MCI)

50. The calculation of the avoided cost discount is set forth in Appendix B to the Award. The Avoided Cost Discount is 21.6%. FTA96 @252(d)(3). (AT&T, MCI)

General Avoided Cost Issues

51. SWBT must calculate the avoided cost discount percentage as the ratio of avoided costs to revenues. The expenses and revenues used in the avoided cost calculation shall consist of Texas' regulated, unseparated expenses and revenues associated with the retail services subject to discount. For the purpose of calculating an avoided cost discount percentage, 1995 regulated, unseparated ARMIS data for Texas should be used. Because @252(d)(3) of the FTA96 mandates that the discount be applied to the retail rates of the ILEC, the Arbitrators find that revenues, rather than expenses, associated with retail services are the appropriate denominator. The Arbitrators find that unseparated expenses (numerator) and unseparated revenues (denominator) should be used in calculating the avoided cost discount percentage. The Arbitrators find that the following revenue accounts are not associated with retail services subject to resale and should not be included in the denominator:

** See Table in Original. **

Because the Arbitrators have included the EUCL in the denominator, when calculating the discount for basic local service, EUCL charges shall be included as part of the rate to which the discount is applied.

The Arbitrators find that the following expense account is not associated with retail services subject to resale and should not be included in the numerator:

** See Table in Original. **

The avoided cost amount will not be increased to account for additional access expenses. The Arbitrators find that if simplicity and ease of administration are relied upon, even in part, to select an aggregate avoided cost methodology over a service-by-service methodology, then simplicity and ease of administration must guide the implementation of an aggregate methodology. In other words, adjustments to the broad aggregate methodology are only permissible if they are simple, easily understood, and do not rely on assumptions. For this reason the Arbitrators reject the additional access expense adjustments recommended by AT&T.

The avoided cost amount will not be increased to account for depreciation, return, and taxes. The Arbitrators find that the dollar amount of contribution to joint and common costs on a per unit basis from the wholesale service should be equal to the contribution from the retail service. Otherwise, SWBT would be forced to make less contribution and profit from its wholesale sales, and in order to maintain the current level of contribution and profit, could conceivably have to raise its retail rates. FTA96 @252(d)(3). (AT&T, MCI)

Wholesale Onset Costs.

52. No additional adjustment shall be made to the avoided cost discount calculation to account for wholesale onset costs. Wholesale onset costs are

incorporated into the avoided cost discount as part of the 10 percent that is not avoided in accounts 6611, 6612, 6613, and 6623. FTA96 @252(d)(3). (AT&T, MCI)

53. Twenty percent (20%) of the expenses in operations testing (account 6533) and none of the operations plant administration expenses (account 6534) are presumed to be avoided. The credible evidence showed that LSPs will perform some of the initial testing in response to customer calls. FTA96 @252(d)(3). (AT&T, MCI)

54. Ninety percent (90%) of Uncollectibles (account 5301) are presumed to be avoided in the wholesale market. FTA96 @252(d)(3). (AT&T, MCI)

Aggregate Cost Study Issues.

55. Ninety percent (90%) of the expenses in sales (account 6612) and product advertising (account 6613) are presumed avoided. Eighty percent (80%) of the expenses in product management (account 6611) and customer services (account 6623) are presumed avoided. The record evidence demonstrates that there will be some product management, sales, product advertisement, and customer service expenses incurred to serve wholesale customers. FTA96 @252(d)(3). (AT&T, MCI)

56. Seventy-five percent (75%) of operator systems (account 6220), call completion (account 6621) and operator services depreciation (account 6560) are presumed to be avoided. Fifty-four and three-quarters percent (54.75%) of number services (account 6622) are presumed to be avoided. The record evidence demonstrated that some LSPs will provide their own operator, call completion, and number services, while others will not. The Arbitrators find that the evidence supports averaging costs in this instance, and thus order that that 75 percent of accounts 6220, 6621, and 6560 be presumed avoided. For account 6622, the Arbitrators find that 27 percent of the expenses are incurred in the provision of white pages and that SWBT will continue to provide white pages in a wholesale environment.

Therefore, 27 percent of this account, which represents the amount related to white pages, will not be avoided. Of the remaining 73 percent, 75 percent will be avoided consistent with the above discussion, resulting in a 54.75 percent total avoided amount for account 6622. FTA96 @252(d)(3). (AT&T, MCI) G. RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TRAFFIC.

57. When SWBT and an LSP jointly provide switched access services to an IXC, switched access revenues should be shared according to the meet point billing arrangements under @23.23(d)(6)(b). The Arbitrators decline to take action with respect to sharing of interstate access revenues. When SWBT and an LSP jointly provide intrastate switched access services to an IXC, and the LSP provides the entrance facilities, the tandem switching, and tandem-switched transport directly to SWBT end office, SWBT is allowed to assess the IXC the charge for performing the end office function (including the carrier common line charge (CCLC)) and keep 100% of the revenues for the end-office function, pursuant to meet point billing procedures established in P.U.C. Subst. Rule @23.23(d)(6)(B). The FCC 96-98 Order permitted ILECs to recover only 75% of the interstate residual interconnection charge (RIC) from purchasers of the unbundled switch because the FCC estimated that the remaining 25% of the interstate RIC reflects revenues associated with transport facilities. SWBT filed an application in May 1996 that would restructure the switched transport portion of its access

tariff pursuant to P.U.C. Subst. Rule @23.23(d)(5)(D). Under that rule, the transport elements (entrance facilities, direct trunked transport, tandem switching and transport, and dedicated signaling) must be cost-based and priced at not less than 105% of the LRIC for the individual transport elements. The revenues not recovered through the transport elements are recovered through the make-whole rate element, the RIC. The intrastate RIC, unlike the interstate RIC, does not contain costs of other transport elements and, therefore, is a subsidy element in its entirety. Upon the effective date of the SWBT's intrastate restructured transport tariff, SWBT shall be allowed to assess and keep 100% of the end office revenues (including the Residual Interconnection Charge (RIC) and the CCLC) if an LSP provides all facilities except the end office function in a meet point billing arrangement.

With respect to the application of intrastate access charges to purchasers of unbundled network elements, under the Arbitrators' interpretation of FTA96, SWBT is not entitled to recover any access charges, including RIC and CCLC, from LSPs that interconnect for the provision of telephone exchange service and exchange access. FTA96 @251(c)(2)(A). Interconnection rates, including transport and termination, must be based on costs. FTA96 @252(d)(1) and (2). However, the Petitioners did not oppose a limited transition period during which SWBT would continue to recover access charges from purchasers of unbundled elements. The Arbitrators therefore conclude that SWBT shall not impose access charges on LSPs that purchase unbundled network elements, over and above the rates that LSPs have already paid for the unbundled network elements, with the following exceptions. Under the existing SWBT intrastate access tariff which does not contain a RIC, SWBT is allowed to recover from purchasers of the unbundled local switch element only the CCLC for all intrastate toll minutes traversing its local switch. Upon the effective date of its restructured intrastate switched transport tariff, SWBT is allowed to recover from purchasers of the unbundled switch, the CCLC and 100% of the RIC for all intrastate toll minutes traversing its local switch. The recovery of the RIC and/or the CCLC shall terminate on the earlier of: (a) June 13, 1997, the date of the review of interconnection issues to be conducted by the Commission; (b) the date on which SWBT is authorized to offer in region inter-LATA service pursuant to FTA96 @271; or (c) the effective date of a Commission decision that SWBT may not assess such charges. FTA96 @252(d). (TCG) 58. Bill-and-Keep shall be the reciprocal compensation arrangement for the first nine months after the date upon which the first commercial call is terminated between SWBT and an LSP. At the completion of the nine-month period, if the difference between the traffic volumes flowing between the two networks exceeds 10% of the larger volume of traffic, the carriers shall assess each other symmetrical transport and termination rates (interim or permanent rates in effect at the end of the nine-month period) adopted in this proceeding. The 10% threshold should be calculated on a per-minute basis. When traffic exceeds the 10% threshold, SWBT and the LSP shall compensate each other for all calls unless the parties agree to apply the compensation rates only to the volume of traffic that exceeds 10%. The reciprocal compensation arrangements adopted herein apply to calls that originate and terminate within the mandatory single or multiexchange local calling area of SWBT including the mandatory EAS areas served by SWBT. If interconnecting carriers are unable to agree upon a measurement and billing method, carriers shall report the percentage of local usage (PLU) to each other for purposes of measurement and billing. If the audit process associated with the PLU method becomes problematic or is challenged in court, carriers may report such problems to the Commission within six months after the date carriers begin to assess reciprocal compensation rates on one another. At that time, the Commission may establish an alternative methodology that does not rely on self-reporting of traffic. FTA96 @252(d)(2). (AT&T, MCI, TCG)

59. Extended area traffic including optional extended area traffic shall not be considered as part of local calling areas, with one exception. Mandatory EAS traffic between SWBT exchanges shall be treated as local traffic for purposes of reciprocal compensation. However, in the interest of promoting competition, the interconnection rates for extended area traffic should be cost justified using the cost standards adopted in this proceeding. The EAS termination rate shall be the same as the local termination rate; however, the transport rates may be different from the transport rate for local calls. The variance in transport rates for EAS calls as compared to local calls may reflect the cost differences caused by the longer distance traveled by EAS calls or by the method used to transport EAS calls. Until cost-based interconnection rates are established for EAS traffic, the interconnection rates in effect between SWBT and other incumbent LECs for such traffic shall apply. When cost-based interconnection rates for EAS are established, LSP traffic in SWBT's EAS areas shall be subject to the lesser of the cost-based interconnection rates established in this proceeding or the interconnection rates in effect between SWBT and other incumbent LECs for such traffic. LSPs are not precluded from establishing their own local calling areas or prices for purposes of retail telephone service offerings. FTA96 @251(c)(2) and @252(d)(2). (AT&T)

60. The Arbitrators do not adopt the Optional EAS/EMS additive proposed by SWBT. Rather, the Arbitrators order that the additive be in the amount of $ 6.25. FTA96 @252(d). (AT&T, MCI)

61. Transport and termination rates will vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. The transport and termination rates assessed on the originating carrier should reflect the functions performed by the terminating carrier in transporting and terminating the calls. To the extent new technologies such as fiber ring or wireless network enable an LSP's end office switch to perform functions similar to those performed by SWBT's tandem switch and thereby to serve a geographic area comparable to that served by SWBT's tandem switch, the transport and termination rates for calls terminated to the LSP's switch shall be SWBT's tandem interconnection rates adopted in this proceeding. However, if the LSP's end-office switch is able to serve the same geographic areas as SWBT's tandem switch only by virtue of being connected to SWBT's tandem switch, the LSP shall not charge SWBT the tandem interconnection rates because LSP's end office switch is not performing any functions equivalent to those performed by SWBT's tandem switch. FTA96 @252(d). (AT&T, MCI) H. COSTING AND PRICING OF UNBUNDLED NETWORK ELEMENTS, INTERCONNECTION, COLLOCATION, AND CERTAIN SERVICES. n5

Cost Models.

62. The Arbitrators find that the record evidence supports the following conclusions and requirements regarding cost study methodologies:

TELRIC methodology shall be used.

The Arbitrators find that using a TELRIC methodology similar to that described in the FCC 96-98 Order is consistent with the methodology adopted by the Commission in P.U.C. Subst. R. @23.91. Subst. R. @23.91 requires completion of basic network function (BNF), service, and groups of service cost studies.

The TELRICs of the ten unbundled elements that this Award requires SWBT to provide should be comparable to the sum of the appropriate @23.91 BNF, service, and group of service LRICs associated with those elements.

There are two types of costs that are implicitly included in a TELRIC study that are separately identified in @23.91 studies. These are excess capacity costs and other group common costs.

An example will illustrate excess capacity costs. In the @23.91 process, the BNF LRICs of custom-calling features such as Call Waiting and Call Forwarding are calculated by using marginal (or capacity) costing as opposed to average costing. One of the differences between each type of costing lies in the different assumptions they make about the assignment of excess switch capacity caused by "lumpy investment." Lumpy investment occurs because some equipment cannot be purchased in discrete quantities that mirror actual demand and instead must be purchased with capacities that are significantly greater than actual demand. Using capacity costing, this excess capacity is attributed to all of the functions that the switch provides (Call Forwarding, interoffice switching, etc.) and is not directly assigned to a particular BNF or service. The excess capacity is separately identified as a shared cost to all switching functions and can then be allocated to individual switching services as appropriate in a pricing exercise. If average costing was used (as is done under TELRIC methodology), this excess capacity would automatically be allocated to each switch function within the cost study as if the provision of each function automatically caused a certain amount of excess capacity. There would be no need to allocate these excess capacity costs among the BNFs/services after the cost was computed, because the costs would already be allocated.

The second type of cost separately identified in a @23.91 study are group common costs. Using the example above, Call Waiting and Call Forwarding require a common switch software package. Because this software package is shared it is not reported as part of either the Call Waiting or Call Forwarding LRIC, but is instead reported in the Custom Calling Features group of services LRIC study. Similar to excess capacity, this group common cost would be allocated in a pricing exercise. A switching TELRIC study, however, will automatically include the common software costs in its result.

In conclusion, a TELRIC is generally equivalent to the sum of the individual BNF LRICs, the excess capacity costs, and the other group common costs that are calculated under Subst. R. @23.91. Therefore, the Arbitrators find the TELRIC methodology reasonable for use in setting rates in FTA96 arbitration proceedings.

SWBT's methodology shall be used to determine TELRIC.

The Arbitrators find that SWBT's costing methodology, with appropriate inputs, will better ensure that TELRIC will accurately reflect the forward looking costs SWBT incurs to provide unbundled network elements.

The Arbitrators find that the Hatfield Cost Model (HCM) has the advantage of being an "open" model, where all parties can know and understand the operations, inputs and outputs of the model. Several computer runs of the HCM were placed in the open record where any interested person could review the inputs and results. By contrast, the SWBT cost studies are proprietary and confidential, utilize inputs that are themselves subject to claims of confidentiality by vendors such as Bellcore and Northern Telecom, and result in record evidence which is filed under seal which restricts the number of people allowed to view it. While the Arbitrators find that the merits of the SWBT methodology outweigh the "openness" advantage of the HCM, they also find that the SWBT methodology must be made much more open.

The Arbitrators' choice of the SWBT methodology is conditioned on SWBT's cooperation in facilitating a thorough review of SWBT cost studies by the Petitioners. The Arbitrators recognize that Petitioners must have a reasonable opportunity to understand and evaluate SWBT's methodology and the value of inputs not specifically addressed in this Award. In the implementation phase of these proceedings, SWBT must provide all information that is reasonably necessary for Petitioners to evaluate SWBT's cost studies, and must provide training for Petitioners' personnel in the use and formulation of the cost studies.

While the Arbitrators recognize the need for protective agreements to shield competitively sensitive information, the Arbitrators find that without adequate sharing of cost study information with Petitioners and the Commission, the use of SWBT's methodology cannot be justified. If, during the implementation phase of these proceedings, it becomes clear that limitations on the availability of necessary information are preventing an adequate review of SWBT's cost studies, the use of the Hatfield Cost Model (HCM) methodology advocated by several of the Petitioners will be ordered as a replacement for use of the SWBT methodology.

Both models have their advantages and disadvantages. The Arbitrators find that, on the whole, the advantages of the SWBT methodology outweigh its disadvantages, if the changes recommended by this Award are made. However, the HCM is supported by sufficient substantial evidence on the record that the Arbitrators are persuaded to utilize it, along with the SWBT methodology, in setting the interim rates in this Award. The following discussion details the basis for the Arbitrators' preference of the SWBT methodology over the HCM methodology.

Efficient Network Design.

One of the issues discussed in the selection of cost models concerns forward-looking technology and efficient network design. Both models assume the existing central office locations, but from there the models diverge. The HCM, using a "rectilinear" pattern, models a network that connects the population in each census block group (CBG) to the nearest central office. The HCM estimates that a 40 percent excess loop length factor resulting from the rectilinear pattern will account for the actual routing and avoidance of obstacles (such as lakes) required to install an actual network. SWBT maintains that the current network routes are least cost because they follow existing rights-of-way and the HCM does not add the costs associated with rights-of-way to its network costs. SWBT further argues its cost studies assume the use of forward-looking technology. SWBT's cost studies assume the presence of advanced digital loop technology that far exceeds that which is actually in place in their "in-ground" network. In addition, many of SWBT's technical assumptions may be adjusted by users. For example, the amount of actual excess capacity in the "in-ground" network can be adjusted for the forward-looking cost study by adjusting the appropriate fill factors. The Arbitrators finds that the use of existing network routes better represents the costs associated with construction and rights-of-way that SWBT actually incurs in the laying of its network. In addition, the assumption of forward-looking technology inherent in the choice of copper/fiber breakpoints, amount and type of pair gain equipment, and use of appropriate fill factors ensures that SWBT's cost studies represent forward-looking technology.

Level of Data.

AT&T and MCI state that most of the HCM inputs are based on nationwide expected values, and that these inputs are appropriate for costing Texas telephone network costs because SWBT experiences cost conditions similar to other large telephone companies. n6 They also pointed out that the HCM does use some SWBT Texas-specific data with the ARMIS and depreciation inputs. n7 However, TELRIC costs should reflect the costs that the ILEC expects to incur in making network elements available to new entrants. The Arbitrators believe that the Texas-specific SWBT inputs generally best reflect these costs. The inputs assumed by the HCM are much too general to be relied upon in costing SWBT's Texas network. The Arbitrators understand that many of the HCM's inputs, such as cable costs, are readily changeable by the user. However, such inputs as labor costs and times, which may be expected to vary widely on a nationwide basis, are less readily changeable. However, while the Commission believes that SWBT's company- and Texas-specific inputs are generally more appropriate for use in computing TELRIC, it does not necessarily believe the specific value of all inputs are necessarily correct. Further discussion of the appropriate values for inputs will be considered elsewhere in this award.

Completeness and ability to modify.

In its current configuration, the HCM is unable to separate recurring and non recurring charges, distinguish between different types of DA and operator services, or capitalize operations support costs. n8 The inability of the HCM to separate recurring and nonrecurring costs increases the danger of over- or under-recovery of costs in rates.

SWBT used a discussion of manhole costs to provide an example that the HCM does not include all of the costs required to provided unbundled network elements. SWBT implies that HCM only applies forward-looking costs to the Petitioners' conception of a theoretical network rather than to a fully developed telecommunications network. Therefore, the HCM may neglect many of the costs associated with actually designing, engineering, and installing a network. Further, SWBT maintains that the HCM does not provide the complete cost of an unbundled element and that other costs associated with unbundling must be added to the HCM TELRIC results. n9

One of the HCM's main attractions is its ease of operation. As a self-contained model, 490 user interface adjustments allow some flexibility in its use. n10 While these input options are available to the user, many such inputs as fill factors and depreciation may require considerable manipulation before entering into the model. In addition, there is a large degree of underlying data that is not subject to user inputs. Overall, the HCM is a much simpler model than the SWBT models.

SWBT, on the other hand, has a large number of component studies which must be fit together to develop the complete TELRIC. SWBT makes no apology for the complexity of its cost studies, arguing that it is their complexity that assures that the TELRIC are complete and accurate. While SWBT's cost studies are complex, inputs can be adjusted, but not in a single computer interface. n11

The Arbitrators must balance the requirement of accurate cost results with the ability to understand the models producing the results. Nevertheless, the Arbitrators do not want the issue of user-friendliness to outweigh considerations of completeness, the appropriate reflections of SWBT's network design, or appropriate separation of nonrecurring charges. The Arbitrators are also concerned that, after spending significantly more time reviewing the HCM than has been done in this proceeding, the FCC has as yet been unable to fully endorse the HCM as an appropriate TELRIC model.

Degree of cost methodology review/burden of proof.

Neither SWBT's cost models nor the HCM has undergone a complete audit in this proceeding. Because of the accelerated nature of the proceeding, parties have not been able to engage in the extensive discovery necessary to fully understand and verify the accuracy of each of the results of the cost models. At the same time, the Arbitrators believe that it is not the usual process in any costing proceeding for parties to verify the validity of each of the hundreds or even thousands of calculations contained in a cost study. The typical level of review concentrates on the general methodology of the study, the overall logic of the calculations and the appropriate value of the inputs that most greatly affect the eventual cost. Parties may also verify a sample of the calculations used in the study.

Need to select one Model. In order to develop accurate costs, one must apply correct input values into the most theoretically accurate cost model. Even the main proponent of the HCM argued it is best to pick a cost model and then battle over the input values. n12 In this proceeding, there is sufficient evidence in the record to inform and support decisions regarding the values of key model inputs and methodologies. Other minor inputs have not been addressed. For economy of effort, it is better to select one model. SWBT can spend its time preparing and presenting the cost studies in a manner that makes its methodology and choices of inputs and assumptions readily apparent to all. Likewise, Petitioners can expend their efforts learning the SWBT methodology and auditing the calculations and underlying data. Otherwise, both parties will have to be engaged in double efforts to prepare cost studies and explain them to others at the same time they attempt to learn another methodology and prepare recommendations for changes.

Sources of Investment Data.

SWBT maintains that the underlying investment used to develop TELRIC is the actual vendor price that SWBT would face if it were to buy the forward-looking equipment today. The Arbitrators find that SWBT's approach to identifying investment is reasonable. SWBT has represented that it has made all of its underlying cost information available to the petitioners under the terms of the protective agreement. n13 Petitioners continue to argue that they have not had enough time to review the material and work their way back through the studies to verify the underlying investment. n14 In the further cost study review required by the Award, Petitioners may prove the investment in SWBT cost studies is not the vendor price SWBT actually faces. Absent rebuttal evidence from the Petitioners as part of further cost study review, SWBT's vendor prices will be deemed approved.

Provision for the preparation of TELRIC studies.

SWBT shall correct their cost studies pursuant to the specific instructions detailed in this Award. SWBT's revised cost studies must be filed with the Commission by January 15, 1997.

Further Cost Study Review.

While SWBT is correcting its cost studies, SWBT must work with the Petitioners so that they are able to understand the operations of all of the cost models SWBT relies upon, including but not limited to: SCIS, CCSCIS, NCAT, COSTPROG, and LPVST. SWBT shall provide a reasonable amount of training in the use of the cost studies for Petitioners' personnel. Upon the completion of SWBT's revised cost studies, Petitioners shall be given until March 14, 1997 to review and file comments with the Commission related to those parts of the cost studies that have not been determined in this proceeding. Until cost studies are approved for various services/elements, the interim rates established in this Award shall apply. The Arbitrators strongly encourage parties to negotiate final TELRIC-based rates based on the findings in this Award, and thus hasten the implementation of permanent rates.

63. The record evidence supports the following requirements for properly constructing an efficient network configuration for economic cost models:

(a) the loop segment of the model must be configured using "hub and spoke" topology; the interoffice segment must be configured using "fiber ring" topology.

(b) redundant and diverse fiber routes must be configured to achieve 99.99% availability of end-to-end connectivity;

(c) digital loop carriers (DLCs) with high speed transmission capability must be included in the model, deployed only to extend loops to subscribers located more than 12,000 feet (12KF) from a central office. The cut-over point from copper to fiber occurs at 12KF from the serving central office. The Arbitrators find the 12KF limit for copper loop length necessary to accommodate forward-looking ADSL technology;

(d) of the DLCs, 25% must be integrated DLCs, while the remaining 75% must be universal DLCs.

(e) switch locations must be at existing central office locations, and outside plant and structure installation routes must follow existing rights-of-way.

64. The Arbitrators find that the digital switching technology used in the SWBT cost studies represents forward-looking technology.

General Inputs.

65. The Arbitrators find that, generally, utilization assumptions based on average expected usage rather than full or near-full capacity are most appropriate. Full or near-full capacity assumptions would usually not constitute a reasonable projection of the actual total usage of the element. Specific utilization factors are provided elsewhere in the Arbitrators' Award.

66. The record evidence supports the following as reasonable levels of capacity utilization (fill factors) for the following network equipment:

(a) Switch

(1) Processor: 90%

(2) Lines: 89.5%. The Arbitrators find SWBT's assumptions and calculations are more reasonable than the evidence provided by AT&T and MCI.

(b) Feeder Cable: underground feeder: 79.2%
buried cable: 75%
aerial cable: 75%

The Arbitrators conclude that the growth rate assumed by SWBT must be reduced by at least two-thirds to account for the effect of facilities-based competition. The Arbitrators find that the HCM failed to consider various types of feeder plant such as underground, buried, and aerial cable. SWBT cost studies must use the same fill factors for feeder stubs and DLCs.

(c) Distribution Cable: 40%. This is the fill factor approved by the Commission in Docket No. 14659. The 40% factor must be used in the SWBT LPVST model. SWBT must place the cable for ultimate service requirements.

(d) STP Processor Capacity: 40% for each STP; 80% in total for the STP pair. The Arbitrators agree with AT&T that the link utilization factor will increase when permanent number portability is implemented. The fill factor for link utilization shall be 32% (80% of the maximum 40% link utilization factor).

(e) STP Ports: 80 percent (80%).

(f) Trunks: The cost study must assume 27 Hundred Call Seconds (CCS) traffic per trunk, and must include six (6) lines per trunk in urban areas and 12 in rural areas. These assumptions take into account the expectation that internet/data calls will typically last longer than voice calls.

(g) Conduits: 50%, when the conduit is used for installing both copper and fiber facilities.

67. FTA96 @252 allows the Arbitrators to set a forward-looking cost of capital without conducting a traditional rate of return proceeding.

68. The record evidence supports a cost of capital (rate of return) of 10.36. The cost of capital is computed as follows:

** See Table in Original. **

69. The Arbitrators find that the record evidence demonstrates that SWBT must use the Average Service Life and Future Net Salvage Value depreciation method prescribed by the FCC, effective June 1996, to calculate the depreciation rates for depreciable plant account categories. SWBT must use the following formula for calculating economic depreciation rates:

Economic Depreciation Rate = (100-Future Net Salvage %) / (Average Service Life).

The Arbitrators find that the depreciation rates listed in Appendix C to this Award are reasonable.

Inputs - SWBT Studies.

70. The record evidence shows that some level of historical data must be used in preparing TELRIC studies. The Arbitrators recognize the need to balance the use of historical data with concerns that the data reflect forward-looking conditions and expectations. The Arbitrators' conclusions regarding use of historical data will be reviewed in the implementation phase of these proceedings. The Arbitrators will consider adjustments to the most recent historical data to reflect forward-looking conditions.

71. The general methodology used by SWBT to calculate operating expense and capital cost annual cost factors (ACF) is reasonable. However, SWBT presented insufficient evidence to establish the appropriateness of its inflation factors, and the inflation factors must be removed from SWBT's studies. The Arbitrators will consider adjustments to the inputs to the ACFs to reflect forward-looking conditions.

Forward-Looking Common Costs.

72. The Arbitrators will consider calculations of forward-looking common costs in the implementation phase of these proceedings, after SWBT has filed the cost study revisions required by this Award. However, the Arbitrators find that, based on the record evidence, a reasonable common cost allocator would be in the range of 10% - 15.5%.

Review of Costs and Prices.

73. In order for SWBT's cost study to be used to develop the cost of the unbundled loop, the following modifications to SWBT's basic level and basic rate interface (BRI) loop studies (including cost development for the cross-connect, NID, and 5 dB loop conditioning must be made:

(a) Cross-connect costs: The cost of the cross-connect jumper used to provide 2-and 4-wire analog loops must be recovered separately from the loop in a non-recurring charge. SMAS and SARTS for 2-wire loops shall be priced separately using TELRIC methodology.

(b) Sharing of pole costs: When it calculates pole costs, SWBT must decrease its investment in poles by 22% to account for sharing facilities with cable television (CATV) and other facilities-based providers. This 22% factor is derived in the following manner. First, the pole must be divided into two different types of investment: usable and unusable. The usable investment, which constitutes the top 60% of the pole is available for attaching cables. The "unusable" investment is the bottom 40% of the pole that must support the upper 60%. By law, no cable may be attached to the unusable part of the pole for safety reasons. These two parts of the poles are shared in different ways. It is reasonable to assume that one-quarter of the top 60% of each pole owned by SWBT will be shared with other companies on a forward-looking basis. However, per FTA 96, two-thirds of the percent of the top 60% assumed to be used by non-ILEC companies should be assumed shared in the bottom 40%. n15 Averaging the one-quarter in the top 60% of the pole with the one-sixth n16 in the bottom 40% yields approximately 22%. n17 In addition, SWBT shall also account for sharing leasing costs on the poles it leases from electric companies in its pole costs. The leasing cost per loop installed on a leased pole shall be equal to the total pole leasing costs incurred by SWBT divided by the total number of loops SWBT carries on these poles. When the per-loop leased pole costs (weighted by the percentage of total loops SWBT has on leased poles) are added to the per-loop owned pole cost (weighted by the percentage of total loops SWBT has on leased poles) described above, the result would be the total per-loop pole cost This pole calculation methodology may require refinement. If this methodology does not fully capture the intricacies of SWBT network practices, SWBT may propose refinements to this methodology prior to performing its loop studies. The Arbitrators reserve the right to review and approve or reject any refinements proposed by SWBT. This decision applies to all of SWBT's TELRIC loop studies.

(c) Sharing of conduit costs: When it calculates conduit costs, SWBT must reduce them by one-third, to account for sharing with CATV and other facilities-based providers. SWBT must apply this methodology in all of its loop studies.

(d) Calculation of pole and conduit costs: SWBT must develop pole and conduit costs that are not dependent on the cost of the cable they support. Therefore, pole and conduit costs will be determined independent of the LPVST model. Pole costs for each cost driver combination (CDC) should be developed as follows: (1) SWBT determines the average loop length and the average amount of aerial cable associated with an average loop; (2) SWBT determines the number of poles needed for the average amount of aerial cable, and calculates the total pole cost; (3) The pole cost must be multiplied by a factor representing the relative capacity of the pole a unit of "loop" will use (see P73(b) of this Award), then adjusted for the sharing percentage described above. The same general methodology must be used to derive conduit costs. The Arbitrators' decision on this issue applies to all of SWBT's TELRIC loop studies.

(e) Costs of 2-wire and 4-wire loops: The record evidence demonstrates that it is inappropriate to calculate 4-wire loop costs by doubling SWBT's 2-wire loop costs. The Arbitrators order SWBT to file a separate 4-wire TELRIC loop study, using an 80% distribution cable fill factor (as well as appropriately adjusting for all other equipment that will not be duplicated for a 4-wire loop). The new study should reflect the additional costs of a 4-wire loop, such as extra investment in feeder cable or terminations needed to provide the second pair of wires, but shall not

include additional distribution cable beyond that in the 2-wire study. A diagram depicting the equipment necessary to provide 2-wire and 4-wire loops is provided as Appendix D to the Award. In addition: (1) the Arbitrators require that the costs of the cross-connect jumper (between the main distribution frame (MDF) and the cross-tie cable) used to provide 2- and 4-wire analog loops be recovered separately from the loop in a non-recurring charge; and (2) SMAS and SARTS tie cable cross-connects for 2-wire loops shall be unbundled (in accordance with the Arbitrators' Unbundled Network Elements decision) and priced separately using TELRIC methodology. These requirements apply to all of SWBT's TELRIC loop studies;

(f) Cost driver levels and deaveraging: The Arbitrators find that, until the completion of state and federal proceedings regarding universal service support mechanisms, a statewide average rate for unbundled loops is appropriate. When it files revised loop studies, however, SWBT must report TELRICs separately for each CDC, so that sufficient information will be available to the Commission in the event loop rates are deaveraged in the future. SWBT's revised studies must use four new loop distance cost drivers, with three break points between the levels: (1) 12,000 feet (12KF), the break point the evidence shows is the most reasonable copper/fiber technology break point; (2) the loop distance that is the median for all loop lengths less than 12KF; and (3) the loop distance that is the median for all loop lengths greater than 12KF. These requirements apply to all of SWBT's TELRIC loop studies.

(g) More information or additional revisions necessary: (1) In all of its TELRIC loop studies, SWBT must remove the application of the frame building investment factor to any investment associated with lines that terminate to the switch rather than to an MDF. n18 (2) The Arbitrators have not yet received an investment binder supporting SWBT's DS-1 network access connection (NAC) costs, and therefore are not in a position to rule on its validity. The changes in the loop studies required by the Award must be incorporated in the SWBT DS-1 NAC study. (3) SWBT must prepare a digital loop carrier (DLC) study for the unbundled DLC required by the Arbitrators. (4) SWBT must prepare a dark fiber TELRIC study for the unbundled dark fiber required by the Arbitrators.

74. SWBT must make the following additions and modifications to its local switching and analog, Basic Rate Interface (BRI) and Primary Rate Interface (PRI) line-side switch port cost studies:

(a) The Arbitrators find that SWBT's switching studies require additional wire center cost driver levels. The filed cost driver levels provide insufficient information on how costs differ with wire center sizes. The following levels should be included in the revised SWBT TELRIC studies: (1) up to 10,000 working lines; (2) 10,001 to 20,000 working lines; (3) 20,001 to 40,000 working lines; and (4) more than 40,000 working lines. SWBT may propose alternative cost driver break points if it believes they are more appropriate due to changes in switching technology; in no event, however, shall SWBT provide less than three cost driver levels. The Arbitrators find that deaveraging is not appropriate at this time, as discussed elsewhere in the Award.

(b) As discussed above, the Arbitrators find that SWBT did not use appropriate wire center size cost driver levels in performing its local switching TELRIC study. Due to these cost driver levels, SWBT may have an inappropriately stratified sample methodology. This concern should be addressed by the use of additional cost driver levels in SWBT's revised TELRIC studies.

75. SWBT's suggested interim rates for interoffice transport are reasonable. SWBT must filed an interoffice transport study by January 15, 1997.

76. The Arbitrators agree with SWBT and the Petitioners that tandem switching does not need to be deaveraged. The record evidence does not provide enough information to support a finding approving SWBT's tandem switching cost study methodology. SWBT must provide the equations and inputs necessary to compute the total tandem setup and MOU investments for each wire center cost driver combination (e.g., small to small, large to small, etc.) developed behind Tab 2 and reported behind Tab 1 of the tandem switching TELRIC investment

study.

77. Neither SWBT nor the Petitioners filed cost studies for specific operations support systems elements. Any rates proposed by SWBT for these elements shall be considered interim rates. The rates will be subject to revision and replacement after SWBT's cost studies have been filed and reviewed. Operations support systems elements cost studies shall be filed with the Commission by January 15, 1997.

78. SWBT's rates currently offered to other ILECs are reasonable interim rates, and shall be used until SWBT files operator services and directory assistance TELRIC cost studies. SWBT must file the studies with the Commission by January 15, 1997.

79. SWBT's transport proxy rates are reasonable, and shall be used as interim rates until permanent rates are approved. The costs of providing transport and termination are generally the same as those used to provide local switching and interoffice transport; SWBT must reflect in its termination costs the changes ordered by the Arbitrators in its local switching study.

80. The Arbitrators find that the costs in the white pages study SWBT filed on October 18, 1996 may include internal SWBT costs that are inappropriately passed on to competitors. Therefore, the Arbitrators believe that a simpler method, using only third-party contract costs plus any distribution costs not included in third party contract costs, should be used to calculate white pages costs. This methodology will yield white pages costs on two different bases: per-book and per-printed page per year. The methodology SWBT shall use to develop the per-book cost is as follows. The most recent cost of the annual third-party contract costs associated with printing white pages listings less the costs of providing "informational" or "advertising" pages shall be divided by the most recent estimate of total number of books produced annually. The result will be a per-book cost of printing white pages listings. For the per-printed page per year cost, the annual third-party contract costs associated with printing white pages informational pages shall be divided by the number of such pages printed per year. The result will be a per-printed page per year cost.

Using the two costs described above, a total white pages expense for a provider (either SWBT or a competitor) can then be calculated as follows. If it can be assumed that SWBT has only one competitor, the white pages directory costs can be divided into four types of costs: (1) the cost of listings (assume these are 45% of directory costs in this example), (2) the cost of SWBT's informational pages (assume 30%), (3) the cost of the LSP's informational pages (assume 20%), and (4) the cost of mandated or jointly-provided pages (e.g., emergency services, government listings) (assume 5%). The total costs the LSP will pay will be a function of the size of the phone book (how many listings), the number of informational pages the LSP has (20% of the book in this example), the number of mandatory or jointly-provided pages, and the number of phone books produced for the LSP's customers and for SWBT's customers. For the books that the LSP orders from SWBT for its own customers, the LSP will pay 70% of the cost of producing the book (45% of the book for the listings, 20% for its informational pages, and 5% for mandated or jointly-provided informational pages) multiplied by the number of copies the LSP orders for its customers. SWBT's cost for providing the book to the LSP's customers will be 30% multiplied by the number of copies of the book the LSP orders for its customers. In contrast, for SWBT's own customers, it will pay a total amount derived by multiplying 80% (45% plus 30% plus 5%) by the number of SWBT customers. The LSP will pay 20% of the cost of providing these books to SWBT's customers. Using this methodology, the costs of providing phone books shall be shared between providers.

The Arbitrators order SWBT to file a white pages TELRIC study using the per-book and per-printed page per year methodology described above. In the study, SWBT should deaverage the white pages costs into the following zones:

Directories of 0 to 15,000 copies for all providers (including SWBT)

Directories of 15,001 to 50,000 copies for all providers (including SWBT)

Directories of 50,001 to 200,000 copies for all providers (including SWBT)

Directories of 200,001 to 500,000 copies for all providers (including SWBT)

Directories of 500,001 to 1,000,000 copies for all providers (including SWBT)

Directories of 1,000,001 to 2,000,000 copies for all providers (including SWBT)

Directories of greater than 2,000,000 copies for all providers (including SWBT)

At this time, the Arbitrators do not require that SWBT deaverage the white pages rates. The Arbitrators may consider appropriate deaveraging of white pages rates when the results of the revised local switching and local loop studies are obtained, reviewed, and approved.

Pricing Issues.

81. SWBT should recover most non-recurring charges (NRCs) at the time they are incurred. The price of the NRCs must be based on TELRIC studies, but until those studies are approved by the Commission, current SWBT tariffed rates shall apply. In the case of collocation cages, however, LSPs may pay SWBT over time. In such cases, SWBT shall reduce the LSP's charges appropriately when another LSP begins utilizing the facility originally built for the first LSP. Should a carrier cause SWBT to build a collocation cage and then not use the facility (or all the facility), the LSP must reimburse SWBT as if it was using the facility. SWBT must give the LSP in such circumstances the opportunity to sublet the cage (or part of the cage) to another LSP if it does not use all or part of the facility.

82. SWBT must perform a TELRIC cost study that develops the costs of changing customers from SWBT to a competing LSP, and vice versa. SWBT must file the study by January 15, 1997.

83. The Arbitrators find that SWBT must provide cost justification for its fees for administrative approval of LSP requests for pole attachments and conduit space. SWBT shall file a study that develops these costs by January 15, 1997. FTA96 @224(f)(1) and @251(b)(4). (AT&T, MCI) I. INTERIM RATES

84. In establishing interim rates, the Arbitrators find that the adjustments in SWBT cost studies required by this Award will lower SWBT's proposed prices in all instances. Since the prices proposed by Petitioners relying on HCM are consistently lower than those proposed by SWBT, the Arbitrators in certain cases use the prices developed through the use of HCM as a benchmark for calculation of interim rates.

85. Loop Rates. For 8 dB loops, the interim rate shall be the statewide averaged rate of $ 15, as developed for the interim rate in Docket 14659. For 5 dB loops, the interim rate shall be $ 17, as developed in the same docket. For the BRI loop, the interim rate shall be $ 38. This value is SWBT's BRI loop cost for its Geographic Zone 2 in the Unbundled Loop Study. The Arbitrators' reasoning for choosing this value is as follows: the interim rate of $ 15 for the 8 dB analog loop is almost exactly the same as the cost SWBT calculated for the 8 dB loop for Geographic Group 2 in its Unbundled Loop Study. Therefore, since the interim rate chosen for the 8 dB loop is basically the same as the cost calculated for Geographic Group 2, it should be so for the BRI loop. For the same reason, the interim rate for the DS-1 loop should be $ 105, SWBT's approximate DS-1 loop TELRIC for Geographic Group 2.

For the MDF to cage cross-connect rate interim rates, SWBT's rates as derived from its TELRIC studies should be used as interim rates, as there is no evidence on the record that other rates are more appropriate. Note that these interim rates do not include rates for jumper wire cross-connects for 2- and 4-wire 8 dB and 5 dB loops. Because the costs of such jumpers are expensed, there shall be no separate interim rate item for this jumper.

For interim dark fiber rates, the rates are based on the per-foot fiber cable (including contractor labor) and interduct (including additional contractor labor associated with the interduct) costs that SWBT developed and reported in its cost study support information. n19 To these costs, SWBT's current annual charge factors for fiber cable and conduit were applied to result in the TELRICs necessary for dark fiber on a per-foot basis. Rates were determined by applying SWBT's forward-looking common cost allocation factor to each cable and conduit TELRIC. These results shall be used as interim rates. These rates are as follows:

(a) Buried 24-Fiber Cable per foot, per month: $ 0.069476 per cable or $ 0.002895 per fiber n20

(b) Underground 24-Fiber Cable per foot, per month: $ 0.072601 per cable or $ 0.003025 per fiber

(c) Buried 36-Fiber Cable per foot, per month: $ 0.103425 per cable or $ 0.002873 per fiber

(d) Underground 36-Fiber Cable per foot, per month: $ 0.107864 per cable or $ 0.002996 per fiber

(e) Conduit, per foot, per month: $ 0.016320 per cable

86. Switching Rates. For the analog line-side switch port, the interim rate shall be the average of SWBT's rates and the HCM rate, or $ 1.95. n21 Because the HCM does not calculate line-side switch port costs for BRI or PRI, the interim rates for these elements will be 72% of the rates that SWBT reports,

or $ 3.88 and $ 115.73, respectively. n22 The Arbitrators choose to use this percentage of these rates because the interim line-side port rate as calculated is approximately 72% of SWBT's line-side port cost.

For the local switching rate, the interim rates shall be computed by averaging the HCM local switching rate with an average of SWBT's three per-minute local switching rates of $ 0.003090, 0.003997, and 0.005042 weighted by the number of lines in each of the three rate groups. The average for the SWBT study rates is approximately $ 0.003906 per minute. When averaged with the HCM result of $ 0.0019 per minute, the resulting interim rate is $ 0.002903 per minute. n23

For the tandem switching rate, the interim shall be the average of the tandem switching rates derived from SWBT's tandem switching study and the HCM. This rate is $ 0.002453 per minute. n24

87. Transport. As discussed above, the interim rates for transport shall be the rates approved by the FCC for interstate dedicated switched transport.

88. Signaling. For signaling links, there shall be two interim rates: one for DS-0 links and one for DS-1 links. The interim rates for each of these link types shall be averages of the SWBT rates for these links and the HCM link rate. For DS-0 links, this average is $ 41.04, and for DS-1 links, this average is $ 32.13. n25

For other parts of the signaling network interim rates cannot be determined by simply averaging the results of SWBT's and the Petitioners' studies, because the structure of the rates are different (e.g., for STPs, SWBT's rates are on a per-node basis, while the HCM calculates per-message costs). SWBT's rates will be used as the interim rates for all signaling equipment except for the links described above.

89. Operations Support Systems. For any operations support systems elements for which rates were actually filed in this proceeding, the SWBT rates are to be used as interim rates. The HCM does not separately calculate the costs of these elements, so the only evidence on the record is presented by SWBT.

90. Operator Services Systems. Because the HCM's one rate of $ 0.08 per call does not adequately capture the range of costs caused by all the different operator services and DA types of calls, the rates that SWBT has proposed, and currently offers to other LECs, shall be used as proxies.

91. White Pages. Because the white pages rates that SWBT developed must be averaged, and no other reliable white pages study is in evidence, the white pages interim rate for each white pages study element shall be an average (by rate group line count from the local switching study) of the three rates developed for that element in SWBT's most recent White Pages Study. n26 These elements and their interim rates are as follows:

Cost to Others for being in Directory, per book copy:

** See Table in Original. **

92. Non-Recurring Costs. SWBT did compute TELRIC non-recurring costs (NRCs) for many of the activities, such as connecting a customer to SWBT's network, that cause one-time labor costs to be incurred. The HCM, however, does not calculate any such costs separately from the recurring costs that it develops. Because of the general paucity of evidence on the record as to what NRCs should be charged for the provision of various labor activities, the NRCs SWBT has proposed in this proceeding shall be used as interim rates until final rates are approved.

93. Collocation. The evidence on the record for collocation costs is sparse. Neither SWBT nor petitioners performed cost studies for these rates, and the Arbitrators find that the rates discussed for SWBT seem extremely high.

The Arbitrators therefore find it reasonable to base interim rates on the average rates set in collocation agreements entered into by a sample of other RBOCs. The method for arriving at this average will be that proposed by TCG in its post-hearing brief. n28 The interim rates will be based on a simple average of the collocation prices included in agreements TCG has reached with Pacific Telesis, BellSouth, and NYNEX. The interim rates (both recurring and non-recurring) will remain in effect until a TELRIC study is approved by the Commission.

94. Fees for administrative approval of LSP requests for pole attachments and conduit space. The Arbitrators find that SWBT must provide cost justification for its fees for administrative approval of LSP requests for pole attachments and conduit space. Until cost-based permanent rates are set, the fees SWBT proposed at a price of $ 250 may be set no higher than $ 125.

95. The Arbitrators do not specifically impose any imputation requirements in this proceeding. Any imputation standards developed in the future should comport with the Commission's imputation rule (as developed in PUC Project No. 14360) and standards of PURA95 @3.454. J. CONTRACT-RELATED LEGAL ISSUES AND FILING OF ARBITRATION AGREEMENTS

96. If the parties choose to include an intellectual property indemnity provision, the contract language proposed by AT&T, modified as follows, shall be used as the intellectual property indemnity provision rather than the language proposed by SWBT. The provision shall read as follows: "The LSP understands that it is responsible for obtaining any license or right-to-use agreement associated with a network element purchased from SWBT, and further agrees to provide SWBT, prior to using any such network element, with either: (1) a copy of the applicable license or right-to-use agreement (or letter from the licenser attesting as such); or (2) an affidavit signed by the LSP attesting to the acquisition of any known and necessary licensing and right-to-use agreements. SWBT agrees to provide a list of all known and necessary licenses or right-to-use agreements applicable to the subject network element(s) within seven days of a request for such a list by the LSP. SWBT agrees to use its best efforts to facilitate the obtaining of any necessary license or right-to-use agreement. In the event such an agreement is not forthcoming for a network element ordered by the LSP, the parties commit to negotiate in good faith for the provision of alternative elements or services which shall be equivalent to or superior to the element for which the LSP is unable to obtain such license or agreement.

Each Party shall and hereby agrees to defend at the other's request, indemnify, and hold harmless the other Party and each of its officers, directors, employees, and agents (each, an "Indemnitee") against and in respect of any loss, debt, liability, damage, obligation, claim demand, judgment, or settlement of any nature or kind, known or unknown, liquidated or unliquidated, including without limitation all reasonable costs and expenses incurred (legal, account or otherwise) arising out of, resulting from, or based upon any pending or threatened claim, action, proceeding or suit by any third party for actual infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right now known or later developed to the extent that such claim or action arises from the actions of the respective Parties, or failure to act, as required pursuant to this Agreement." FTA96 @252(b)(4). (AT&T, MCI)

97. The Arbitrators find that the contract language proposed by SWBT and AT&T concerning the effect of intervening law on an interconnection agreement is not, when considered as a whole, reasonable. If the parties choose to include an "intervening law" provision, the contract provision shall provide, in substance, as follows: "This agreement is entered into as a result of both private negotiation between the Parties and arbitration by the Public Utility Commission of Texas (PUC), acting pursuant to FTA96, PURA95, and the PUC's Substantive Rules. If the actions of Texas or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the basis for a provision of the contract required by the Arbitration Award approved by the PUC, the affected provision shall be invalidated, modified, or stayed as required by action of the legislative body, court, or regulatory agency. In such event, the Parties shall expend diligent efforts to arrive at an agreement respecting the modifications to the agreement required. If negotiations fail, disputes between the Parties concerning the interpretation of the actions required or provisions affected by such governmental actions shall be resolved pursuant to the dispute resolution process provided for in this agreement. The invalidation, stay, or modification of the pricing provisions of the FCC's First Report and Order in CC Docket No. 96-98 (August 8, 1996) and the FCC's Order on Reconsideration (September 27, 1996) shall not be considered an invalidation, stay, or modification requiring changes to provisions of the agreement required by the PUC Arbitration Award, in that the FCC's pricing provisions are not the basis for the costing and pricing provisions of the PUC's Arbitration Award." FTA96 @252(b)(4). (AT&T, MCI)

Filing of Interconnection Agreements.

98. ACSI, AT&T, MCI, MFS, and TCG shall each be responsible for filing individual interconnection agreements with SWBT that are consistent with the terms of this Award. The agreements must be filed with the Commission no later than 3:00 p.m. on November 19, 1996. ACSI, AT&T, MCI, MFS, TCG, and SWBT shall consult and cooperate with one another in preparing the agreements to be filed with the Commission, and the parties shall make every effort to resolve remaining disagreements prior to filing the interconnection agreement. If SWBT believes that aspects of the agreement filed by a Petitioner do not comply with the Arbitration Award, SWBT may file comments (limited to five pages) identifying the provisions of the agreement it believes are not in compliance with this Award To the extent disagreements remain, they may be addressed in more detail during the comment period prior to Commission approval of the agreements.

When interconnection agreements are filed on November 19, the parties shall make filings that state either: (1) that the filed agreement includes negotiated provisions (agreed to either before, during, or after the arbitration proceedings) that were not the subject of arbitration, as well as provisions required by this Arbitration Award; or (2) that the parties consider the entire agreement "arbitrated," and thus subject in its entirety to the review standards for arbitrated agreements stated in FTA96.

If (1) applies, the parties shall identify which provisions are "Negotiated" and which are "Arbitrated." IV. SCHEDULE FOR IMPLEMENTATION OF ARBITRATION AWARD

Pursuant to FTA96 @252(c)(3), the Arbitrators provide the following "schedule for implementation of the terms and conditions" of this Award and the parties' arbitration agreements. This schedule incorporates deadlines for: (1) the filing and approval of interconnection agreements consistent with this Award; (2) the filing, review, and approval of SWBT cost studies; (3) the implementation of permanent rates for the elements/services for which interim rates are set in this Award; and (4) the status reports on certain issues required by this Award. This schedule is, and should be considered, an integral part of the Arbitration Award in this proceeding.

November 19, 1996

ACSI, AT&T, MCI, MFS, and TCG file interconnection agreements with SWBT. If necessary, SWBT files comments on the filed agreements. (See Award P98.)

November 29, 1996

Deadline for comments on interconnection agreements from interested parties.

December 19, 1996

Commission approval of ACSI, AT&T, MCI, MFS, and TCG interconnection agreements.

December 31, 1996

SWBT and Petitioners submit agreed upon list of central offices and other SWBT premises where physical collocation should be offered. (See Award P13.)

January 15, 1997

1. Deadline for SWBT to file cost studies (revisions and new studies required by this Award) with the Commission. (See Award P62.)

2. SWBT files first monthly progress report regarding development and implementation of electronic interfaces. (See Award P25.)

February 15, 1997

SWBT files tariffs for collocation at designated central offices and other locations. (See Award P13.)

February 28, 1997

SWBT and the Petitioners report to the Commission on the status of SWBT's implementation of real-time electronic interfaces that allow LSPs to perform preordering, ordering, provisioning, maintenance and repair, and billing for resale services and unbundled network elements. (See Award P25.)

May 1, 1997

Deadline for parties to: (1) file negotiated permanent rates; and/or (2) request further arbitration on certain rate issues.

June 13, 1997

Commission review of interconnection issues. The review will focus on the status of issues including, but not limited to, the following:

1. Industry standards concerning connectivity of SWBT switches with LSP service control points (SCPs). (See Award P5.)

2. The technical feasibility or further unbundling at the SWBT feeder distribution interface (FDI). (See Award P8.)

3. The workability of, and proposed alternatives to, the 15-step approval process required by SWBT for administrative approval of LSP requests for pole attachments and conduit space. (See Award P17.)

4. The implementation by SWBT of real-time electronic interfaces that allow LSPs to perform preordering, ordering, provisioning, maintenance and repair, and billing for resale services and unbundled network elements. (See Award P25.)

5. The status of LSP negotiations with SWBT regarding branding the cover of the white pages telephone directory. (See Award P34.)

6. The availability of hardware and software that would allow LSPs access to systems used in populating and editing the 9-1-1 database. (See Award P46.)

June 30, 1997

Petitioners designate additional collocation sites for tariffing, if necessary. (See Award P13.)

August 15, 1997

SWBT files tariffs for additional collocation locations, if necessary. (See Award P13.) V. CONCLUSION

The Arbitrators conclude that the foregoing Arbitration Award, including the attached appendices, reflects a resolution of the disputed issues presented by the parties for arbitration. The Arbitrators find that their resolution of the issues complies with the standards set in FTA96 @252(c), the relevant provisions of PURA95, and the Commission's dispute resolution rules.

SIGNED AT AUSTIN, TEXAS the 7th day of November, 1996. PUBLIC UTILITY COMMISSION OF TEXAS FTA96 @252 ARBITRATION PANEL PAT WOOD, III, Arbitrator ROBERT W. GEE, Arbitrator JUDY WALSH, Arbitrator

Commission Staff Arbitration Advisors Rick AkinDaphne AllenSuzanne BertinCandice Clark John CostelloDenise TaylorJanis ErvinDavid Featherston Kathy HamiltonLeslie KjellstrandLynne LeMonMark MacLeod Bill MagnessMartha HinkleMeena ThomasVicki Oswalt Pam WhittingtonJohn GillespieNelson ParishRay Murray Roger StewartHoward SiegelNara SrinivasaMartin Wilson Diana ZakeKevin ZarlingLisa RedkeyCarole Vogel

APPENDIX A

STIPULATIONS FILED BY SWBT AND THE PETITIONERS

AGREEMENT CONCERNING CO-CARRIER CROSS CONNECT

ACSI and SWBT make the following agreement concerning cross connections between carriers with collocation in the same SWBT premises.

1. The attached response to ACSI's 1st RFI No. 18 reflects the agreement between the parties. ACSI 1.18 has been admitted in the record as SWBT Exhibit No. 4.

2. This agreement resolves the "co-carrier cross connect" issue as between ACSI and SWBT in this proceeding. The parties jointly request the Commission to include the terms of this agreement as part of its final decision. Signature For ACSI Signature For SWBT ACSI-18.. Does SWBT agree the FCC ruled in the Interconnection Order that a carrier collocated with SWBT may connect to other collated carriers on the same premise (Co-Carrier cross-connect)? See, e.g. 594. Answer: Para. 594 states the commission believes "it is in the best interest and is consistent with the policy goals of section 251 to require that incumbents permit two or more interconnectors to interconnect to their networks at the incumbent's premises". The order goes on to say that the collocated equipment must be "used for the interconnection with the incumbent LEC or access to the LEC's unbundled network elements" and the incumbent LEC is not required to connect "transmission facilities outside of the actual physical collocation space". The order requires incumbent LECs to provide the connection between the equipment in the collocated spaces "unless they permit the collocating parties to provide the connection for themselves". Therefore, to the extent that SWBT is required by law to permit such interconnection, SWBT will provide connects between physical collocation arrangements on a time and materials basis whenever the collocators cannot for technical reasons provide the connection for themselves by passing the facility through cage wall(s). SWBT will provide nothing more than the labor and physical structure(s) necessary for the collocator(s) to pull facilities provided by one collocator from its cage to the cage of another collocator. However, if as an example, the collocators requesting the interconnection are not located on the same floor and cannot physically pull the cable themselves through the SWBT provided structure(s). SWBT will perform the cable pull on time and materials basis. At no time will the collocators be allowed access to any portion of the central office other than the collocation area. SWBT will not make any physical connection within the collocator's cage, SWBT will not accept any liability for the cable or the connections and SWBT will not maintain any records concerning these connections. Responsible Person: Carol Burdine Area Manager-Interconnection and Resale Southwestern Bell Telephone Company One Bell Center, Room 8-S-8 St. Louis, MO 63101

AGREEMENT CONCERNING ADSL AND HDSL

ACSI and SWBT make the following agreement concerning SWBT provision of ADSL and HDSL capable lines.

1. SWBT will continue to monitor development of industry standards and testing of 2-wire HDSL and all types of ADSL by LECs, and will continue its testing of these technologies in its network.

2. Within six months of the entry of a final decision or contract in this matter, SWBT will submit a report to the Commission of the status of its testing and monitoring of industry testing and standards development, including the technical status and "state of the art." SWBT will also provide its best estimate of the date each type loop capability will be made available and the specific reason the capability cannot or should not be made immediately available. SWBT will serve ACSI with a copy of the report.

3. ACSI may submit comments to the Commission in response to SWBT's report. If there is a factual or legal dispute concerning the contents of the report or if ACSI believes that one or more of the technologies is or should be made immediately available, the Commission may initiate an inquiry. Either party may seek further negotiations and seek arbitration and/or mediation as allowed under federal or state law.

4. This agreement resolves the "type of loop" issue as between ACSI and SWBT in this proceeding. The parties jointly request the Commission to include the terms of this agreement as part of its final decision. Signature For ACSI Signature For SWBT

STIPULATION CONCERNING ADSL AND HDSL

MCI and SWBT make the following agreement concerning SWBT provision of ADSL and HDSL capable lines. 1. SWBT will continue to monitor development of industry standards and testing of 2-wire HDSL and all types of ADSL by LECs, and will continue its testing of these technologies in its network. 2. Within six months of the entry of a final decision or contract in this matter, SWBT will submit a report to the Commission of the status of its testing and monitoring of industry testing and standards development, including the technical status and "state of the art." SWBT will also provide its best estimate of the date each type loop capability will be made available and the specific reason the capability cannot or should not be made immediately available. SWBT will serve MCI with a copy of the report. 3. MCI may submit comments to the Commission in response to SWBT's report. If there is a factual or legal dispute concerning the contents of the report or if MCI believes that one or more of the technologies is or should be made immediately available, the Commission may initiate an inquiry. Either party may seek further negotiations and seek arbitration and/or mediation as allowed under federal or state law. Signature MCI Representative Date 10-9-96 Signature SWBT Representative Date 10/10/96

This is issue 7 in the Stipulation Issues under Unbundled Elements.

INTERCONNECTION/COLLOCATION

Based on the agreements set forth below, MCI and SWBT (the Parties) agree that the Public Utility Commission of Texas (Commission) as arbitrator in

Docket No. 16285, need not provide a decision on the issues noted below. The numbering of issues is with reference to the list of decision-point issues provided by the Commission regarding Interconnection/Collocation.

DECISION POINT LIST ISSUE NO. I(1):

MCI and SWB agree that MCI may designate at its option, a minimum of one point of Interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If MCI desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by MCI, or MCI may self-provision, or use a third party's facilities.

DECISION POINT LIST ISSUE NO. I(2) AND I(3): MCI Originating (MCI to SWBT):

IntraLATA toll traffic may be combined with local traffic on the same trunk group when MCI routes traffic to either a SWBT access tandem which serves as a combined local and toll tandem or directly to a SWBT end office. When mutually agreed upon traffic data exchange methods are implemented direct trunk group(s) to SWBT end offices will be provisioned as two-way and used as two-way. When there are separate SWBT access and local tandems in an exchange, a separate local trunk group will be provided to the local tandem and a separate intraLATA toll trunk group will be provided to the access tandem. When there are multiple SWBT combined local and toll tandems in an Exchange Area, separate trunk groups will be established to each tandem. Such trunk groups may carry both local and intraLATA toll traffic. Trunk groups to the access or local tandem(s) will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks in SWBT tandems. Trunks will utilize Signaling System 7 (SS7) protocol signaling when such capabilities exist within the SWBT network. Multifrequency (MF) signaling will be utilized in cases where SWBT switching platforms do not support SS7.

Trunking to a SWBT access tandem will provide MCI access to the SWBT end offices and NXXs which subtend that tandem and to other service providers which are connected to SWBT. Trunking to a SWBT end office(s) will provide MCI access only to the NXXs served by that individual end office(s) to which MCI interconnects. MCI Terminating (SWBT to MCI):

Where SWBT has a combined local and access tandem, SWBT will combine the local and the intraLATA toll traffic over a single trunk group to MCI. The trunk groups will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks. When SWBT has separate access and local tandems in an exchange area, a separate trunk group will be established from each tandem to MCI. Direct trunk group(s) between MCI and SWBT end offices will be provisioned as two-way and used as two-way. Trunks will utilize SS7 protocol signaling unless the SWBT switching platform only supports MF signaling. To facilitate the provision of two-way trunking, MCI agrees to supply SWBT the necessary information regarding the manner in which MCI transmits local traffic and local transit traffic on Feature Group-D-type trunks to and from a tandem switch on two-way trunks in other incumbent local exchange companies' areas.

Within thirty (30) days from the receipt of the above information, SWBT shall inform MCI if such modification can be made within three (3) months and at what cost, or explain in detail in writing why SWBT cannot so do. If the latter explanation is not satisfactory to MCI, the Parties agree that the issue will be presented to the Commission for a determination of the technical feasibility of providing such two-way trunking.

DECISION POINT LIST ISSUE NO. I(1) AND I(2):

The Parties agree that MCI shall be allowed to designate any technically feasible point of interconnection including: mid-span meets, line-side of local switch; trunk side of local switch; trunk interconnection point for tandem switch; central office cross connect points; out-of-band signalling transfer points; and the points of access to unbundled elements as defined by the FCC and/or the Commission, or as otherwise agreed to by the Parties irrespective of whether defined by the FCC and/or the Commission. A mid-span meet shall not require each party to physically build its separate segment of a facility. This permits shared ownership of a facility built by one party, with a meet-point denoting where ownership changes and with both parties bearing their proportionate share of the costs.

DECISION POINT LIST ISSUE NO. I(4):

Where space permits, SWBT agrees to allow MCI to locate remote switching module equipment (RSM'S) in space dedicated to MCI within SWBT's central office premises, for the purpose of accessing unbundled network elements or for network interconnections.

SWBT will place no restriction or limitation on MCI as to the type or quantity, or use or functionality of that equipment, except that as provided by the FCC's Order in C.C. Docket No. 96-98, Paragraph No. 681, such equipment shall only be used for interconnection and accessing unbundled network elements, and shall not be used for enhanced services.

DECISION POINT LIST ISSUE NO. I(6):

In physically collocating MCI's equipment in SWBT's space SWBT shall provide MCI an estimate of the cost of construction and data of completion for such physical collocation within 35 days from receipt of MCI's request for physical collocation, and MCI shall have 35 days from receipt of SWBT's estimate within which to accept or reject such estimate. If MCI accepts SWBT's cost estimate, and unless otherwise mutually agreed to by the Parties in writing, the Parties agree the provision of such physical collocation shall be completed in no more than three (3) months from the date of MCI's acceptance of SWBT's cost estimate for such physical collocation. If a completion date outside the 3-month period is not agreed to by the Parties, the Parties agree that the issue may be presented to the Commission for determination.

In the provision of virtual collocation by SWB for MCI, and unless otherwise mutually agreed to by the Parties in writing, with respect to the interval between the time MCI requests virtual collocation and the time such request shall be fully implemented, the Parties agree that the provision of virtual collocation shall be completed in no more than two (2) months from the date of the request by MCI for such virtual collocation, subject to availability of equipment selected by MCI. In such case SWBT will inform MCI of the equipment delivery date. If the delivery date is not satisfactory to MCI, the issue can be presented to the Commission for determination.

The Parties agree that MCI may choose to lease unbundled transport from SWBT or a third carrier, rather than construct to SWBT's facility where equipment is to be collocated, whether physical or virtual collocation. Signature MCI Representative Signature SWB Representative DATE: 10/14/96

STIPULATION REGARDING AIN SCP ACCESS ISSUE

Any mediation to SWBT's AIN database must be performed on a competitively neutral, nondiscriminatory basis. Thus, any network management controls found necessary to protect the SCP from an overload condition must be applied on a non-discriminatory basis for all users of that database, including SWBT. Therefore, SWBT and AT&T agree that any load mediation will affect all links to the STP, including SWBTs, in a like manner. Signature AT&T Representative 9/19/96 Signature Southwestern Bell Telephone Company Representative 9/19/96

STIPULATION ON COLLOCATION OF REMOTE SWITCHING MODULE EQUIPMENT

Where space permits, Southwestern Bell Telephone Company (SWBT) agrees to allow AT&T to locate remote switching module equipment (RSMs) in space dedicated to AT&T within SWBT's central office premises, for the purpose of accessing unbundled network elements or for network interconnection.

SWBT will place no restriction or limitation on AT&T as to the use or functionality of that equipment. Signature AT&T Representative 9/19/96 Signature Southwestern Bell Telephone Company Representative 9/19/96

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

Southwestern Bell Telephone Company (SWBT) agrees to permit AT&T reasonable access, subject to a non-disclosure agreement and during normal business hours, to its pole and conduit maps and records and also to its cable plat maps, by appointment, on two (2) business days notice. Such access shall include the right to make copies, at AT&T's expense, except for the cable plat maps, which shall be available for inspection only. In all instances, such access shall include the ability to take notes and make drawings with references to those maps and records. Signature AT&T Representative 9/19/96 Signature Southwestern Bell Telephone Company Representative 9/19/96

STIPULATION ON POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

Southwestern Bell Telephone Company (SWBT) agrees to permit MCI reasonable access, subject to a non-disclosure agreement and during normal business hours, to its pole and conduit maps and records and also to its cable plat maps, by appointment, on two (2) business days' notice. Such access shall include the right to make copies, at MCI's expense, except for the cable plat maps, which shall be available for inspection only. In all instances, such access shall include the ability to take notes and make drawings with references to those maps and records. Signature MCI Representative Date 10-9-96 Signature Southwestern Bell Telephone Company Representative Date 10/10/96

This issues is item 9-a on the Commission's list.

STIPULATION ON INTERVALS FOR COMMITMENTS ON MAKE-READY WORK FOR THE PLACING OF AT&T FACILITIES

Southwestern Bell Telephone Company (SWBT) agrees that SWBT and AT&T will mutually establish a list of vendors that may be contracted to perform "make-ready work" on poles, conduits, and rights-of-way owned or controlled by SWBT where such make-ready work is performed preparing space for the placing of AT&T facilities. Such "make-ready work" will be performed by SWBT in an interval consistent with the intervals SWBT performs for itself. If SWBT's interval for beginning or completing make-ready work does not meet AT&T's needs, AT&T, as a qualified contractor, may perform the make-ready work itself or utilize subcontractor(s) selected by AT&T from a list of mutually agreeable qualified "bidders" developed by SWBT and AT&T. In addition, SWBT and AT&T agree that from time to time, additional vendors may be approved by SWBT and AT&T to perform such work in the event that the work load exceeds the capacity of the approved list of vendors to perform the "make-ready work" in a timely manner. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/13/96

This is item 9 - d on the Commission's list.

STIPULATIONS ON INTERVALS FOR COMMITMENTS ON MAKE-READY WORK FOR THE PLACING OF MCI FACILITIES

Southwestern Bell Telephone Company (SWBT) agrees that SWBT and MCI will mutually establish a list of vendors that may be contracted to perform "make-ready work" on poles, conduits, and rights-of-way owned or controlled by SWBT where such "make-ready work" is performed preparing space for the placing of MCI facilities. Such make-ready work will be performed by SWBT in an interval consistent with the intervals SWBT performs for itself. If SWBT's interval for beginning or completing make-ready work does not meet MCI's needs, MCI, as a qualified contractor, may perform the make-ready work itself or utilize subcontractor(s) selected by MCI from a list of mutually agreeable qualified "bidders" developed by SWBT and MCI. In addition, SWBT and MCI agree that from time to time, additional vendors may be approved by SWBT and MCI to perform such work in the event that the work load exceeds the capacity of the approved list of vendors to perform the "make-ready work" in a timely manner. Such approval shall not be unreasonably withheld. Signature MCI Representative Date 10-7-96 Signature SWBT Representative Date 10/15/96

This is item 9-d on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY INSTALLATION OF INNER-DUCT BY AT&T

SWBT agrees to install inner-duct in a timely manner to accommodate AT&T's space needs in accordance with the same time interval SWBT provides to itself. If SWBT's interval for beginning or completing make-ready work does not meet AT&T's needs, AT&T, as a qualified contractor, may perform the inner-duct installation itself or utilize subcontractor(s) selected by AT&T from a list of mutually agreeable qualified "bidders" developed by SWBT and AT&T. In such case, the materials for the inner-duct placement will be provided by SWBT. AT&T will indemnify SWBT for any damages resulting from AT&T's self-provisioning of the inner-duct. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item 10-g on the Commission's list. [Editor's note: The material below enclosed in brackets is struckout.]

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY INSTALLATION OF INNER-DUCT BY [AT&T] MCI

SWBT agrees to install inner-duct in a timely manner to accommodate MCI's space needs in accordance with the same time interval SWBT provides to itself. If SWBT's interval for beginning or completing make-ready work does not meet MCI's needs, MCI, as a qualified contractor, may perform the inner-duct installation itself or utilize subcontractor(s) selected by MCI from a list of mutually agreeable qualified "bidders" developed by SWBT and MCI. In addition, SWBT and MCI agree that from time to time, additional "bidders" may be approved by SWBT and MCI to perform such work in the event that the work load exceeds the capacity of the approved list of bidders to perform the work. Such approvals shall not be unreasonably withheld. In such case, the materials for the inner-duct placement will be provided by SWBT. [However, if such materials are not made available in a timely manner, MCI may provide such materials from a mutually agreed to list of materials.] MCI will indemnify SWBT for any damages resulting from MCI's self-provisioning of the inner-duct. Signature MCI Representative Signature SWBT Representative Date 10/15/96

This is item 10-g on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY AVAILABILITY OF UNASSIGNED INNER DUCTS

SWBT agrees to deem all unassigned inner ducts it owns or controls available for AT&T's use. "Unassigned inner ducts" shall include all inner ducts, sub-ducts, or partitioned conduits that are not occupied or assigned (i.e. scheduled to be used within twelve (12) months). Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item 10 - d on the Commission's List

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY IMMEDIATE AVAILABILITY OF UNASSIGNED DUCTS

SWBT agrees to make available to AT&T for immediate occupancy any duct, conduit, or pole space that is not currently assigned to a local service provider, or other entity. Availability shall be based on space assignment/occupancy records to be maintained by SWBT but which will be made available for viewing by AT&T upon request within two (2) business days notification. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item 10 - f on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY IMMEDIATE AVAILABILITY OF UNASSIGNED DUCTS

SWBT agrees to make available to MCI for immediate occupancy any duct, conduit, or pole space that is not currently assigned to a local service provider, or other entity. Availability shall be based on space assignment/occupancy records to be maintained by SWBT but which will be made available for viewing by MCI upon request within two (2) business days notification. Signature MCI Representative Date 10-9-96 Signature SWBT Representative Date 10/10/96

This is item 10-f on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY JUST AND REASONABLE RATES

AT&T shall pay to SWBT for the use of poles, ducts, conduits, and rights-of-way: 1. Reimbursement for "make-ready" work requested by AT&T; 2. Annual "license fee" for the use of the space in Texas at $ 2.85/ year per pole attachment, $ 0.63/ft per year for a full-size conduit, and $ 0.315/ft per year for an inner-duct (i.e. half duct rate). 3. Administrative fees, if and to the extent such fees are authorized by the Public Utility Commission of Texas (PUC) in this Arbitration, PUC Docket No. 16226. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY JUST AND REASONABLE RATES

MCI shall pay to SWBT for the use of poles, ducts, conduits, and rights-of-way: 1. Reimbursement for "make-ready" work requested by MCI. 2. Annual "license fee" for the use of the space in Texas at $ 2.85 / year per pole attachment, $ 0.63 / ft per year for a full-size conduit, and $ 0.315 / ft per year for an inner-duct (i.e. half duct rate). 3. Administrative fees, if and to the extent such fees are authorized by the Public Utility Commission of Texas (PUC) in this Arbitration, PUC Docket No. 16226. Signature MCI Representative Date 10-9-96 Signature SWBT Representative Date 10/10/96

STIPULATION BETWEEN SWBT AND AT&T REGARDING TIME FRAMES WITHIN WHICH SPACE ON SWBT's POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY CAN BE RESERVED FOR FUTURE USE

SWBT and AT&T agree that: a. on receipt of license application and payment for estimated make-ready work, if any, SWBT will assign such poles, conduit, ducts and rights-of-way space to AT&T and shall not allow any use thereof by any party, including SWBT. b. pole, duct, conduit or right-of-way space shall be assigned to SWBT or AT&T for a period not to exceed 12 months. The 12-month period shall begin from the time the space is assigned and entered into the appropriate SWBT record. This "assigned" period applies to SWBT and AT&T equally. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This issue is item 9-b on the Commission's list.

STIPULATION AS TO THE DEGREE TO WHICH SWBT SHOULD MODIFY ITS OUTSIDE PLANT FACILITIES TO ACCOMMODATE NEW LSP's SPACE REQUIREMENTS BEFORE DECLARING SPACE UNAVAILABLE.

SWBT agrees to modify its outside plant facilities to the extent that AT&T agrees to pay for the modification at cost, such as but not limited to cable consolidations, as long as such modifications are consistent with capacity, safety, reliability, and engineering considerations which SWBT would apply to SWBT if the work were performed for its own benefit. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item 10 - i on the Commission's list

STIPULATION AS TO THE DEGREE TO WHICH SWBT SHOULD MODIFY ITS OUTSIDE PLANT FACILITIES TO ACCOMMODATE NEW LSP's SPACE REQUIREMENTS BEFORE DECLARING SPACE UNAVAILABLE.

SWBT agrees to modify its outside plant facilities to the extent that MCI agrees to pay for the modification at cost, such as but not limited to cable consolidations, as long as such modifications are consistent with capacity, safety, reliability, and engineering considerations which SWBT would apply to SWBT if the work were performed for its own benefit, to the extent such factors can be considered pursuant to the FCC's Order in C.C. Docket No. 96-98. Signature MCI Representative Signature SWBT Representative Date 10/15/96

This is item 10-I on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

REMOVAL OF RETIRED OR INACTIVE CABLES

SWBT agrees to remove cables at its expense that are retired or inactive (dead) to free-up requested duct and pole space, provided that such removal is reasonably feasible (i.e. cable pulls easily without incident). If a section of cable is "frozen" in a duct and would require excavation to remove, AT&T, at its option, may excavate the obstruction or request that SWBT excavate the obstruction. The excavation would be at AT&T's expense; removal of the remainder of the cable would be at SWBT's expense. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item III 10-h on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

REMOVAL OF RETIRED OR INACTIVE CABLES

SWBT agrees to remove cables at its expense that are retired or inactive (dead) to free-up requested duct and pole space, provided that such removal is reasonably feasible (i.e. cable pulls easily without incident). If a section of cable is "frozen" in a duct and would require excavation to remove, MCI, at its option, may excavate the obstruction or request that SWBT excavate the obstruction. The excavation would be at MCI's expense; removal of the remainder of the cable would be at SWBT's expense. Signature MCI Representative Date 10-9-96 Signature SWBT Representative Date 10/10/96

This is item III 10-h on the Commission's list.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

REPAIR/MAINTENANCE/EMERGENCY DUCT

SWBT agrees to designate no more than one full-sized conduit within any given conduit system cross-section as being the Repair/Maintenance/Emergency Duct. Such duct shall be available for use by any local service provider needing to restore service and shall be available on a non-discriminatory basis. In emergency situations (service disruptions), prioritization of occupancy of the emergency duct space among service providers shall be based upon restoring 911, fire, police, and hospital telephone service first. Secondary criteria for occupancy of the emergency duct space shall be based on the service provider with the greatest number of lines out of service due to the emergency being rectified. Based on the above criteria, disputes will be immediately resolved at the site among the affected parties, with no privileged use of emergency conduits space by SWBT unless SWBT's outage places its needs above those of other parties following the criteria listed above.

SWBT and LSPs may utilize the repair/maintenance duct on a short-term basis (i.e. 30 days) in non-emergency situations. However, such cables shall be subject to accommodations that can rectify the emergency. The LSP (or SWBT) is obligated to recreate at least one full-sized duct for emergency/maintenance repair. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is issue 10 - e on the Commission's List.

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

ACCESS TO PUBLIC AND PRIVATE RIGHTS-OF-WAY

SWBT agrees to provide non-discriminatory access to poles, ducts, conduit systems, without regard to whether the site is located on public or private property. SWBT also agrees to provide non-discriminatory access to rights-of-way containing CEVs, huts, cabinets and similar structures provided co-location to these facilities is granted as part of this arbitration proceeding. AT&T's ability to construct, maintain, and monitor its facilities at these sites shall be no more restrictive than SWBT places on itself. Such access to these sites shall be provided by SWBT in an expeditious manner. (1) AT&T shall first attempt to obtain right-of-way directly from the property owner. (2) Where SWBT has the authority to permit access to a third party right-of-way, SWBT will not restrict AT&T's use of the right-of-way. (3) Where AT&T is not able to obtain access to a right of way under (1) or (2) above, SWBT agrees to act as AT&T's agent at AT&T's expense in any condemnation proceedings to the extent such a proceeding is required and consistent with any applicable state statutes. Signature AT&T Representative Date 10/3/96 Signature SWBT Representative Date 10/3/96

This is item 7-c on the Commission's list.

STIPULATION ON COLLOCATION

USE OF ELECTRICAL POWER

SWBT agrees to provide AT&T with access to, and use of, electrical power where available (e.g. 110 A/C volt convenience outlets) at the required SWBT-controlled points of network unbundling or physical collocation. Signature AT&T Representative Date 10/4/96 Signature SWBT Representative Date 10/4/96

This is item 7.a on the Commission's List

STIPULATION ON COLLOCATION

USE OF ELECTRICAL POWER

SWBT agrees to provide MCI with access to, and use of, electrical power where available (e.g. 110 A/C volt convenience outlets) at the required

SWBT-controlled points of network unbundling or physical collocation. Signature MCI Representative Date 10/9/96 Signature SWBT Representative Date 10/10/96

This is item 7.a on the Commission's List

INTERCONNECTION STIPULATION REGARDING SWBT PROVIDING TWO-WAY TRUNKS AT&T Originating (AT&T to SWBT):

IntraLATA toll traffic may be combined with local traffic on the same trunk group when AT&T routes traffic to either a SWBT access tandem which serves as a combined local and toll tandem or directly to a SWBT end office. When mutually agreed upon traffic data exchange methods are implemented as specified in Sections (1) and (2) of Attachment A, which is incorporated herein, direct trunk group(s) to SWBT end offices will be provisioned as two-way and used as two-way. When there are separate SWBT access and local tandems in an exchange, a separate local trunk group will be provided to the local tandem and a separate intraLATA toll trunk group will be provided to the access tandem. When there are multiple SWBT combined and toll tandems in an Exchange Area, separate trunk groups will be established to each tandem. Such trunk groups may carry both local and intraLATA toll traffic. Trunk groups to the access of local tandem(s) will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks in SWBT tandems. Trunks will utilize Signaling System 7 (SS7) protocol signaling when such capabilities exist within the SWBT network Multifrequency (MF) signaling will be utilized in cases where SWBT switching platforms do not support SS7.

Trunking to a SWBT access tandem will provide AT&T access to the SWBT end offices and NXXs which subtend that tandem and to other service providers which are connected to SWBT. Trunking to a SWBT end office(s) will provide AT&T access only to the NXXs served by that individual end office(s) to which AT&T interconnects. AT&T Terminating (SWBT to AT&T):

Where SWBT has a combined local and access tandem, SWBT will combine the local and the IntraLATA toll traffic over a single trunk group to AT&T. The trunk groups will be provisioned as two-way and used as one-way until such time as it becomes technically feasible to use two-way trunks. When SWBT has separate access and local tandems in an exchange area, a separate trunk group will be established from each tandem to AT&T. As set forth above, direct trunk group(s) between AT&T and SWBT end offices will be provisioned as two-way and used as two-way. Trunks will utilize SS7 protocol signaling unless the SWBT switching platform only supports MF signaling. Signature AT&T Representative Date 10/4/96 Signature SWBT Representative Date 10/4/96

This is item I(3) on the Commission's List

ATTACHMENT A 1. Servicing Objective/Data Exchange Each party agrees to service trunk groups to the blocking criteria listed in Section 2 below. Each party will attempt to service trunk groups in a timely manner when they have sufficient data to determine that the service objectives in Section 2 are not being met. Each party will make trunk group blockage information available to the other Party by mechanized procedures. The existing exchange of data for Access Trunk Groups will be extended to provide data on all joint trunk groups. 2. Trunk Design Blocking Criteria Trunk forecasting and servicing for the local and intraLATA toll trunk groups will be based on the industry standard objective of 2% overall time consistent average busy season busy hour loads 1% from the

End Office to the Tandem and 1% from tandem to End Office based on Neal Wilkinson B.01M [Median Day-to-Day Variation] until traffic data is available. Listed below are the trunk group types and their objectives:

** See Table in Original. **

STIPULATION ON POLES, DUCTS, CONDUITS AND RIGHTS OF WAY

INFREQUENT CONSTRUCTION TECHNIQUES AND CONNECTIVITY SOLUTIONS

Unless precluded by documented engineering criteria or written guidelines SWBT applied to itself as of 1/1/96, and consistent with considerations of safety, reliability and engineering practices, SWBT agrees to permit AT&T at its own expense to utilize the following techniques to avoid high or unusual expenditures: . placement of pole attachment on both the "field" side and "road" side . placement of extension arms or stand-off brackets on poles . building conduit branches into SWBT's conduit systems

It is recognized and understood by AT&T and SWBT that the above techniques will be rare and considered on a case-by-case basis. Signature AT&T Representative Date 10/7/96 Signature SWBT Representative Date 10/7/96 [Editor's note: 10-b below (enclosed in brackets) is struckout.]

These are items 9-c, 10-a and [10-b] on the Commission's list.

STIPULATION REGARDING RESALE SERVICES

AT&T Communications of the Southwest, Inc. (AT&T), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (MCI) and Southwestern Bell Telephone Company (SWBT) (collectively referred to herein as the Parties) are continuing to negotiate to resolve unresolved issues regarding Resale Services raised in this proceeding. Since the time the Parties filed their testimony with the Public Utility Commission of Texas (Commission), the Parties have resolved the issues set forth herein. As a result of this agreement, the issues raised in the Commission's Decision Points List Nos. I and II have been resolved between the Parties hereto in the manner set forth herein.

The Parties hereby agree and enter into the following Stipulation Regarding Resale Services in this proceeding as follows: 1. The Parties agree that those services identified on Exhibit A attached hereto will not be made available for resale by SWBT to any Local Service Provider (LSP). 2. The Parties agree that all of those services identified or referred to on Exhibit B will be made available for resale by SWBT to all LSPs at the level of discount identified on Exhibit B. 3. The Parties will file with the Commission a matrix listing those services available for resale by SWBT to all Local Service Providers in a form similar to that used in AT&T Exhibit 5 (excluding the associated language on pp. 1-5), including the wholesale discount rate established by this Commission. This matrix will be provided to all parties of record within seven (7) business days following release of any order of the Commission in this proceeding establishing discount whole percentages, whether on an interim or final basis. It is anticipated that this matrix will be filed with the Interconnection agreements that will result from the Commission's order in this proceeding. 4. The Parties have not reached any agreement regarding whether promotions of 90 days or less should be offered to LSPs at the wholesale discount that will be ordered by this Commission in this proceeding. The Parties have agreed, however, under paragraph 950 of the Federal Communications Commission Order of August 8, 1996 (96-98) "short-term" promotions are limited in length to no more than ninety (90) days for the length of the period during which the promotion may be offered to the public, and to no more than ninety (90) days for the period during which any and all benefits from the promotion must be realized or captured by the customer; and (2) that the customer must begin receiving the benefit during the offering period. 5. The Parties have further agreed that, for purposes of resold services: (1) all basic residential and business end-user customers of any LSP will receive a basic listing in SWBT's White Pages directories in the same form and under the same conditions as SWBT provides to its customers; (2) upon receipt of a request from Southwestern Bell Yellow Pages for end user listing information, SWBT will provide to Southwestern Bell Yellow Pages the LSP end user's listing information on an interfiled basis and indistinguishable from SWBT's end user listing information; and (3) each LSP end user customer will receive a copy of Southwestern Bell's White Page directory, as well as a Southwestern Bell Yellow Pages' directory when co-bound with the White Pages, in the same manner and at the same time that they are also provided to SWBT's end user customers. It is the Parties' expectation that separately bound Southwestern Bell Yellow Page directories will be delivered in the same manner and at the same time to LSP end user customers as to SWBT's end user customers. The Parties have agreed that all of the services provided by SWBT referenced in this paragraph are included in the wholesale price and will be provided by SWBT at no additional charge.

AT&T, MCI and SWBT hereby agree to the agreements as outlined in items 1 through 6 of this Stipulation. AGREED TO: Name: Nancy M. Dalton Authorized Representative for AT&T Communications of the Southwest, Inc. AGREED TO: Name: J. Alan Holman Authorized Representative for MCI Telecommunications Corp. Name: Signature Authorized Representative for Southwestern Bell Telephone Company

EXHIBIT A

Services Not Offered For Resale BDS/LAN Customer Provided Equipment Customized Billing Reports Inline Products Inside Wiring Products Semi-Public Telephone Booths and Enclosures 911 Universal Emergency Number Equipment

EXHIBIT B

1. Available for Resale at Retail Rates The Parties have agreed that the following services will be made available for resale by SWBT to all LSPs at the tariff rate for each such service (or in the event that such service is not tariffed, at the rate charged to end-user customers, except as otherwise noted): Construction Charges Distance Learning n29 Connections with Terminal Equipment and Communications Systems Maintenance of Service Charges Suspension Services n30 Telecommunications Service Priority Systems Access Services 976 Information Delivery Service Cellular Mobile Telephone Interconnection Services Exchange Connection Services Shared Tenant Service n31

2. Available for Resale at Five Percent (5%) Discount The Parties have agreed that the following services will be made available for resale by SWBT to all LSPs at a discount of five percent (5%) off of the tariff rate (or in the event that such service is not tariffed, at the rate charged to end-user customers, except as otherwise noted): Bill Plus Consolidated Billing

3. Available for Resale at Wholesale Discount The Parties have agreed that the following services will be made available for resale by SWBT to all LSPs at the wholesale discount rate ordered by the Public Utility Commission of Texas in this Proceeding. A. All services identified or referred to on Revised Attachment 3 to Mr. Eugene Springfield's testimony filed in this proceeding on September 19, 1996. B. All services identified or referred to on AT&T Exhibit 5 except those previously listed, filed with the Public Utility Commission of Texas in this proceeding on September 19, 1996. C. In addition to those services identified or referenced in 3(A) and 3(B) above, the following services will be made available for resale by SWBT to all LSPs: 1. Customized Service Contracts (e.g., FDDI); 2. Enhanced Directory Listings; 3. Prepaid Card; 4. Joint User Services; and 5. Any other Telecommunications Service provided to SWBT's end user customers on a retail basis that are not telecommunications carriers subsequently identified by any Party which has not been included in Exhibit A or Exhibit B of this Stipulation.

STIPULATION REGARDING CERTAIN NUMBERING ISSUES

AT&T Communications of the Southwest, Inc. ("AT&T") and Southwestern Bell Telephone Company ("SWBT") (collectively referred to herein as "Parties") are continuing to negotiate to resolve unresolved issues regarding Numbering raised in this proceeding. Since the time the Parties filed their testimony with the Public Utility Commission of Texas ("Commission"), the Parties have resolved the issues set forth herein. As a result of this agreement, the issues raised in the Commission's Decision Points List No. 2 under Issue V.(a) Number Portability and No. 1 under Issue V.(b) Dialing Parity have been resolved between the Parties hereto in the manner set forth herein.

The Parties hereby agree and enter into the following Stipulation Regarding Numbering in this proceeding:

I. Number Portability

The Parties agree to the following terms and conditions regarding interim number portability ("INP"):

1.0 Other INP Provisions 1.1 SWBT shall exchange with AT&T, SS7 TCAP messages as required for the implementation of Custom Local Area Signaling Services (CLASS) or other features available in the SWBT network. 1.2 SWBT shall notify AT&T of any technical or capacity limitations that would prevent use of a requested INP implementation in a particular switching office. 1.3 AT&T shall have the right to utilize the existing SWBT 911 infrastructure for all 911 capabilities as described in Attachment 15:911. SWBT shall cooperate with AT&T to ensure 911 service is fully available to ported end users consistent with state provisions. AT&T shall have the right to verify the accuracy of the information regarding the AT&T customer in the ALI database. 1.4 SWBT shall pass all Calling Party Number (CgPN) or Automatic Number Identification (ANI) information to and from the ported number, whenever technically feasible. 1.5 SWBT agrees to populate its Line Information Database (LIDB) with information, such as TLN calling cards and Billing Number Screening (BNS), regarding ported numbers for billing. SWBT shall provide access to LIDB database interfaces to accomplish this function, or make input on behalf of AT&T pursuant to LIDB data storage and administrative contracts. 1.6 SWBT agrees not to issue calling cards on ported numbers based on subscriber telephone numbers. 1.7 SWBT and AT&T shall cooperate in all service cut-overs involving AT&T service, to avoid unnecessary service outages. 1.8 SWBT shall provide competitively neutral cost recovery as defined by the Commission which reflects the FCC NP Order.

2.0 Requirements for INP 2.1 Cut-Over Process 2.1.1 For a Coordinated Cutover Environment (where the loop is being purchased by AT&T as an Unbundled Network Element at the time of INP implementation), SWBT shall update switch translations where necessary as close to the requested time as possible, not to exceed 30 minutes after the physical cutover is completed. 2.1.2 For a Non-Coordinated Cutover Environment (where the loop is supplied by AT&T). SWBT shall schedule a mechanized update of switch translations at the AT&T requested cutover time (frame due time). SWBT shall provide an Operation contact whom AT&T can reach in the event manual intervention is needed to complete the cutover. In the event of manual intervention, completion shall be negotiated by the parties. 2.2 Testing SWBT and AT&T shall cooperate in conducting AT&T's testing to ensure interconnectivity between systems. SWBT shall inform AT&T of any system updates that may affect the AT&T network and SWBT shall, at AT&T's request, perform tests to validate the operation of the network. Mutual testing will occur only on a first office application basis per INP solution methodology. 2.3 Exceptions SWBT shall not be required to provide number portability for non-geographic services (e.g., 500 and 900 NPAs and 976 NXX number services) or on COPT line under this Stipulation, unless otherwise ordered by the FCC. 2.4 Recording and Billing SWBT shall provide AT&T with information necessary to allow AT&T to bill end-user customers utilizing ported services, and to allow AT&T to bill SWBT for any local interconnection charges. 2.4.1 SWBT shall provide to AT&T the Exchange Message Records (EMR) for all alternatively billed collect, calling card, and billed-to-third number calls. 2.4.2 SWBT shall supply AT&T with originating billing records that will enable AT&T to bill SWBT or any other LSP for any local interconnection charge. 2.5 Operator Services and Directory Assistance With respect to the operator services and directory assistance associated with INP for AT&T subscribers, SWBT shall provide the following: 2.5.1 While INP is deployed and prior to conversion to a permanent number portability solution: 2.5.1.1 If requested by AT&T, SWBT shall provide Busy Line Verification/Emergency Interrupt (BLV/EI) trunks to the AT&T End Office for BLV/EI call requests for lines that terminate at the AT&T End Office. 2.5.1.2 When a BLV/EI request for a ported number is directed to a SWBT operator and query is not successful (i.e., the request yields an abnormal result), if the operator is aware that the number is a ported number, then the operator shall inform whether the number has been ported and shall direct the request to the appropriate operator. 2.5.1.3 SWBT agrees to remove from its Line Information Data Base (LIDB) all existing SWBT issued Telephone Line number (TLN)-based card numbers when a customer ports their number to AT&T. 2.5.1.4 Where SWBT has control of directory listings for NXX codes containing ported numbers, SWBT shall maintain entries for ported numbers as agreed to by the parties.

II. Dialing Parity

SWBT will not require AT&T customers to dial more digits than similarly-situated customers of SWBT service, nor incur post dial delay (time elapsed between the last digit dialed and the first network response) on the SWBT network in excess of what SWBT customers experience on SWBT's network for the same type of call. AGREED TO: Name: Mark Lancaster Authorized Representative for AT&T Communications of the Southwest, Inc. Name: Signature Authorized Representative for Southwestern Bell Telephone Company

STIPULATION REGARDING CERTAIN OPERATIONAL AND TECHNICAL ISSUES

AT&T Communications of the Southwest, Inc. (AT&T) and Southwestern Bell Telephone Company (SWBT) (collectively referred to herein as the Parties) are continuing to negotiate to resolve unresolved issues regarding certain operational and technical issues raised in this proceeding. Since the time the Parties filed their testimony with the Public Utility Commission of Texas (Commission), the Parties have resolved the issues set forth herein.

The Parties hereby agree and enter into the following Stipulation Regarding Certain Operational and Technical Issues in this proceeding as follows: 1. Outcollects and Incollects: (a) Outcollects: AT&T and SWBT have stipulated and agreed that SWBT will provide to AT&T the unrated message detail that originates from an AT&T subscriber line but which is billed to a telephone number other than the originating number (e.g., calling card, bill-to-third number, etc.). SWBT has agreed to transmit such data on a daily basis. AT&T as the Local Service Provider (LSP) will be deemed the earning company and will be responsible for rating the message at AT&T tariffed rates and AT&T will be responsible for providing the billing message detail to the billing company for end-user billing. AT&T will be compensated by the billing company for the revenue it is due. AT&T and SWBT have stipulated that a per message charge for SWBT's transmission of Outcollect messages to AT&T is applicable, and SWBT will bill AT&T for the transmission charge. The amount of such charge will be addressed in the Resale Attachment to the Interconnection Agreement to be entered into between AT&T and SWBT (Agreement). In addition, AT&T will compensate SWBT for the receipt of the intraLATA toll message as set forth in the same Attachment. (b) Incollects: AT&T and SWBT have also stipulated and agreed regarding the handling of issues associated with messages that originate from a number other than the billing number and that are billable to AT&T customers (Incollects). SWBT will provide the rated messages it receives from the CMDS network to AT&T for billing to AT&T's end-users. SWBT has agreed to transmit such data on a daily basis. SWBT will credit AT&T the Billing and Collection (B&C) fee for billing the Incollects. The B&C credit will be provided in accordance with the procedures set forth in Attachment 4: Connectivity Billing-Resale of the Agreement and the credit will be $ .05 per billed message. AT&T and SWBT have stipulated that a per message charge for SWBT's transmission of Incollect messages to AT&T is applicable, and SWBT will bill AT&T for the transmission charge. The amount of such charge will be addressed in the Resale Attachment to the Agreement. 2. Information Service Provider (ISP) services (976 service): AT&T and SWBT have stipulated and agreed that SWBT will provide to AT&T the Information Service Provider (ISP) messages that originate from an AT&T subscriber line and will charge AT&T for the messages through the supplier billing process. AT&T will include the ISP messages on AT&T's end-user bills and will follow the same collection practices that SWBT follows for collecting revenues associated with such calls. SWBT agrees to adjust AT&T's monthly Connectivity Bill for any uncollectible revenue attributable to an AT&T end-user line for these specific call types to the extent that SWBT has similar contractual adjustment procedures with the ISP. 3. Non-published directory listings: AT&T has stipulated and agreed to withdraw its request for non-published directory listings. AT&T and SWBT have stipulated and agreed that in the event of an emergency wherein an AT&T customer must reach a non-AT&T customer that has a non-published telephone number, the AT&T operator will contact SWBT's operator and request the assistance of a supervisor as is done by SWBT's operators today. 4. White pages information: AT&T and SWBT have stipulated and agreed that SWBT will provide AT&T with up to eight single-sided customer information pages in SWBT white pages directories. The parties have not agreed on price. 5. Operator Services Busy Line Verify/Emergency Interrupt (BLV/EI): AT&T and SWBT have stipulated and agreed that access to Operator Services Busy Line Verify/Emergency Interrupt (BLV/EI) for SWBT subscriber lines will be performed by the SWBT operator upon receipt of a request from an AT&T operator. SWBT has agreed that it will meet the same performance results for AT&T customer requests as it does for SWBT customer requests and will size the trunk groups required to perform this function in accordance with the volume demands. SWBT will provide to AT&T performance reports for the BLV/EI access and success rates on a quarterly basis for the next 12 months from the date of the Agreement or as mutually agreed to between the Parties. AT&T acknowledges that SWBT will not be able to separate AT&T and SWBT results.

AT&T and SWBT hereby agree to the agreements as outlined in items 1 through 5 of this Stipulation. AGREED TO: Name: Nancy M. Dalton Nancy M. Dalton AT&T SW Region Business Planning VP DATE: 9/24/96 Name: Signature Authorized Representative of Southwestern Bell Telephone Company DATE: 9/24/96

STIPULATION REGARDING BRANDING AND CUSTOMIZED ROUTING FOR OPERATOR SERVICES AND DIRECTORY SERVICES 1. Southwestern Bell Telephone Company (SWBT) will offer re-branding of directory assistance and operator services in the name of the LSP starting March 1, 1997, and will complete implementation of this process in all SWBT operator and directory assistance platforms by June 30, 1997. In the interim, SWBT will, if allowed by federal and state law and regulatory rules, unbrand LSP operator services and directory assistance calls that are branded by live operators. AT&T withdraws its request for interim unbranding of directory assistance and operator services for calls that are branded by automated systems until such time as SWBT's operator services platforms are capable of re-branding. The schedule is dependent upon the ability of SWBT's vendor to meet its current commitment; however, SWBT will use its best efforts to manage the vendor to meet said date. 2. Customized routing of operator services and directory assistance services on those SWBT switches with existing capabilities and capacity (e.g. by utilizing line class code or similar method) will be provided starting March 1, 1997 and complete implementation on all such switches by June 30, 1997. For those switches that lack the existing capability and/or capacity to support customized routing, SWBT will develop alternative methods (e.g. AIN based method) of providing customized routing of operator service and directory assistance service. SWBT will complete implementation of this method by December 31, 1997. The schedule for development of alternative solutions is dependent upon the ability of SWBT's vendor to meet its current commitment; however, SWBT will use its best efforts to manage the vendor to meet said date. SWBT is free to choose the methodology deployed in their network to perform customized routing of operator services and directory assistance calls. SWBT will provide a implementation schedule by switch to AT&T no later than December 1, 1996. 3. SWBT agrees to the customized routing of the following types of calls: 0- 0+ Local 0+ 411 1+ 411 4. If the Commission rules or the parties agree that AT&T is entitled to intraLATA toll on resale services and unbundled switch elements, SWBT agrees to customized routing of the following types of calls: 0+ IntraLATA toll 0+ HNPA-555-1212 (IntraLATA) 1+ HNPA-555-1212 (IntraLATA) Nancy M. Dalton AT&T Authorized Representative Date: 9/25/96 Signature SWBT Authorized Representative Date: 9/25/96

STIPULATION REGARDING BRANDING AND CUSTOMIZED ROUTING FOR OPERATOR SERVICES AND DIRECTORY SERVICES 1. Southwestern Bell Telephone Company (SWBT) will offer re-branding of directory assistance and operator services in the name of the LSP starting March 1, 1997, and will complete implementation of this process in all SWBT operator and directory assistance platforms by June 30, 1997. In the interim, SWBT will, if allowed by federal and state law and regulatory rules, unbrand LSP operator services and directory assistance calls that are branded by live operators. MCI withdraws its request for interim unbranding of directory assistance and operator services for calls that are branded by automated systems until such time as SWBT's operator services platforms are capable of re-branding. The schedule is dependent upon the ability of SWBT's vendor to meet its current commitment; however, SWBT will use its best efforts to manage the vendor to meet said date. 2. Customized routing of operator services and directory assistance services on those SWBT switches with existing capabilities and capacity (e.g. by utilizing line class code or similar method) will be provided starting March 1, 1997 and complete implementation on all such switches by June 30, 1997. For those switches that lack the existing capability and/or capacity to support customized routing, SWBT will develop alternative methods (e.g. AIN based method) of providing customized routing of operator service and directory assistance service. SWBT will complete implementation of this method by December 31, 1997. The schedule for development of alternative solutions is dependent upon the ability of SWBT's vendor to meet its current commitment; however, SWBT will use its best efforts to manage the vendor to meet said date. To the extent the methodology is competitively neutral and non-discriminatory, SWBT is free to choose the methodology deployed in their network to perform customized routing of operator services and directory assistance calls. SWBT will provide a implementation schedule by switch to MCI no later than December 1, 1996. 3. SWBT agrees to the customized routing of the following types of calls: 0- 0+Local 0+411 1+411 4. If the Commission rules or the parties agree that MCI is entitled to intraLATA toll on resale services and unbundled switch elements. SWBT agrees to customized routing of the following types of calls: 0+IntraLATA toll 0+HNPA-555-1212 (IntraLATA) 1+HNPA-555-1212 (IntraLATA) Signature MCI Authorized Representative Date: 10-14-96 Signature SWBT Authorized Representative Date: 10/15/96

APPENDIX B

AVOIDED COST DISCOUNT CALCULATION

** See Table in Original. **

APPENDIX C

ECONOMIC DEPRECIATION RATES FOR SWBT

** See Table in Original. **

** See Table in Original. **

** See Table in Original. **

APPENDIX E AT&T EXHIBIT 15A

** See Table in Original. **

** See Table in Original. **

** See Table in Original. **

** See Table in Original. **

** See Table in Original. **

FOOTNOTES

n1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. @@151 et seq. Hereinafter, all citations to FTA96 will be to the 1996 Act as codified in the United States Code.

n2 The Commission has the authority to conduct the FTA96 arbitrations pursuant to @252 of FTA96 and @@1.101, 3.051, 3.451, 3.458, and 3.460 of the Public Utility Regulatory Act of 1995, Texas Civil Statutes, Article 1446c-0 (PURA95).

n3 P.U.C. Proc. R. @@22.301 - 22.310 (establishes procedures for mediation, arbitration, and approval of interconnection agreements under FTA96).

n4 The original consolidation order also included a sixth petition, Docket No. 16244, a petition filed by TCG for arbitration with GTE Southwest Incorporated (GTE). TCG withdrew its arbitration request regarding GTE prior to hearing.

n5 The Arbitrators' decisions in PP62-95 are based on FTA96 @251(c) and @252(d). All Petitioners are affected by the decisions in PP62-95 of the Award.

n6 Tr. 3376-3379.

n7 Tr. 3377.

n8 Tr. at 3606-3607.

n9 Tr. at 3392.

n10 Tr. at 3286-3290.

n11 Tr. at 3320-3323.

n12 Tr. 3356 (Testimony of Dr. Mercer).

n13 Tr. at 4397.

n14 Tr. at 2979-2981.

n15 FTA 96 @ 224(e)(2).

n16 25% * 2/3 = 16.67%, or approximately 1/6.

n17 25% * 60% + 16.67% * 40% = 21.67%, or 22% when rounded.

n18 SWBT witness Moore agreed that SWBT's use of MDF costs on the 25% integrated pair gain factor that does not terminate to an MDF is inappropriate. In response to staff clarifying questions, Mr. Moore stated: "If the question is getting to the point, have we included an MDF on those 25 percent and should not have, the answer is 'yes'." Tr. 3521.

n19 Bates Stamped pages 12712 and 12713 of binder labeled "Texas Additional Supporting Documentation Requested by AT&T 9/25/96 [General Request]".

n20 $ 0.069476 per 24-fiber cable/24 fibers = $ 0.002895 per fiber. See "SWBT Texas Additional Support Documentation."

n21 ($ 2.35*1.155 + $ 1.19)/2 = $ 1.95.

n22 $ 4.66*1.155*72% = $ 3.88 and $ 139.16*1.155*72% = $ 115.73.

n23 ($ 0.003960 + $ 0.0019)/2 = $ 0.002903.

n24 ($ 0.002603*1.155 + $ 0.0019)/2 = $ 0.002453.

n25 ($ 56.57*1.155 + $ 16.87)/2 = $ 41.04 and ($ 41.03*1.155 + $ 16.86) = $ 32.13.

n26 Filed on October 18, 1996.

n27 This value is equal to the total Texas initial delivery cost multiplied by the percentage of deliveries that are initial deliveries plus the total Texas subsequent delivery cost multiplied by the percentage of deliveries that are subsequent deliveries.

n28 TCG Brief (October 18, 1996), at 41.

n29 Distance Learning discount is an addition to the discounts for the underlying services provided.

n30 Suspension of Service discounts apply to the discounted rate for the underlying service.

n31 When an LSP resells Shared Tenant Service, the LSP will receive the discount associated with the underlying service used in the shared tenant arrangement.

NORTHWEST PAYPHONE ASSOCIATION, A WASHINGTON NON-PROFIT CORPORATION, DIGITAL ACCESS COMMUNICATIONS CORP., NCS TELEWORK COMMUNICATIONS CO., PAYTEL NORTHWEST, INC., and PUBLIC COMMUNICATIONS OF AMERICA, Complainants, v. U S WEST COMMUNICATIONS, INC., Respondent

DOCKET NO. UT-920174

Washington Utilities and Transportation Commission

1995 Wash. UTC LEXIS 8

March 17, 1995

PANEL:
[*1]

Sharon L. Nelson, Chairman; Richard D. Casad, Commissioner; A. J. Pardini, Commissioner; Richard Hemstad, Commissioner; Heather Ballash, Administrative Law Judge

COUNSEL:
APPEARANCES: The Northwest Payphone Association and the four other complainants were represented by Brooks Harlow, attorney, Seattle. The Staff of the Washington Utilities and Transportation Commission (Commission Staff) was represented by Sally G. Johnston, assistant attorney general, Olympia. U S WEST Communications, Inc., was represented by Edward T. Shaw, Steve Holmes, and Molly Hastings, attorneys, Seattle.

OPINION:
ORDER GRANTING COMPLAINT IN PART

SUMMARY

PROCEEDINGS: On February 7, 1992, the Northwest Payphone Association (NWPPA or complainants) and four of its members, Digital Access Communications Corp., NCS Telework Communications Co., Paytel Northwest, Inc., and Public Communications of America, n1 filed with the Commission a complaint against U S WEST Communications, Inc. (U S WEST or company), alleging that the rates, charges, rules, regulations, and practices of U S WEST regarding the payphone services of non-local exchange company (LEC) providers are unreasonable, discriminatory, illegal, and unfair. The complaint [*2] alleged that the competitive public payphone industry has been hindered by the anti-competitive abuses of U S WEST. In its answer, U S WEST denied the allegations and argued that competitive payphone providers (CPPs) must register with the Washington Utilities and Transportation Commission as telecommunications companies.

n1 After the complaint was filed, NCS Telework Communications Co. and Paytel Northwest, Inc., merged into the surviving entity Paytel Northwest, Inc.

HEARINGS: The Commission held twelve days of hearings in this proceeding. Hearings were held in Olympia before Chairman Sharon L. Nelson, Commissioners Richard D. Casad, A.J. Pardini, and Richard Hemstad, who also reviewed all of the testimony and exhibits, and Administrative Law Judge Heather Ballash of the Office of Administrative Hearings.

COMMISSION: The Commission orders U S WEST to reduce its public access line rate to the equivalent simple business line rate and to eliminate usage charges. The Commission also orders U S WEST to reduce its answer supervision-line side monthly recurring rate from $ 3.95 to $ 1.00. Based upon a proper imputation analysis, these two reductions eliminate the price squeeze [*3] created by the price charged to competitors for essential monopoly or "bottleneck" inputs and the $ 0.25 per call charged to end-users for a local call. Additionally, the Commission orders U S WEST to respond in writing to competitive payphone providers' requests for network services within 120 days of a request. U S WEST shall implement the request by offering the service under tariff if the service is feasible based upon currently available technology and if forecasted demand is sufficient to allow U S WEST to recover its costs. U S WEST shall implement the request as soon as practicable and no later than 6 months following the receipt of the customer's request.

SCOPE OF PROCEEDINGS

I. Procedural History

A pre-hearing conference in this complaint proceeding was convened on June 2, 1992; the parties agreed to reconvene for another pre-hearing conference at a later date. n2 On September 16, 1992, prior to the reconvening of the pre-hearing conference, oral argument on a motion to compel discovery was held. On October 16, 1992, the pre-hearing conference was reconvened.

n2 The continued pre-hearing conference was set October 5, 1992, but due to the Commission's schedule was moved to a later date. [*4]

The pre-filed testimony and exhibits of the NWPPA were cross-examined on February 1 and 2, 1993. On February 2, 1993, at the conclusion of the cross-examination of the complainant's direct case, U S WEST made an oral motion to dismiss the NWPPA's complaint for lack of jurisdiction. After briefs were filed and oral argument heard, the Commission denied the company's motion on February 10, 1993.

The pre-filed testimony and exhibits of U S WEST and Commission Staff were cross-examined on October 11, 13, 14, and 15, 1993. Hearings for cross-examination of the NWPPA's rebuttal testimony and exhibits were held on December 13 and 14, 1993. Briefs were filed with the Commission on February 22, 1994.

II. Issues Presented

There are two fundamental policy issues inherent in the allegations of the NWPPA complaint. First, whether the complainants must be registered as telecommunications companies in order to invoke the jurisdiction of the Commission. Second, the merits of the complainants' allegations that U S WEST is acting in an anti-competitive manner. The latter issue relates to U S WEST's pricing strategies, service offerings, discrimination, and other alleged anticompetitive [*5] conduct in the provision of public payphone services.

III. Summary of the Parties' Recommendations

A. NWPPA

NWPPA alleges that U S WEST's pricing strategies and anticompetitive practices have subjected the competitive payphone providers to a price squeeze in the payphone market. To remedy this situation, they recommend the company create a separate subsidiary for its payphone operations or file an annual imputation study. They also ask that U S WEST reduce the rate for a public access line, the message rate (after the 300th call), and the answer supervision-line side rate. In their view, U S WEST also has subjected the competitive payphone providers to a price squeeze in the operator services market and therefore should pay commissions to PAL subscribers on non-sent paid calls.

NWPPA further claims that U S WEST provides inferior services to competitive payphone providers (CPPs) when compared to those provided to the company's payphone service. The company therefore must offer coin line service to CPPs, handle repair and refund requests in the same manner for PAL subscribers as for its own payphones, offer answer supervision in all central offices where it is technically [*6] feasible, and offer magnetic billing to PAL subscribers within six months.

It is alleged that U S WEST discriminates in its installation of public access lines and in its access to customer proprietary network information, and therefore should be ordered to stop improperly delaying PAL order installations due to an existing U S WEST or other vendor payphone, and establish a separate computer system or install other security provisions that physically prevent its payphone personnel from obtaining access to the general payphone and the PAL data bases.

Complaint is made that U S WEST's advertising practices have been unfair and misleading and constitute improper anticompetitive behavior because competitive payphone providers are "captive competitors." The complaint asks that U S WEST therefore stop using the advertisements contained in Ex. 18 and Ex. 54 and any similar advertising. It contends that the company also should cease making any advertising claims that (1) it has the most reliable payphones or the fastest service; (2) non-U S WEST payphones will "cut-off" callers; (3) non-U S WEST payphone owners do not give refunds; and (4) non-U S WEST payphones do not return coins for [*7] uncompleted calls.

According to NWPPA, the company "locks" payphone site owners into long-term contracts using the unfair advantages of the price squeeze and its superior coin line service. Therefore, site owners should be allowed to "opt out" of their contracts during the 12 month period beginning with termination of the price squeeze and offering of coin line service, whichever is later.

Finally, NWPPA alleges the "one phone per PAL" rule is inefficient and places complainants at a competitive disadvantage. U S WEST should remove the one phone per PAL rule from its tariffs, and the Commission should commence a rulemaking proceeding to address the similar provision in WAC 480-120-138(13).

B. U S WEST

U S WEST answers that the complainants have failed to comply with state law and register with the Commission as telecommunications companies. They provide the same telecommunications services in their provision of public payphone service as do all other local exchange companies and until they are registered, the Commission cannot proceed with this complaint.

U S WEST posits that even if the Commission finds that public payphone service is not a telecommunications service [*8] subject to its jurisdiction, the complaint must still be dismissed: (1) if complainants are customers of U S WEST, and not telecommunications companies, complaining about rates charged to them, they have failed to comply with RCW 80.04.110; (2) regardless whether RCW 80.04.110 permits this complaint by customers, the Commission has no jurisdiction to consider the effect of U S WEST's rates upon the competitive interests of unregulated competitors; and (3) even if the Commission has jurisdiction to address such allegations of anticompetitive behavior, the evidence in this proceeding fails to support those allegations.

U S WEST responds that its payphone services rates and its PAL rates are fair, just, reasonable, and nondiscriminatory. It is therefore premature for the Commission to establish an imputation test for these local exchange services because there is no evidence that U S WEST's rates or its charges to competitive payphone providers are improper or that rates charged by U S WEST for its services to the public are unfair, unjust, unreasonable, or insufficient.

C. Commission Staff

Commission Staff recommended only that (1) there be no increase in the local coin rate [*9] of $ 0.25, and (2) there be no reduction in the public access line (PAL) rate. n3

n3 During the hearing, the Commission expressed its dismay that Commission Staff took no position on several key issues in the NWPPA complaint. On brief, Staff argued that it is not unusual for it to assume a limited role in a private complaint case where both complainant and respondent are represented by counsel. Regardless whether Staff should have taken a more active role in this proceeding, the Commission finds the Staff's investigation in this case too narrow and too limited to support its recommendations.

MEMORANDUM

The Commission faces numerous difficult issues as it attempts to facilitate the transition of the telecommunications industry from a monopoly market structure to a competitive market structure. One of the most difficult issues is determining what constitutes anticompetitive behavior. Yet, this is precisely what resolution of this complaint requires. The complainants argue that U S WEST's pricing strategies and business practices are anticompetitive and impede their ability to effectively compete in the public payphone market.

In response, U S WEST denies all allegations [*10] of anticompetitive behavior and argues that the competitive payphone providers must be registered as telecommunications companies in order to invoke the jurisdiction of the Commission.

The Commission first must address the question whether it has jurisdiction over this complaint. If the Commission determines it has the authority to decide the issues posited by the complaint, then we must address the complainant's allegations of anticompetitive behavior by U S WEST in the public payphone market.

I. Legal Jurisdiction

Based upon its assertion that competitive payphone providers must be registered as telecommunications companies, U S WEST maintains that this complaint must be dismissed because the complainants: (1) failed to register as telecommunications companies as required by state law; (2) raised issues beyond the jurisdiction of the Commission; and (3) failed to prove their allegations on issues within the Commission's power to decide, if its jurisdiction was properly invoked.

On February 10, 1993, after reviewing written and oral arguments on U S WEST's motion to dismiss the complaint, the Commission determined that the motion to dismiss should be denied. The basis [*11] of the Commission's decision was threefold.

First, Paytel Northwest, Inc., is a registered telecommunications company which makes it a public service company under Title 80 RCW. The Commission rejected the proffered U S WEST distinction that as a registered alternate operator service (AOS) provider, Paytel could complain only with regard to operator service matters.

Second, the Commission has jurisdiction to consider this complaint under the general terms of RCW 80.04.110; the complaint is not only against rates, but against other terms and conditions of service as well, which would authorize any person to bring such a complaint. In addition, the Commission found persuasive the complainants' argument that the purpose of the complaint statute is to assure that rate complaints are serious enough that substantially more than a single consumer is required to join in a complaint before the Commission may act. Not only are four companies represented by this complaint, but so is the Northwest Payphone Association which is comprised of numerous telecommunications companies registered with the Commission.

Third, the Commission has jurisdiction under RCW 80.36.135(6), which provides that [*12] a person may file a complaint against a company under an alternative form of regulation. n4 RCW 80.36.135(6) states in pertinent part:

The commission or any person may file a complaint alleging that the rates charged by a telecommunications company under an alternative form of regulation are unfair, unjust, unreasonable, unduly discriminatory, or are otherwise not consistent with the requirements of this act: PROVIDED, That the complaint shall bear the burden of proving the allegations in the complaint.

n4 U S WEST, at the time the compdlaint was filed, was regulated under an alternative form of regulation which expired December 31, 1994. See, Fourth Supplemental Order Accepting Settlement With Modifications, Resolving Complaint And Authorizing An Alternative Form Of Regulation, Docket Nos. U-89-2698-F and U-89-3245-P, January 16, 1990.

Finally, the Commission's powers to protect customers and competitors from discrimination are very broad under RCW 80.04.110 and RCW 80.36.080, .140, .170, .180, and .186.

Based upon the discussion of the aforementioned arguments, and the broad powers granted the Commission to guard against discrimination, the Commission reaffirms its [*13] ruling that it has jurisdiction to consider the complaint. The fact that some competitive payphone providers are not registered with the Commission does not prevent the Commission from granting the complainants such relief as is supported by the record evidence. n5

n5 The Commission does not regulate cellular or voice mail providers. Nevertheless, if one of these service providers complained that U S WEST was abusing its monopoly position to unfairly compete against them, U S WEST could not assert lack of registration as defense against, or could not demand registration as a pre-condition to, the Commission's granting such relief as may be proven in a formal proceeding.

II. Determination of Anticompetitive Behavior

A. Price Squeeze

The complainants allege that U S WEST is acting in an anticompetitive manner by creating a price squeeze and by discriminating between the services it provides for competitive payphone providers and the services it provides for its own payphone operations. The price squeeze results from the interaction of the rate charged the competitive payphone providers for access to the network - the Public Access Line (PAL) rate -- and the rate U S [*14] WEST charges for use of its payphones by end-users. A price squeeze is defined by the NWPPA as the equivalent of selling below cost. The direct testimony of NWPPA witness Dr. Cornell states:

A price squeeze exists when the monopolist sets the price for its monopoly input and for the "competitive" downstream product in such a manner that dependent competitors that are just as efficient as the monopolist cannot charge the same price for the output that the monopolist charges and still cover all their costs due to the higher price that they must pay for the monopoly input. n6

n6 Testimony of Dr. Nina W. Cornell, Ex. T-1, p. 13.

With respect to certain toll services, the Commission utilizes an imputation test to determine the appropriate imputed cost and price floor. The purpose of imputation is to establish a price floor for retail services in a market where the monopoly provider of the bottleneck network facilities competes against a competitor at the retail level. With respect to toll services, the Commission has already established an appropriate imputation methodology, i.e., tariffed rates for essential facilities plus any additional long-run incremental costs necessary [*15] to provide the service. n7 In this case, the bottleneck facility is the public access line and the retail service is the public payphone market.

n7 The Commission first approved the principle of imputation in Docket No. U-85-23; it was further refined in Docket No. U-87-1083-T and Docket No. U-88-2052-P.

While imputation requirements for toll services have been refined in prior proceedings, imputation in the public payphone market, and other local exchange services, is relatively new. The controversy over imputation is evidenced not only by the parties' arguments in this proceeding, but U S WEST's position that the Commission must first consider whether such a price test for a local exchange service is appropriate for the Commission to prescribe in the first instance. The Commission believes a price test based on imputation principles is appropriate. As stated in the Commission's CentrexPlus Order:

[T]he Commission believes the principles of imputation are appropriate for pricing essential monopoly elements of competitive services. n8

n8 Fourth Supplemental Order Denying Complaint; Accepting Tariffs Conditionally; Requiring Tariff/Price List Refiling, Docket Nos. UT-911488, -911490, -920252, November 18, 1993, p. 13. [*16]

It remains the Commission's policy to require imputation where there is competition, or emerging competition, to U S WEST's services and the competitors are dependent upon U S WEST for certain essential bottleneck inputs in order to provide their services.

B. U S WEST's Imputation Analysis

U S WEST presented two versions of an imputation test. Their initial imputation analysis showed the company's costs of providing a local call, on an imputed basis, was $ 0.273 per call. n9 The revised imputation test (Ex. C-27) estimated that the $ 0.25 per call barely covered relevant costs. n10

n9 This non-confidential figure was discussed on the record. TR., pp. 593-594

n10 U S WEST revised its imputation test by 1) changing the Federal Communications Commission's rate for end-user access charge, 2) changing the total number of stations to reflect removal of public policy payphones, 3) changing the imputed PAL non-recurring rate, 4) removing the answer supervision-line side service element, 5) removing the outgoing screening service element, and 6) imputing the revenue from "Yellow Page" directory placement maintenance paid to U S WEST from U S WEST Direct, the directory publisher. [*17]

In its revised imputation analysis, the company excluded public policy payphones. U S WEST witness Mr. Lanksbury testified that the revised imputation study reflected that 10.2 percent of public payphones were removed as public policy phones. When questioned about the definition of a "public policy" payphone, Mr. Lanksbury responded that neither the Commission nor the Washington Legislature has defined what is a public policy payphone. In Oregon, Mr. Lanksbury noted, a workshop has developed criteria in order to define a public policy payphone. n11

n11 Mr. Lanksbury testified that Oregon uses the following criteria to identify "public policy" phones: (1) profitability -- does the payphone generate less than $ 100 a month in revenue; (2) the payphone can be either coin or coinless; (3) there must be at least one payphone available 24 hours a day in every municipal government entity; (4) the payphone must not be part of a contract with a space provider; and (5) special public sites with public access, where no fee is charged and there is no other telephone within 1/4 mile of the site. TR., pp. 604-606

In addition to excluding public policy phones, U S WEST argues that toll [*18] and operator service revenues should be included in the imputation analysis. The company states that if it were to include toll and operator service revenues and costs in an analysis of the profitability of its payphone operations, not only would it cover costs but it would be very profitable. n12 On brief, U S WEST argues:

Properly analyzed, the revenues U S WEST directly derives from its public payphone service -- local, toll, directory assistance and operator charges -- are more than adequate to cover its long-run incremental costs for non-essential service elements and tariffed rates for essential elements that must be used by its competitors, even if an imputation test were to be required by this Commission for local exchange services like payphone service. n13

n12 Closing Memorandum of U S WEST Communications, Inc., p. 28.

[N.B.: It is interesting to note that if the Commission were to extend this same rationale to other markets, e.g., the residential local exchange service market, then toll revenues, carrier access revenues, and revenues from custom calling features would need to be included in the imputation test for residential basic local service.]

n13 Id., pp. 4-5 [*19]

C. NWPPA's Imputation Analysis

NWPPA witness Dr. Cornell developed an imputation test (Ex. C-3) which purported to show that U S WEST's pricing strategies have subjected competitive payphone providers (CPPs) to a price squeeze. Dr. Cornell's initial imputation analysis limited revenues to local coin, directory assistance, and the coin toll surcharge. Dr. Cornell included directory assistance revenues and expenses based on the argument that directory assistance is a bottleneck monopoly service, thus distinguishable from operator services. Dr. Cornell argues that payphone revenues are those revenues that U S WEST gets if it places the payphone, and does not get if it does not place the payphone but takes all reasonable steps to supply network services.

With respect to U S WEST's revised imputation analysis, complainants contend there are at least two problems with U S WEST's determination of what constitutes a public policy payphone: (1) U S WEST has used an inconsistent definition of such a payphone, and (2) the company's workpapers do not support it's claims as to the number of such payphones. According to the complainants, these errors reveal that U S WEST claims more [*20] than twice the number of public policy payphones as the company's data supports.

Although complainants disagree with the U S WEST imputation analysis which excluded public policy payphones, Dr. Cornell filed a revised imputation test (Ex. C-75) that excluded public policy payphones. n14 Dr. Cornell's revised imputation test also included as revenues directory payments from U S WEST Direct. n15 Based on Dr. Cornell's revised imputation test, the CPPs were still being subjected to a price squeeze.

n14 The number of public policy payphones excluded from Dr. Cornell's analysis was slightly less than one-half the number of payphones excluded in U S WEST's analysis.

n15 Dr. Cornell stated she was unsure whether it was appropriate to include U S WEST Direct revenues in the imputation analysis.

D. Commission Discussion and Decision

1. Imputation

As evidenced by the testimony and exhibits in the record, there is considerable debate as to the proper imputation test for payphone service. It is especially unclear what position U S WEST advocates. Initially, the company claimed the $ 0.25 per local call didn't meet an imputation test. After the company made certain adjustments [*21] in its imputation analysis, the $ 0.25 per local call only barely covered imputed costs. Finally, on brief, the company argued that a completely different imputation test should be used -- an imputation test that accounts for toll and operator service revenues. n16 This inconsistency illustrates well U S WEST's ability to control cost information and, as a result, to frustrate efforts to penetrate the relationship between its costs, by whatever definition, and its prices.

n16 In U S WEST's conceptual proposal for a new alternative form of regulation (AFOR), the company states that several services will have to be adjusted to cover costs, including payphone local rates. U S WEST COMMUNICATIONS, INC.'S (USWC) AFOR PROPOSAL, Docket No. UT-931349, August 3, 1994.

Based upon the evidence presented in this case, the Commission believes the appropriate payphone imputation analysis compares the revenue derived from a local call with the tariffed rate for "bottleneck" network services, plus the additional incremental costs of providing local payphone service. Admittedly, this is a very narrow and conservative imputation test. The reason is twofold. First, if the Commission were [*22] to include toll and operator services revenues in the imputation analysis, then the toll and operator services costs would also have to be included. The Commission recognizes that when payphone providers, whether U S WEST or a competitive payphone provider, choose where to place a payphone their decision does not hinge solely upon whether $ 0.25 per call covers all of the costs of providing payphone service. Obviously, the provider takes into account all of the expected revenues and expenses to be incurred, including toll and operator services revenues. However, none of the parties presented evidence that included both the revenues and costs for these services in their imputation analysis.

Second, by limiting the imputation test to local payphone revenues ($ 0.25 per call) the Commission specifically addresses the concerns of the complainants that the relationship between the PAL rate and the local calling rate of $ 0.25 per local call is creating a price squeeze. If the $ 0.25 per local call is greater than the imputation price floor, then a price squeeze is not occurring. Conversely, if the $ 0.25 per local call is less than the imputation price floor, then a price squeeze [*23] is occurring.

The proper payphone imputation analysis includes the following expense elements: (1) the tariffed public access line rate and extended area service additive; (2) the federally-mandated subscriber line charge; (3) the tariffed rate for Answer Supervision - Line Side n17 (AS-LS) and Billed Number Screening; n18 (4) amortization of non-recurring charges; n19 (5) amortization of the terminal equipment and enclosures costs; n20 (6) long-run incremental costs for sales, public administration, advertising, refunds, and coin collection; n21 and (7) access line surcharges such as Enhanced 9-1-1 (E911), Washington Telephone Assistance Program (WTAP) and Telecommunications Relay Service (TRS).

n17 Answer Supervision - Line Side (AS-LS) service sends a signal to a vendor's payphones indicating that a call has been answered. This allows less software to be built into a payphone instrument, and provides more accurate timing of calls for billing, coin collection, and coin return by the vendor's payphone. AS-LS is a feature that can be added to current public access lines that originate from certain central offices.

n18 U S WEST's response to complainant's Fourth Data Requests, Data Request No. 51, stated:

Currently, USWC imputes the monthly Public Access Line, usage, End User Access Charges, Touchtone (where tariffed rates exist), Answer Supervision Line Side (where tariffed rates exist), and Billed Number Screening rates to its payphone services.

n19 The service order and line connection cost is calculated by taking the non-recurring charges assessed a PAL subscriber for both the access line and the answer supervision-line side service and converting those charges into a monthly charge. This is the same process used by U S WEST on pages TE-10A through TE-10G of Tab S of the "1991 Cost Workpapers."

n20 Terminal equipment costs were taken from NWPPA witness Dr. Cornell's Confidential Exhibit C-3, and were based on U S WEST's PUBLIC TELEPHONE SERVICE, SUMMARY OF COSTS, STUDY YEAR: 1991, STATE: WASHINGTON.

n21 These costs were included in Dr. Cornell's imputation analysis, Confidential Exhibit C-3. [*24]

The specific items and the revenues and expenses excluded from the proper imputation analysis include: (1) "public policy" phones; (2) directory assistance revenues and expenses; (3) U S WEST Direct n22 revenues; and (4) toll and operator services revenues and expenses. Public policy phones were excluded based on the fact that public policy phones have not been defined in the state of Washington. Directory assistance, toll and operator services revenues and expenses were all excluded.

n22 A wholly-owned subsidiary of U S WEST Communications which publishes the U S WEST white and yellow page directories.

In the Commission's analysis, one adjustment has been made with respect to commission expense. n23 The commission expense has been adjusted to reflect the fact that commissions are based on total intraLATA revenues, including non-sent paid operator and toll revenues. Mr. Lanksbury stated for U S WEST that:

U S WEST does use all local, operator assisted call and intraLATA toll revenues as a measurement for paying rental for a location, but those rental costs are considered to be a local service cost and are not allocated to the toll and operator costs.

n23 Commission expense is the revenue paid a location owner by the payphone provider for rental of the space occupied by the payphone. [*25]

If the Commission excludes the toll and operator services revenues in the imputation analysis, then it must be consistent and exclude the expenses related to those revenues. n24 The Commission has adjusted the commission expense by

30 percent based on the percentage of revenues the competitive payphone providers claimed to be other than local.

n24 The commission expense imputed by all parties was based on total intraLATA revenues, including non-sent paid toll and operator services.

Based upon this imputation test, the cost of a local call is greater than $ 0.25 per call. The Commission believes the complainants have substantiated their allegation that they are subject to a price squeeze in the public payphone market.

2. Price squeeze remedies

To end the alleged price squeeze the complainants proposed new rates for three U S WEST monopoly service elements: (1) reduce the PAL rate by $ 8.94, from $ 28.45 to $ 19.51; (2) reduce the message rate from $ 0.06 per call to $ 0.03 per call (after the 300th call); and (3) reduce the monthly recurring rate for AS-LS from $ 3.95 to $ 1.00.

Although the Commission has determined that a price squeeze is in fact occurring, it will not [*26] order U S WEST to reduce its PAL rates to $ 19.51 as proposed by the complainants. In order to eliminate the price squeeze, the Commission orders U S WEST to reduce its monthly recurring PAL rate to the existing recurring simple business line rate in each rate group. n25 In addition, U S WEST is ordered to reduce the recurring rate for AS-LS from $ 3.95 to $ 1.00.

n25 As of the date of the instant order, the monthly recurring simple business line rates are as follows: Rate Group 1 - $ 18.40; Rate Group 2 - $ 23.10; and Rate Group 3 - $ 26.20.

The Commission bases the reduction in the PAL rate on two factors. First, the elimination of the usage cost combined with the reduction in the AS-LS rate results in the current rate of $ 0.25 per local call passing the imputation test. Second, it was evident from the record that all parties consider a public access line technically and functionally equivalent to a business line. In fact, U S WEST argued on brief that the PAL provides the same thing as a business line -- local exchange access. The Commission therefore believes it is appropriate to reduce the PAL rate to the simple business rate, but no lower. The Commission agrees [*27] with U S WEST that a reduction below the simple business line rate would create a rate anomaly, discriminate against business customers, and create yet another opportunity for tariff arbitrage.

The reduction in the AS-LS rate is also based on two factors. First, the requirement to pass an imputation test and eliminate the price squeeze. As stated previously, the combination of the reduced PAL rate and the reduced AS-LS rate results in the elimination of the price squeeze. n26 Second, U S WEST's marketing study showed a significantly higher demand for AS-LS at a price much lower than the tariffed rate of $ 3.95. n27 Not only has demand been constrained by the tariffed rate, but the study also showed that the revenue maximizing price is substantially lower than the tariffed rate. Therefore, the Commission agrees with NWPPA witness Dr. Cornell's recommendation that the tariffed recurring rate be reduced to $ 1.00.

n26 It seems quite evident from a public policy viewpoint that if the option is either to raise rates to end-users or to reduce the cost of inputs to competitors, the Commission should advocate the latter whenever feasible.

n27 See, Confidential Exhibit C-25, RE: COIN MARKET DEMAND ANALYSIS, December 6, 1991. [*28]

3. Preventing reoccurrence

To prevent the price squeeze from re-occurring, the complainants present two alternatives: (1) ordering U S WEST to put its payphone operations in a separate subsidiary; or (2) requiring U S WEST to file an imputation cost study annually, using Dr. Cornell's methodology, and disallow any losses for rate-making purposes. n28

n28 Under this regimen, U S WEST would be required to perform annual cost studies to verify that the price charged for its payphone service covers all costs of providing that service, including the full tariffed rates that CPPs pay for all "bottleneck" monopoly inputs used to provide their service. If these studies showed that the price charged by U S WEST failed to cover costs, the losses would have to go below the line, rather than forming part of the revenue requirement.

The complainants argue that a separate subsidiary is the most effective way of ensuring that U S WEST's payphones and the CPP's payphones all receive monopoly services on the same terms and conditions. U S WEST argues that RCW 80.04.270 n29 gives the Commission power only to require an accounting separation of non-utility services or products offered by [*29] a regulated company.

n29 RCW 80.04.270 provides in relevant part:

Any public service company engaging in the sale of merchandise or appliances or equipment shall keep separate accounts, as prescribed by the commission, of its capital employed in such business and of its revenues therefrom and operating expenses thereof. The capital employed in such business shall not constitute a part of the fair value of said company's property for rate making purposes, nor shall the revenues from or operating expenses of such business constitute a part of the operating revenues and expenses of said company as a public service company.

While the Commission believes the concept of ordering the company to put its payphone operations into a separate subsidiary may have merit, we are unwilling to mandate such a separation at this time. The Commission believes there are too many questions, from both a policy and an accounting perspective, which have yet to be fully explored on a proper record, to determine if ordering a separate subsidiary for the company's payphone operations is in the public interest.

Additionally, the Commission believes that an annual imputation cost study is not required. [*30] The Commission is confident that the indicated price squeeze has been corrected by our decisions in the instant order. Any future increase in the PAL rate, which is the majority of the CPP's network costs, would have to be approved by the Commission, and the NWPPA and its members could intervene and argue their case for a new imputation cost analysis. The Commission must abstain from imposing unnecessary and overly burdensome reporting requirements, unless the public interest is clearly affected and can be remedied by such requirement. If a U S WEST rate case is conducted in the future, nothing prohibits a party to that proceeding from addressing issues of the reasonableness of an expense item, such as imprudent commission payments to location providers, and advocating exclusion of that expense from recovery in the company's revenue requirement.

4. Other price squeeze issues

In addition to the price squeeze evidenced by the imputation cost analysis, the NWPPA complains that a price squeeze is created through the interaction of the compensation paid by U S WEST to location providers to place a payphone, and the revenue sources from which that compensation is made. The complainants [*31] recommend therefore that the Commission require U S WEST to compensate PAL subscribers for non-sent paid calls. The amount of compensation should be at the same level as the highest commission paid by U S WEST to a site owner with a comparable volume of traffic.

U S WEST maintains that the decision to pay compensation for delivery of toll or operator-assisted traffic to U S WEST by non-regulated payphone providers is a business decision that cannot be mandated by a regulatory agency. U S WEST urges there are extensive revenue generating opportunities from other providers of toll and operator services available to competitive payphone providers. Therefore, U S WEST reasons that complaints about these revenues not being made available to CPPs are at best irrelevant.

The Commission agrees with U S WEST on both counts. Based on the record in this case, the Commission does not believe that it should mandate that competitive payphone providers are entitled to any compensation from U S WEST for non-sent paid calls. It is a business decision that should be the province of U S WEST alone. Part of the reason consumers have an overwhelming preference for U S WEST's calling card or credit [*32] card calls stems from past negative experience with alternative operator services providers. U S WEST should not be required to compensate its competitors for consumers' reactions to prior abuses by the alternative operator services industry.

III. Discrimination in Service Provision

A. Availability of Service

The NWPPA also alleges that U S WEST discriminates between the services it provides CPPs and those it provides its own payphone operations. This includes differences in how quickly public access lines are provisioned, access to customer proprietary network information, and the actual services provided CPPs compared to those which serve U S WEST payphones.

A principal concern of the Commission is whether U S WEST provides CPPs with services and features equal in quality to those used by U S WEST in its own payphone operations. "Coin Line" service is a primary example. n30 By not providing Coin Line service, a service U S WEST provides itself, U S WEST forces the CPPs to incur additional capital investment. n31 With Coin Line service, U S WEST operators get screening information "hard coded" into the automatic number identification (ANI) stream. Without further effort, [*33] the operator knows the call is being placed from a payphone. With PAL screening, there is no screening information in the ANI stream. Instead, the alternative operator services provider is signaled that it must undertake a data base inquiry. U S WEST in turn charges the operator services provider for that data base inquiry. The following is the response of U S WEST witness Mr. Lanksbury to counsel for NWPPA:

Q. Would you please explain for the record how originating call screening works from a U S WEST payphone?

A. Originating call screening from a U S WEST payphone is part of the ANI -- auto number identification -- indication to the operator and it's hard-coded into the ANI stream of number to allow the operator when the call comes in to see that the call is placed from a U S WEST payphone.

Q. Now please explain for the record how originating call screening works from a PAL line, from a competitive payphone.

A. The code similarly comes into the operator, although the code indicates to the operator that they will have to do a look-up in the billing validation system to see that this is in fact a payphone. It's a screening function that requires them, one, to see that [*34] they need to do a look-up and then to subsequently do the look-up. TR pp. 689-690.

n30 Coin Line service is a central office based line very similar to that utilized by U S WEST in its payphone operations. A Coin Line sends signals to the payphone instrument which detect coin deposit, coin collection or return (depending on whether or not the call was completed), and additional coins needed during toll calls. Currently these functions must be programmed into the payphone instrument, because the Public Access Line U S WEST sells the CPPs does not differ functionally from a simple business line.

n31 This additional capital investment is due to the extra functionalities built into the payphone instrument, e.g., automatic polling and answer supervision.

The NWPPA urges the Commission to order U S WEST to provide a Coin Line service similar to what it provides itself. U S WEST responds that, like AS-LS, there is neither genuine demand nor willing purchasers for such a service even if U S WEST were to offer it.

There are significant problems with U S WEST's claim that there is no real demand for Coin Line service and AS-LS. First, these are services that the company already [*35] provides itself. By not providing a similar service to competitive payphone providers, U S WEST has granted itself undue preference or advantage in the public payphone market. The company's unwillingness to offer these services forces CPPs to invest in more expensive "smart" payphones. Therefore, demand now may be limited due to the investment in smart phones already incurred by competitive payphone providers.

Second, U S WEST's own studies show there is in fact some level of interest in these services at a reasonable price. n32 However, with AS-LS, for example, U S WEST elected to price the service at a rate that severely restricted demand.

n32 See, Confidential Exhibit C-25.

In order to limit U S WEST's ability to discriminate between the network services it provides itself and those it provides competitors, the Commission orders U S WEST to respond in writing to all legitimate requests for those network services from competitive payphone providers within 120 days. U S WEST shall implement the request by offering the service under tariff, if the service is feasible based on currently available technology and if forecasted demand is sufficient to allow U S WEST to [*36] recover its cost. U S WEST shall implement the request as soon as practical and in any event no later than 6 months following the receipt of the customer's request. n33

n33 The complainants requested that U S WEST be given a deadline of not more than six months to offer magnetic billing to PAL subscribers.

B. Repair and Refund Service

The complaint alleges that U S WEST's operators discriminate between their payphones and competitors' payphones. When an end-user calls a U S WEST operator from a U S WEST payphone to request repair service or a refund, the operator's equipment indicates the call is coming from a U S WEST payphone. By contrast, if an end-user calls a U S WEST operator from a competitor's payphone, the operator's equipment provides no information about the payphone. The only assistance in the U S WEST operator can offer is to suggest that the caller look on or near the payphone for a referral card or sticker. On this subject, the U S WEST witness Mr. Lanksbury testified:

Q. Is there any service that U S WEST offers to competitive payphone providers that would allow U S WEST's operators to handle refund and repair requests the same way that U S WEST operators [*37] handle those calls from their own payphones?

A. No, there's not. There are other ways that the vendor can handle their repair outside the U S WEST operator. TR pp. 672-673

The NWPPA asks the Commission to order U S WEST's operators to handle payphone repair and refund requests in the same manner for both CPPs and U S WEST. The Commission believes its decision requiring U S WEST to offer services within 6 months of a request from a CPP, as more fully discussed in the preceding section, provides an opportunity for the parties to undertake discussions which could lead to a satisfactory resolution of the repair and refund service problem.

C. Service Requests and Misuse of Customer Proprietary Network Information

The complaint alleges that U S WEST delays the installation of public access lines. U S WEST witness Mr. Lanksbury testified the company has never marketed to location providers based on information obtained from orders for public access lines. He maintained that U S WEST has policies in place to prevent use by its payphone marketing personnel of PAL service order information received by vendor service marketing personnel.

In spite of U S WEST's claims of "safe [*38] harbor" policies to preclude any advantage over its competitors, the NWPPA argues that U S WEST continues to retain an advantage. According to the complaint, the ability to delay installation of an access line is an advantage that only U S WEST, and no other competitor, can have. Any contract or arrangement that would permit U S WEST to exploit this monopoly advantage to the detriment of its competitors should be declared void as against public policy. When U S WEST receives a PAL work order, it should promptly complete the order.

In response to questions from complainants' counsel, company witness Mr. Lanksbury testified:

Q. As I understand it, both the public access line team, if you will, and the U S WEST account executives have access to the same computer system of U S WEST?

A. That would be correct.

Q. And they share a database that shows records for both U S WEST payphones and public access lines; is that correct?

A. The database shares records for virtually all accounts. It covers residence, business, PAL lines and public telephones, yes. TR. 746-747.

NWPPA witness Mr. Coulson stated in his direct testimony that U S WEST no longer markets to location providers [*39] based on information obtained from PAL orders. However, in Mr. Coulson's supplemental direct and rebuttal testimony there is a lengthy discussion of U S WEST's contract with Southland Corporation and the problems encountered when a CPP attempted to install a payphone at a Seven-Eleven convenience store. If the Commission doesn't order U S WEST to put its payphone operations into a separate subsidiary, Mr. Coulson recommends the Commission prohibit U S WEST's vendor services from ever giving any information about PAL orders to U S WEST's payphone marketing personnel.

The Commission agrees with NWPPA that U S WEST is the only payphone provider with the ability to delay the installation of public access lines. However, the Commission believes that the company has established a policy that prevents information on PAL orders from being accessed by payphone marketing personnel. The basis for this allegation appears to be a contract between Southland Corporation and U S WEST. It is Commission policy not to interfere in such contracts, just as the Commission does not interfere in contracts between competitive payphone providers and location providers.

Except for the Southland Corporation [*40] example, the complainants failed to substantiate instances of U S WEST intentionally delaying installation of public access lines. Therefore, the Commission will take no action on the allegations that the company discriminates in either installation of payphone service requests or misuses customer proprietary information. The company's assurances that policies exist to prevent misuse of proprietary marketing information, and the Commission's quality of service rules governing installation of new services, should sufficiently protect complainants.

D. Advertising Practices

The complaint alleges U S WEST has made claims in its advertising that unfairly and deceptively disparage the service of competitive payphone providers. The NWPPA requests the Commission prohibit U S WEST from using unfair or misleading advertising. They also seek protection against U S WEST's advertising which takes advantage of the price squeeze it has created, or the inferior service it provides complainants.

U S WEST denies all allegations of unfair advertising, and additionally argues that the alleged detrimental advertising is no longer in place. U S WEST also contends the Commission has no authority [*41] to grant the requested relief.

The Commission will take no action with respect to the allegation that U S WEST's advertising has been unfair and misleading. The Commission does not believe it is the proper authority to judge whether advertising is unfair or deceptive. In response to questions from the bench, NWPPA witness Mr. Coulson agreed that the courts are a better place to resolve claims of unfair advertising.

E. Effect of long-term contracts on price squeeze

The complainants argue that current location providers under contract with U S WEST should be allowed a "fresh look" at their choice of payphone provider without incurring penalties for rescinding their contract. They argue this is necessarily part and parcel of requiring U S WEST to pass the proper imputation test. Otherwise, current customers will be locked into contracts that only exacerbate the price squeeze, and many more years must pass before the public payphone market sees the full benefit of fair competition.

U S WEST responds that the Commission has no authority to grant this relief, even if it were desirable and in the public interest.

As previously stated, the Commission ordinarily refrains from [*42] interfering in contracts between U S WEST and its customers. The Commission therefore will take no action with respect to the contracts between U S WEST and its location providers.

E. Use of Public Access Lines

Complainants allege that the "one payphone per PAL" requirement is inefficient and places them at a competitive disadvantage. WAC 480-120-138(13) requires subscribers to order separate public access lines for each pay telephone installed. U S WEST has incorporated this language into its tariffs. The complainants argue that since the PAL rate is such a large portion of their costs, the rule in effect drives their costs. They request the Commission initiate a rulemaking proceeding to amend this rule to provide reasonable circumstances and conditions which would permit the attachment of more than one payphone per public access line.

The Commission is concerned that public payphone service be provided in the most efficient manner possible. However, the Commission is not convinced by the evidence presented here that a rulemaking to eliminate the existing rule requirement is necessary. If competitive payphone providers can prove to the Commission that the one payphone [*43] per public access line rule is not in the public interest, then a waiver of WAC 480-120-138(13) could be granted. n34 The Commission will utilize the information from specific waiver requests to determine if an amendment to WAC 480-120-138(13) is necessary.

n34 In granting a waiver of WAC 480-120-138(13), the Commission would also require U S WEST to waive its tariff provisions to permit attachment of more than one phone per public access line.

Having discussed above in detail both the oral and documentary evidence concerning all material matters, and having stated findings and conclusions, the Commission now makes the following summary of those facts and conclusions. Those portions of the preceding detailed findings pertaining to the ultimate findings and conclusions are incorporated by this reference.

FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, accounts, securities, and transfers of public service companies, including telecommunications companies.

2. The complainants, Northwest Payphone Association by and through [*44] its individual members, are engaged in the business of furnishing payphone telecommunications services within the state of Washington.

3. Respondent U S WEST Communications, Inc., is engaged in the business of furnishing telecommunications service within the state of Washington as a public service company.

4. The Commission may require an imputation test whenever competition, or emerging competition, exists for U S WEST services, and competitors are wholly dependent upon U S WEST for essential monopoly inputs in order to provide service.

5. The imputation test for the public payphone service market should include these expense elements: (1) the tariffed public access line rate and extended area service additive; (2) the federally-mandated subscriber line charge; (3) the tariffed rate for Answer Supervision - Line Side (AS-LS) and Billed Number Screening; (4) amortization of non-recurring charges; (5) amortization of the terminal equipment and enclosures costs; (6) long-run incremental costs for sales, public administration, advertising, refunds, and coin collection; and (7) access line surcharges such as Enhanced 9-1-1 (E911), Washington Telephone Assistance Program (WTAP) and [*45] Telecommunications Relay Service (TRS).

6. The imputation test for the public payphone service market should not include these revenue and expense elements: (1) "public policy" phones; (2) directory assistance revenues and expenses; (3) U S WEST Direct revenues; and (4) toll and operator services revenues and expenses.

7. Based upon the Commission's imputation test, the cost of a local telephone call is greater than $ 0.25, and the complainants have substantiated their allegation that they are subject to a price squeeze in the public payphone service market. The Commission should eliminate the price squeeze by reducing the price of essential monopoly inputs in the public payphone services market:

A. Because a public access line is technically and functionally equivalent to a simple business line, the monthly recurring rate for both services should be the same and in each rate group and the PAL message rate should be eliminated; and

B. The monthly recurring rate for answer supervision-line side service should be reduced from $ 3.95 to $ 1.00.

8. The Commission should not require U S WEST to transfer its public payphone operation to a separate subsidiary, nor should the company [*46] be required to file an annual imputation cost study.

9. U S WEST should not be required to compensate competitive payphone providers for non-sent paid calls.

10. U S WEST discriminates in the provision of network public payphone services. The company should respond in writing within 120 days to all legitimate requests for any network services from competitive payphone providers. The company should implement the request by offering the service under tariff, if the service is feasible based upon current technology and if forecasted demand is sufficient to permit U S WEST to recover its costs of providing the service.

11. The Commission is not the appropriate agency to decide claims of deceptive and unfair advertising.

12. The Commission should not interfere with contracts between U S WEST and payphone location providers.

13. A rulemaking to amend WAC 480-120-138(13) is premature at this time, but waiver of the rule's requirement is appropriate if proven to be in the public interest. The Commission prospectively may determine from specific waiver requests that amendment of the rule is necessary.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission [*47] has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. The Commission should require U S WEST to file a new Public Access Line tariff to conform prices with the simple business line rates in each of the existing three business line rate groups, and to eliminate the message rate.

3. The Commission should require U S WEST to lower the monthly recurring answer supervision-line side rate from $ 3.95 to $ 1.00.

4. U S WEST should be required to respond in writing within 120 days of a request for network public payphone services, and to offer services under tariff within 180 days if technically and economically feasible.

ORDER

THE COMMISSION ORDERS:

1. U S WEST must file a new PAL tariff within 20 days of this order to conform the monthly recurring rates for this service with the simple business line rates in each of the company's three existing rate groups, and to eliminate the message rate;

2. U S WEST must file a new AS-LS tariff within 20 days of this order to reduce the monthly recurring rate from $ 3.95 to $ 1.00; and,

3. U S WEST must develop internal company policies to respond to legitimate requests for network services to support [*48] competitive public payphones within 120 days of such request, and must offer such services under tariff within 180 days if the service is technically feasible and recovers the company's costs of providing the service.

DATED at Olympia, Washington, and effective this 17th day of March 1995.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SHARON L. NELSON, Chairman

RICHARD HEMSTAD, Commissioner