Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Local Competition Provisions	)	CC Docket No. 96-98
Of the Telecommunications Act of 1996	)	
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SUPPLEMENTAL ORDER CLARIFICATION

Adopted: May 19, 2000 **Released:** June 2, 2000

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On November 5, 1999, we released the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* in this docket responding to the U.S. Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996 (1996 Act).[1] On November 24, 1999, we released a *Supplemental Order* that modified the *Third Report and Order and Fourth FNPRM* with regard to the ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*.[2] In this Order, we take three actions to extend and clarify the temporary constraint that we adopted in the *Supplemental Order*. First, we extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record for addressing the legal and policy disputes presented here. Second, we clarify what constitutes a "significant amount of local exchange service." Third, we clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3699, para. 1 (1999) (citing *AT&T v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)) (*Third Report and Order and Fourth FNPRM*).

[2] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) (*Supplemental Order*).

significant local usage requirements.

II. BACKGROUND

2. In the *Third Report and Order*, we explained that incumbent LECs routinely provide the functional equivalent of combinations of unbundled loop and transport network elements (also referred to as the enhanced extended link) through their special access offerings. Because section 51.315(b) of the Commission's rules precludes the incumbent LECs from separating loop and transport elements that are currently combined, we stated that a requesting carrier could obtain these combinations at unbundled network element prices.[3] At the same time, we stated our concern that allowing requesting carriers to use loop-transport combinations solely to provide exchange access service to a customer, without providing local exchange service, could have significant policy ramifications because unbundled network elements are often priced lower than tariffed special access services. Because of concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges,[4] we agreed that we should further explore these considerations, recognizing that full implementation of access charge and universal service reform was still pending.[5]

3. The question of whether we should allow requesting carriers to use unbundled network elements to provide exchange access service to customers to whom the requesting carrier does not provide local exchange service has arisen in three contexts. First, in the *Local Competition Third Order on Reconsideration*, the Commission limited the obligation of incumbent LECs to provision shared transport as an unbundled network element to requesting carriers that provide local exchange service to a particular end user. It also sought comment on whether requesting carriers may use unbundled dedicated or shared transport facilities, in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.[6] Second, in the *Fourth FNPRM*, we asked parties to address the legal and policy issues associated with the ability of requesting carriers to obtain entrance facilities, which consist of a dedicated link from a carrier's point-of-presence to an incumbent LECs' serving wire center, as an unbundled network element.[7] We also asked that parties refresh the record in the *Local Competition Third Order on*

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3 *Third Report and Order*, 15 FCC Rcd at 3909, paras. 480-81 (citing 47 C.F.R. 51.315(b)).

4 *Id*. at 3912, para. 485 (citing Letter from William B. Barfield, Associate General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98, at 1 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Letter*)).

5 *Third Report and* Order, 15 FCC Rcd at 3912-13, paras. 485-89.

6 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12494-96, paras. 60-61 (1997) (*Local Competition Third Order on Reconsideration*).

7 *Fourth FNPRM*, 15 FCC Rcd at 3914-15, paras. 494-96.

Reconsideration.[8] Third, in the *Supplemental Order*, we expanded the scope of the *Fourth FNPRM* to seek comment on whether incumbent LECs could decline to provide carriers combinations of unbundled loop and transport network elements solely for the provision of exchange access service.[9]

4. A series of events since the Commission issued its *Local Competition First Report and Order*, culminating in the Supreme Court's decision in *AT&T v. Iowa Utilities Bd.*,[10] have shaped the issues associated with the ability of carriers to substitute unbundled network elements for tariffed special access services. Although the Commission found in the *Local Competition First Report and Order* that the Act does not permit incumbent LECs to place restrictions on the use of unbundled network elements,[11] it concluded that it was necessary to adopt a temporary mechanism to avoid a reduction in contributions to universal service prior to full implementation of access charge and universal service reform.[12] It therefore allowed incumbent LECs to recover access fees from purchasers of unbundled network elements until June 30, 1997.[13] Before this transition period expired, the Eighth Circuit stayed the Commission's unbundled network element pricing rules in October, 1996.[14] Once these rules were stayed, it became uncertain whether or

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8 *Id.* at 3915, para. 496.

9 By limiting the ability of carriers to convert the entrance facility portion of special access service to unbundled network element pricing in the *Third Report and Order*, we believed that could sufficiently preserve the status quo while we examined the legal and policy ramifications of allowing requesting carriers to substitute unbundled network elements for special access service. We concluded subsequently in the *Supplemental Order* that we had underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and extended the temporary constraint to include combinations of unbundled loops and dedicated interoffice transport network elements. *Supplemental Order* at para. 4, n.5.

10 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. 721, 729-32, 736-38 (1999) (*Iowa Utils. Bd.*).

11 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15680, para. 359 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

12 *Local Competition First Report and Order*, 11 FCC Rcd at 15862-64, paras. 716-20.

13 *Id.* at 15864-66, para. 721-25. The Eighth Circuit Court of Appeals upheld the imposition of the temporary mechanism. *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8th Cir. 1997) (*CompTel v. FCC*).

14 *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423-26 (8th Cir. 1997). The Commission's pricing rules are based on forward-looking costs. *See Local Competition First Report and Order*, 11 FCC Rcd at 15844-62, paras. 672-715. The Eighth Circuit made final its determination that the Commission lacked authority under the 1996 Act to determine the rates involved in the implementation of the local competition provisions of the Act, including rates for access to unbundled network elements. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 793-796 (8th Cir. 1997).

not unbundled network elements would continue to be priced at forward-looking cost and whether there would be a significant difference between tariffed access rates and unbundled network element rates. Then, in 1997, the Eighth Circuit also vacated sections 51.315(b)-(f) of the Commission's rules, which protected the right of requesting carriers to obtain combinations of unbundled network elements, such as loop-transport combinations.[15] Vacatur of rule 51.315(b), in particular, precluded requesting carriers from obtaining access to such combinations without first incurring costly reconnection charges. In January 1999, the Supreme Court reinstated the Commission's pricing rules and rule 51.315(b).[16] At the same time, however, it ordered the Commission to revisit its implementation of section 251(d)(2), which addresses the circumstances in which incumbent LECs must make unbundled network elements available to requesting carriers.[17] We addressed this issue in the *Third Report and Order* and determined that incumbent LECs must unbundle loops and interoffice transport individually.[18] The *Fourth FNPRM* asks about the legal and policy implications of allowing requesting carriers to substitute combinations of unbundled loop and transport network elements for the incumbent LECs' tariffed special access service.

5. We took several steps in the *Supplemental Order* to ensure that we sufficiently preserved the status quo pertaining to the special access issue while the *Fourth FNPRM* remains pending. Specifically, we concluded that until resolution of the *Fourth FNPRM*, which we said would occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loop and transport network elements. We explained that this constraint does not apply if an IXC uses such combinations to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[19] In order to determine whether or not an IXC is using combinations of unbundled network elements to provide a significant amount of local exchange service, we stated that we would consider, for example, whether the IXC was providing at least one third of the customer's local traffic as described in a joint filing submitted by several parties.[20] In addition, we stated that we would presume that the requesting carrier is providing a significant amount of local exchange service if it

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15 *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813 (citing 47 C.F.R. § 51.315(b)-(f)).

16 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 736-38. The validity of rules 51.315(c)-(f), requiring incumbent LECs to combine network elements that are not currently combined, is again pending before the Eighth Circuit after the Commission asked the Court to reinstate the rules. *See Third Report and Order*, 15 FCC Rcd at 3907, para. 475.

17 *Iowa Utils. Bd. v. FCC*, 119 S. Ct. at 733-36 (citing section 47 U.S.C. § 251(d)(2)).

18 *Third Report and Order*, 15 FCC Rcd at 3779-3787, 3842-3866, paras. 181-201, 321-79.

19 *Supplemental Order* at paras. 4-5.

20 *Id.* at n. 9 (citing Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999)) (*Bell Atlantic September 1999 Joint Letter*).

is providing all of the end user's local exchange service.[21]

6. In a joint filing submitted on February 28, 2000, several incumbent LECs and competitive LECs request that the Commission clarify the *Supplemental Order* regarding the minimum amount of local service a requesting carrier must provide in order to convert special access services to combinations of unbundled loop and dedicated transport network elements.[22] They propose certain changes to the *Bell Atlantic September 1999 Joint Letter* and request that the Commission modify the amount of local traffic considered "significant" in accordance with these changes.[23] The parties further request that the Commission allow limited auditing rights in order to ensure that requesting carriers meet the minimum threshold for purchasing combinations of unbundled loop and dedicated transport network elements.[24] Several parties responded to the *February 28, 2000 Joint Letter*. They argue generally that the use limitations on combinations that the incumbent LECs and competitive LECs propose are too restrictive, and will prevent requesting carriers from being able to use combinations of unbundled network elements to serve their customers.[25] We address these filings in this Order.

III. DISCUSSION

7. As we observed in the *Third Report and Order and Fourth FNPRM*, and as we

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[21] *Supplemental Order* at n.9.

[22] Letter from Gordon R. Evans, Vice President Federal Regulatory, Bell Atlantic; Robert T. Blau, Vice President Executive and Federal Regulatory Affairs, BellSouth; Richard Metzger, Vice President Regulatory and Public Policy, Focal Communications; Alan F. Ciamporcero, Vice President-Regulatory Affairs, GTE Service Corporation; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Priscilla Hill-Ardoin, Senior Vice President-Federal Regulatory, SBC Communications, Inc.; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom; Melissa Newman, Vice President-Regulatory Affairs, U.S. West, Inc.; Russell C. Merbeth, Vice President, Legal and Regulatory Affairs, WinStar Communications, Inc. to Chairman Kennard and Commissioners, FCC, CC Docket No. 96-98 (filed February 28, 2000) (*February 28, 2000 Joint Letter*).

[23] *February 28, 2000 Joint Letter* at 1-2.

[24] *Id.* at 3.

[25] Letter from Joseph Kahl, Director Regulatory Affairs, RCN Telecommunications Services; and other members of the Competitive Telecommunications Association (CompTel) to The Honorable William E. Kennard, Chairman, FCC, CC Docket No. 96-98 (filed March 13, 2000) (*Comptel March 13, 2000 Letter*); Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98 (filed March 10, 2000)(*MCI WorldCom March 10, 2000 Letter)*; Letter from Jonathan Askin, General Counsel, Association for Local Telecommunications Services (ALTS), CC Docket No. 96-98 (filed March 24, 2000) (*ALTS March 24, 2000 Letter*); Letter from Jonathan E. Canis, Counsel for Winstar Communications and e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Mar. 29, 2000); Letter from Douglas G. Bonner, Counsel for VoiceStream Wireless Corporation, Daniel Waggoner, Counsel for AT&T Wireless Corporation, Mary Davis, Esq., Manager-External Affairs, United States Cellular Corporation, to The Honorable William E. Kennard, Chairman, and Commissioners, FCC, CC Docket No. 96-98 (filed Apr. 12, 2000); Letter from Ross A. Buntrock, Counsel for e.spire Communications, to Magalie R. Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 19, 2000).

reaffirmed in the *Supplemental Order*, permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service.[26] For example, in the absence of completed implementation of access charge reform, allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale.[27] In the words of one incumbent LEC, this would amount to a "roundabout termination" of the access charge regime, prior to the actual elimination of the implicit universal service subsidies contained in access charges, and would require it to bear the expense of providing local dialtone service without a viable means of recovering the costs of universal service.[28] We therefore invoked our longstanding authority to adopt temporary measures designed to protect universal service and prevent industry instability during periods of regulatory transition.[29]

8. Although we have recently taken significant steps in implementing access charge reform,[30] a number of additional considerations, discussed below, require us to extend the temporary constraint identified in the *Supplemental Order* while we compile an adequate record in the *Fourth FNPRM* for addressing the legal and policy issues that have been raised. Therefore, until we resolve the issues in the *Fourth FNPRM*, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[31] We emphasize that by issuing this clarification order, we do not decide any of the substantive issues in the *Fourth FNPRM* on the merits.

9. We previously asked commenters to discuss the source and extent of any right of incumbent LECs to withhold unbundled network elements from carriers seeking to use such elements solely for the purpose of providing special access services.[32] As discussed below,

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[26] *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd at 3912, 3913, paras. 485, 489; *Supplemental Order* at 7.

[27] *See BellSouth Aug. 9, 1999 Letter* at 3-7; Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9. The comments and reply comments cited in this order refer to the filings parties submitted in response to the *Fourth FNPRM* on January 19, 2000 and February 18, 2000.

[28] *BellSouth Aug. 9, 1999 Letter* at 6.

[29] *See Fourth FNPRM*, 15 FCC Rcd at 3914, para. 492 (citing *CompTel v. FCC*, 117 F.3d at 1073-75); *see also MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984); *Supplemental Order* at para. 4, n.5.

[30] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000).

[31] *Supplemental Order* at para. 4. This temporary constraint does not apply to stand-alone loops. *See Third Report and Order*, 15 FCC Rcd at 3777, para. 177.

[32] *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

several commenters argue that such a right follows from the "impair" standard of section 251(d)(2), which directs the Commission to order the unbundling of network elements only after "consider[ing], at a minimum, whether . . . the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[33] In 1999, the Supreme Court rejected our prior rules implementing that provision and directed us to give greater effect to the "impair" standard.[34]

10. In response to our inquiry in the *Fourth FNPRM*, the incumbent LECs argue that, in reexamining our implementation of section 251(d)(2), we must conduct a more market-specific analysis in deciding when network elements must be unbundled.[35] They contend that, in some contexts, denial of particular elements in the incumbent's network may impair the ability of other carriers to provide services in one market but not in another. In those circumstances, the incumbents argue, the availability of such elements should be restricted to the carriers that intend to use them -- substantially, though not necessarily exclusively -- in the markets in which the "impair" standard is met. Here, the incumbents contend, denial of access to the loop-transport combinations at issue would not "impair" a carrier's ability to provide services in the special access market or, more generally, in the exchange access market, of which the special access market is a subset.[36] Thus, the incumbents conclude, competitors have no statutory right to obtain access to such combinations for purposes of competing only in that market, even though the Commission has found that denial of access to those combinations would impair a carrier's ability to compete in the separate market for ubiquitous local exchange and xDSL services.[37]

11. Other commenters, by contrast, contend that "[t]he Section 251(d)(2) determination must . . . be made available on a *network element-by-network element* basis."[38] Those commenters argue that if certain elements satisfy the "impair" standard with respect to *one* market, a carrier may automatically obtain access to those elements solely for purposes of competing in *other* markets, without using the elements to compete in the market that was the basis of the "impair" analysis.[39]

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33 47 U.S.C. 251(d)(2)(B).

34 *Iowa Utils. Bd. v. FCC*, 119 S.Ct. at 733-36.

35 *See, e.g.*, Bell Atlantic Comments at 13-16; BellSouth Comments at 22-29; SBC Comments at 6-10; US West Comments at 2-12.

36 Special access service employs dedicated, high-capacity facilities that run directly between the end user, usually a large business customer, and the IXC's point-of-presence. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, para. 8 (rel. Aug. 27, 1999) (*1999 Access Charge Reform Order*); US West Comments at 8-9.

37 *See, e.g.*, SBC Comments at 7; Bell Atlantic Comments at 18-19.

38 AT&T Reply Comments at 11 (emphasis in original).

39 *Id.* at 9-12; *see also* MCI WorldCom Reply Comments at 3-6.

12. Before the Supreme Court issued its decision in *Iowa Utilities Board*, we sometimes approached an incumbent's obligation to unbundle network elements as though it were an all-or-nothing proposition, suggesting that, if a competitor were entitled to obtain access to an element for one purpose, it was generally also entitled to obtain access to that element for wholly different purposes as well.[40] At that time, however, we never specifically focused on the relationship between that issue (particularly as it relates to this special access dispute) and the "impair" standard of section 251(d)(2). Now that the Supreme Court has rejected our previous interpretation of that provision as insufficiently rigorous, it is appropriate for us to revisit the issue.

13. In the *Third Report and Order*, we conducted a general "impair" analysis of loops and dedicated transport and ordered those elements to be unbundled.[41] That analysis did not fully focus, however, on application of the "impair" standard to the exchange access market, with the limited exception of entrance facilities.[42] With regard to entrance facilities, we determined that there was insufficient record evidence for us to find that requesting carriers had effective alternatives in the market to allow them to provide service.[43] We sought additional evidence in the *Fourth FNPRM* on whether there was any basis in the statute or our rules, including the "impair" standard, under which the incumbent LECs could decline to provide entrance facilities at unbundled network element prices, and we later modified this inquiry in the *Supplemental Order* to include loop-transport combinations.[44]

14. The exchange access market occupies a different legal category from the market for telephone exchange services; indeed, at the highest level of generality, Congress itself drew an explicit statutory distinction between those two markets.[45] Even though the exchange access market is legally distinct from the local exchange market, we must determine whether the markets are otherwise interrelated from an economic and technological perspective, such that a finding that a network element meets the "impair" standard for the local exchange market would itself entitle competitors to use that network element solely or primarily in the exchange access market. Unless we find that these markets are inextricably interrelated in these other respects, it is unlikely that Congress intended to compel us, once we determine that a network element meets the "impair" standard for the local exchange market, to grant competitors access — for that

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40 *See generally Third Report & Order*, 15 FCC Rcd at 3911-12, para. 484 (discussing prior Commission orders); *but see id.* at para. 81 (finding that section 251(d)(2)(B) permits consideration of "the particular types of customers that the carrier seeks to serve"); SBC Comments at 8-9 (characterizing the Commission's limitation on access to circuit switches in the *Third Report & Order* as a use restriction).

41 *Third Report and Order*, 15 FCC Rcd at 3779-82, 3846-3852, paras. 182-189, 332-348.

42 *Id.* at 3852, para. 348.

43 *Id.*.

44 *Fourth FNPRM*, 15 FCC Rcd at 3914-15, para. 494; *Supplemental Order* at para. 6.

45 *See, e.g.*, 47 U.S.C. 153(16) (defining "exchange access"); 153(47) (defining "telephone exchange service").

reason alone, and without further inquiry — to that same network element solely or primarily for use in the exchange access market.

15. Contrary to the views of some commenters,[46] section 251(d)(2) does not compel us, once we determine that any network element meets the "impair" standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market. That provision asks whether denial of access to network elements "would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer*."[47] Although ambiguous, that language is reasonably construed to mean that we may consider the markets in which a competitor "seeks to offer" services and, at an appropriate level of generality, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services. We adopted a similar approach in the *Third Report and Order*, observing that, because "Section 251(d)(2)(B) requires us to consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer," it is "appropriate for us to consider the particular types of customers that the carrier seeks to serve."[48] In any event, even if section 251(d)(2) were altogether silent on this issue, that provision directs us to consider the substantive criteria of subparagraphs (A) and (B) "at a minimum." As we have previously determined, that language authorizes us, at our discretion, to consider other factors in addition to those explicitly designated criteria, such as the development of facilities-based competition.[49] Here, the statute plainly entitles us to ask, as part of our inquiry into whether network elements should be made available for the sole or primary purpose of providing exchange access services, whether denying competitors access to that combination would in fact impair their ability to provide those services.[50]

16. Our identification of the network elements that "should be made available" for purposes of section 251(d)(2) is an ongoing exercise in legislative rulemaking authority. The

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46 *See, e.g.*, AT&T Reply Comments at 9-12.

47 47 U.S.C. 251(d)(2)(B) (emphasis added). Along similar lines, Rule 309(a), which we promulgated in 1996, addresses limitations on the use of network elements "that would *impair* the ability of a requesting telecommunications carrier" to offer particular services. 47 C.F.R. 51.309(a) (emphasis added).

48 *Third Report and Order*, 15 FCC Rcd at 3737-38, para. 81 (emphasis in original).

49 *See id*. at 3745-50, paras. 101-16.

50 AT&T alternatively argues that section 251(c)(3) overrides any suggestion in section 251(d)(2) that we may conduct a market-specific analysis in making our unbundling determinations. AT&T Reply Comments at 10-12. We disagree. Section 251(c)(3) does not speak directly to whether a market-specific analysis is appropriate in determining whether carriers may obtain access to particular elements, and it could therefore pose no conflict with an otherwise proper implementation of section 251(d)(2). Moreover, as the Supreme Court held in *Iowa Utilities Board*, section 251(c)(3) does not itself create "some underlying duty" to "provide all network elements for which it is technically feasible to provide access." 119 S.Ct. at 736. Instead, it is section 251(d)(2) that directs the Commission to issue legislative rules imposing unbundling obligations on incumbent LECs, and that provision permits the Commission to consider criteria that include "the services that [the requesting carrier] seeks to offer."

inquiry we conduct in discharging that authority is necessarily empirical and dynamic. As we emphasized in the *Third Report and Order*, we properly look to actual developments in the telecommunications marketplace before imposing additional unbundling obligations on incumbent LECs; we generally do not impose such obligations first and conduct our "impair" inquiry afterwards.[51] Here, we must gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the *Third Report and Order* before we can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services. One of our tasks will be to resolve a key empirical dispute: whether the markets for local exchange service and special access are so closely interrelated from an economic and technological perspective that a showing of impairment with respect to the former market would by itself tend to suggest, as a practical matter, that the "impair" standard is satisfied with respect to the latter market.[52]

17. Our new unbundling rules, issued in the wake of *Iowa Utilities Board*, should significantly increase competition in local markets by removing long-standing uncertainty about the scope of the incumbent LECs' unbundling obligations and by stimulating new investment. We must take the market effects of those new rules into account as we conduct our "impair" analysis for special access service, and we must therefore allow a meaningful period of time to elapse from the date on which those new rules became effective.[53] We will issue a Public Notice in early 2001 to gather evidence on this issue so that we may then resolve it expeditiously. In addition, the Commission and the parties need more time to evaluate the issues raised in the record in the *Fourth FNPRM*. For example, the incumbent LECs have produced complex economic analyses of the effect on the marketplace of permitting requesting carriers to convert existing special access services to combinations of unbundled network elements.[54] At least one party has argued that, in order to respond, it needs more information concerning the assumptions and calculations underlying the analysis.[55]

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[51] *See Third Report and Order*, 15 FCC Rcd at 3712, para. 21 ("In considering whether to unbundle a particular network element, we look first to what is occurring in the marketplace today.").

[52] *See* AT&T Reply Comments at 15-19 (arguing that the facilities that competitive LECs use to provide special access are no different from the facilities they use to provide other services, and that thus, there is no basis to treat competitive LECs' use of these elements to provide special access service differently from the use of the same facilities to provide other telecommunications services); MCI WorldCom Reply Comments at 7-10 (arguing that if there are insufficient lines from some incumbent LEC serving wire centers to IXC points-of-presence (POPs) such that competitive LECs are impaired without access to these lines to provide the "services they seek to offer," then it follows that there are insufficient lines from some serving wire centers to IXC POPs such that they are also impaired in their ability to provide access services). *Contra* SBC Comments at 10-12 (arguing that the traditional special access/private line market is distinct from transport generally because competitive carriers have deployed fiber to specifically provide these services).

[53] While most of the unbundling rules that we adopted in the *Third Report and Order* became effective on February 17, 2000, certain requirements in the rules did not become effective until May 17, 2000. 65 Fed. Reg. 2542 (Jan. 18, 2000).

[54] *See* USTA Comments, Special Access Fact Report, Jan. 19, 2000.

[55] *See* MCI WorldCom Comments at 26-29.

18. Our extension of this temporary constraint is necessary for an independent reason as well. An immediate transition to unbundled network element-based special access could undercut the market position of many facilities-based competitive access providers.[56] Competitive access, which originated in the mid-1980s, is a mature source of competition in telecommunications markets.[57] We are reluctant to adopt a flashcut approach with potentially severe consequences for the competitive access market without first permitting the development of a fuller record.

19. Contrary to the concerns of some parties,[58] the temporary constraint at issue here should not allow incumbent LECs that provide in-region long distance service to engage in "price squeezes" or other anticompetitive practices, either by allowing their long-distance affiliates to obtain access service below tariffed access charges or by impairing competition in the long-distance market by raising access charges across the board and simultaneously lowering the retail rates of its affiliate's long-distance services to below cost. Incumbent LECs seeking to provide interLATA services through an affiliate must adhere to certain structural separation and non-discrimination requirements. For example, Congress anticipated that some Bell Operating Companies ("BOCs") would obtain authorization under 47 U.S.C. 271 to originate in-region long-distance services before the completion of access charge reform (which includes reform not just of charges for the special access services at issue here, but also of charges for ordinary switched access as well). Congress therefore enacted Section 272, which requires a BOC competing in the in-region long-distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers.[59]

20. As we have consistently determined, those structural and non-discrimination requirements provide adequate safeguards against any effort by an incumbent to obtain an unfair competitive advantage in the long-distance market by discriminating against unaffiliated IXCs or

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[56] *See* Time Warner Telecom Comments at 19.

[57] The Commission has observed competition develop in the special access market and has taken steps to increase the incumbent LECs' pricing flexibility and ability to respond to the advent of such competition. *1999 Access Charge Reform Order* at para. 14 (citing *Special Access Expanded Interconnection Order*, CC Docket Nos. 91-141 and 92-333, Report and Order, 7 FCC Rcd 7369 (1992) (subsequent citations omitted). *See also Third Report and Order*, 15 FCC Rcd at 3852, para. 348 (discussing alternatives to unbundled transport for certain point-to-point routes).

[58] *See* MCI WorldCom Comments at 16; TRA Comments at 9.

[59] *See* 47 U.S.C. 272(e)(3). In the *Accounting Safeguards Order*, the Commission determined that, "where a BOC charges different rates to different unaffiliated carriers for access to its telephone exchange service, the BOC must impute to its integrated operations the highest rate paid for such access by unaffiliated carriers." *Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd at 17539, 17577, para. 87 (1996). *See also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as* amended, CC Docket No. 96-149, Report and Order, 11 FCC Rcd 21905, 22028-30, paras. 256-58 (1996) (implementing section 272(e)(3)).

by improperly allocating costs or assets between itself and its long-distance affiliate.[60] Indeed, those "separation requirements have been in place for over ten years, and independent (non-BOC) incumbent LECs have been providing in-region, interexchange services on a separated basis with no substantiated complaints of a price squeeze."[61] Moreover, because the interim constraint at issue is merely temporary, we will of course be free to take into account any claims of unfair competition when we adopt permanent rules addressing the unbundling issue presented here.

21. To reduce uncertainty for incumbent LECs and requesting carriers and to maintain the status quo while we review the issues contained in the *Fourth FNPRM*, we now define more precisely the "significant amount of local exchange service" that a requesting carrier must provide in order to obtain unbundled loop-transport combinations. We recognize that making a determination about what constitutes a significant amount of local usage on a facility is not an exact science. We believe, however, that the incumbent LECs and competitive LECs that submitted the *February 28, 2000 Joint Letter* have presented a reasonable compromise proposal under which it may be determined that a requesting carrier has taken affirmative steps to provide local exchange service to a particular end user and is not seeking to use unbundled loop-transport combinations solely to bypass tariffed special access service. The local usage options we adopt below thus provide a safe harbor that allows the Commission to preserve the status quo while it examines the issues in the *Fourth FNPRM* in more detail, while still allowing carriers to use combinations of unbundled loop and transport network elements to provide local exchange service.

22. We find that a requesting carrier is providing a "significant amount of local exchange service" to a particular customer if it meets one of three circumstances:

(1) As we found in the *Supplemental Order*, the requesting carrier certifies that it is the exclusive provider of an end user's local exchange service.[62] The loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, the requesting carrier is the end user's only local service provider, and thus, is providing more than a significant amount of local exchange service. The carrier can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or

(2) The requesting carrier certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local

60 *E.*g., Access *Charge Reform*; *Price Cap Performance Review for Local Exchange Carriers, et al.*, CC Docket Nos. 96-262, 94-1, First Report and Order, 12 FCC Rcd 15982, 16101-04, paras. 277-82 (1997).

61 *Id*. at 16101, para. 279.

62 *Supplemental Order* at n.9.

dialtone lines; and for DS1 circuits and above,[63] at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually,[64] and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level),[65] each of the individual DS1 circuits must meet this criteria. The loop-transport combination must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, a carrier's provision of at least one third of an end user's local traffic is significant because it indicates that the carrier is providing more than a de minimis amount, but less than all, of the end user's local service. As we stated above, we find this to be a reasonable indication that the requesting carrier has taken affirmative steps to provide local exchange service to the end user, and is not using the facilities solely to bypass special access service. Such a carrier may then use unbundled loop-transport combinations to serve the customer as long as the active channels on the facility, and the entire facility, are being used to provide the amount of local exchange service specified in this option, thereby offering the carrier some flexibility to use the combinations to provide other services besides local exchange service; or

(3) The requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic. When a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet this criteria. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, collocation is not required. The requesting carrier does not need to provide a defined portion of the end user's local service, but the active channels on any loop-transport combination, and the entire facility, must carry the amount of local exchange traffic specified in this option. This option may be the most efficient for requesting carriers that provide high capacity facilities to large end users that carry a significant amount of local voice traffic, but that represent only a small

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63 A DS1 circuit contains 24 voice-grade channels.

64 Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC. This is consistent with the Commission's statement in the *Local Competition First Report and Order* that state commissions have the authority to determine what geographic areas should be considered "local areas" for purposes of applying reciprocal compensation arrangements, consistent with their historical practice of defining local service areas for local exchange carriers. *Local Competition First Report and Order*, 11 FCC Rcd at 16013, para. 1035.

65 A DS3 circuit contains 24 DS1s. A DS1 circuit that is multiplexed to the DS3 level passes through electronic equipment that allows the signals carried on the DS1 to be consolidated on to the DS3.

> portion of the end user's total local exchange service. This option recognizes that although the requesting carrier is not providing one-third of the end user's local voice service, as set forth in option 2, the carrier has still taken affirmative steps to provide local service to the customer, and is not using the circuits simply to bypass special access. As the record indicates, while such a carrier may not be providing a significant amount of the customer's total local service, the 50 percent facility threshold indicates that a significant portion of the service that the carrier does provide to the end user is local.[66]

23. We clarify that the three alternative circumstances described above represent a safe harbor for determining the minimum amount of local exchange service that a requesting carrier must provide in order for it to be deemed "significant." We acknowledge that there may be extraordinary circumstances under which a requesting carrier is providing a significant amount of local exchange service but does not qualify under any of the three options. In such a case, the requesting carrier may always petition the Commission for a waiver of the safe harbor requirements under our existing rules.[67]

24. We find that the limited collocation requirements contained in local usage options 1 and 2 are reasonable. They are consistent with both the *Third Report and Order*, in which we stated that any requesting carrier that is collocated in a serving wire center is free to order loops and transport to that serving wire center as unbundled network elements,[68] and with the *Supplemental Order*, in which we referred to a requesting carrier's provision of local exchange service terminating at a collocation arrangement as an example of significant local usage.[69] We also stated in the *Third Report and Order* that the Commission expected that it would be most efficient for the incumbent LEC to connect unbundled loop-transport combinations directly to a requesting carrier's collocation cage.[70] Finally, the collocation requirements contained in options 1 and 2 should not impose an undue burden on requesting carriers because they require only that the circuit that the requesting carrier seeks to convert terminate at a single collocation arrangement in the incumbent LEC's network.[71]

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66 Letter from Susanne A. Guyer, Assistant Vice President, Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 11, 2000) (*Bell Atlantic Apr. 11, 2000 Letter*).

67 47 C.F.R. § 1.3.

68 *Third Report and Order*, 15 FCC Rcd at 3912, para. 486

69 *Supplemental Order* at n.9.

70 *See Third Report and Order*, 15 FCC Rcd at 3831, para. 298.

71 *See February 28, 2000 Joint Letter* at 2 (stating in options 1 and 2 that "the loop/transport combination originates at a customer's premises and terminates at the telecommunications carrier's collocation arrangement."); Letter from Melissa Newman, Vice President – Federal Regulatory, US West, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 2 (filed Apr. 13, 2000) (*US West Apr. 13, 2000 Letter*) ("US (continued….)

25. We do not adopt MCI WorldCom's proposal that incumbent LECs should presume that any circuit that a requesting carrier connects to a port on a "Class 5" switch or its equivalent is used exclusively to provide local service.[72] There is no basis to assume that every circuit that terminates in a certain type of switch is being used exclusively for local traffic, and for circuits that are multiplexed into larger capacity facilities, which are often the circuits that carriers seek to convert to unbundled loop-transport combinations, there may be no way to determine whether an individual line actually terminates into a particular switch.[73] We also do not believe that we should regulate the type of equipment that a carrier must use while the temporary constraint is in effect.

26. We also do not adopt MCI WorldCom's proposal that we deem a circuit carrying at least ten percent local traffic to be carrying a significant amount of local traffic. It argues that this approach is consistent with the Commission's rules under which the revenues and costs generated by a special access circuit carrying at least ten percent interstate traffic are classified as "interstate."[74] As the Commission has stated, the amount of interstate traffic carried on a circuit is deemed to be de minimis if it amounts to ten percent or less of the total traffic on a special access line.[75] Because the Commission has found the ten percent threshold to represent a de minimis, not a significant, amount of traffic, we will not use this rule to determine significant local usage.

27. We do not adopt CompTel's proposal for significant local usage under which requesting carriers would be able to request wholesale conversions of special access circuits if (a) the carrier is certified as a competitive LEC and reports that at least 70 percent of its revenues reported to the Universal Service Fund Administrator are local, or (b) the special access arrangements are used to provide services that are "priced to attract (and are capable of completing) the customer's local usage," or (c) the carrier certifies that the special access arrangements are used for the completion of local calls, or (d) the special access arrangements are

(Continued from previous page)
West also emphasized that the collocation requirement is not burdensome because a requesting carrier only needs one collocation arrangement per switch it places in service").

[72] *MCI WorldCom Mar. 22, 2000 Letter* at 9. Some carriers use circuit switches with a "Class 5" designation to provide local exchange service.

[73] *See Bell Atlantic Apr. 11, 2000 Letter*, Attachment at 3.

[74] Letter from Chuck Goldfarb, Director Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau, FCC, CC Docket No. 96-98, at 9-10 (filed Apr. 4, 2000) (*MCI WorldCom Apr. 4, 2000 Letter*). MCI WorldCom proposed subsequently that we find that a requesting carrier is providing a significant amount of local exchange service if 25 percent or more of the activated channels on a DS-1 facility are used for local service. It based this proposal on an analysis of the costs and benefits associated with a requesting carrier converting some of the DS-0 channels on a DS-1 circuit to local usage. Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 2 (filed Apr. 28, 2000). This proposal appears highly dependent on a carrier's individual costs and does not enable the Commission to verify that a requesting carrier is providing a significant amount of local exchange service to a particular end user.

[75] *MTS and WATS Market Structure Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Decision and Order, 4 FCC Rcd 5660, 5660-61 (1989).

used to provide data services.[76] It also argues that incumbent LECs that provide interexchange services in a certain market must make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user.[77] We reject these proposals because they offer no way to verify whether a requesting carrier is providing any specified amount of local service. In addition, its proposal to allow unconstrained use of unbundled loop-transport combinations in markets in which the incumbent LEC provides interexchange service does not allow us to preserve the status quo while we consider the issues in the *Fourth FNPRM*. Instead, the three options described above provide a reasonable threshold for determining whether a carrier has taken affirmative steps to provide local service. They are also verifiable for both the requesting carrier and the incumbent LEC and prevent parties from gaming implementation of the interim requirements. While CompTel expresses a concern about incumbent LECs being both an input supplier and a retail competitor in the interexchange market, the temporary constraint, as we explain above, should not allow incumbent LECs that provide in-region long distance service to engage in anticompetitive behavior.[78]

28. We further reject the suggestion that we eliminate the prohibition on "co-mingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.[79] We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations that we make in this order do not prejudge any final resolution on whether unbundled network elements may be combined with tariffed services. We will seek further information on this issue in the Public Notice that we will issue in early 2001.

29. We clarify that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements.[80] We do not believe it is necessary to address the precise form that such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a

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[76] With regard to data services, we note that the local usage options we adopt do not preclude a requesting carrier from providing data over circuits that it seeks to convert, as long as it meets the thresholds contained in the options.

[77] Letter from Jonathan D. Lee, Vice President, Regulatory Affairs, CompTel, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98 (filed Apr. 27, 2000) (*CompTel Apr. 27, 2000 Letter*). Sprint supports CompTel's proposal except for the requirement that incumbent LECs that provide interexchange services in a certain market make unbundled loop-transport combinations available to requesting carriers in that market regardless of whether the requesting carrier is providing any local exchange service to the end user. Letter from Richard Juhnke, General Attorney, Sprint, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 1 (filed May 2, 2000).

[78] *CompTel Apr. 27, 2000 Letter* at 2.

[79] *See MCI WorldCom Apr. 4, 2000 Letter* at 6-8; *February 28, 2000 Joint Letter* at 2.

[80] *See Supplemental Order* at n.9.

requesting carrier is a practical method of certification.[81] The letter should indicate under what local usage option the requesting carrier seeks to qualify. In order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options. We stated in the *Supplemental Order* that we did not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport network elements was so limited in duration.[82] Because we are extending the temporary constraint, we find that it is reasonable to allow the incumbent LECs to conduct limited audits.

30. We agree with ALTS that once a requesting carrier certifies that it is providing a significant amount of local exchange service, the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay.[83] We stated in the *Third Report and Order* that incumbent LECs and requesting carriers have developed routine provisioning procedures that can be used to deploy unbundled loop-transport combinations using the Access Service Request process, a process that carriers have used historically to provision access circuits.[84] Under this process, the conversion should not require the special access circuit to be disconnected and re-connected because only the billing information or other administrative information associated with the circuit will change when a conversion is requested. We continue to believe that the Access Service Request process will allow requesting carriers to avoid material provisioning delays and unnecessary costs to integrate unbundled loop-transport combinations into their networks, and expect that carriers will use this process for conversions.

31. We agree with MCI WorldCom that upon receiving a conversion request that indicates that the circuits involved meet one of the three thresholds for significant local usage that the incumbent LEC should immediately process the conversion.[85] We emphasize that incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements.[86] There is broad agreement

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81 *See ALTS March 24, 2000 Letter* at 13.

82 *See Supplemental Order* at n.9

83 *ALTS March 24, 2000 Letter* at 13.

84 *See Third Report and Order*, 15 FCC Rcd at 3831, para. 298, n.581. ALTS states that the Access Service Request process has been adopted by industry consensus in New York. *ALTS March 24, 2000 Letter* at 13.

85 *MCI WorldCom Apr. 4, 2000 Letter* at 9.

86 The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. *February 28, 2000 Joint Letter* at 3. We agree that this should be the only time that an incumbent LEC should request an audit.

among the incumbent LECs and the competitive LECs on auditing procedures. In particular, parties agree that incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options.[87] In order to reduce the burden on requesting carriers, we find that incumbent LECs must provide at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements that it will conduct an audit, and may not conduct more than one audit of the carrier in any calendar year unless an audit finds non-compliance. We agree with Bell Atlantic that at the same time that an incumbent LEC provides notice of an audit to the affected carrier, it should send a copy of the notice to the Commission.[88] While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

32. We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. For example, US West points out that records that demonstrate that a requesting carrier's unbundled loop-transport combination is configured to provide local exchange service should be adequate to support the carrier's certification without the need for extensive call detail records.[89] We emphasize that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business. We will not require specifically that incumbent LECs and requesting carriers follow the other auditing guidelines contained in the *February 28, 2000 Joint Letter*. As the parties indicate, in many cases, their interconnection agreements already contain audit rights.[90] We do not believe that we should restrict parties from relying on these agreements.

33. We note that the requirements in this order will take effect immediately upon publication in the Federal Register. We find good cause for doing so because they will allow incumbent LECs to promptly process requests from requesting carriers for access to unbundled loop-transport combinations, and provide the industry with more clearly defined standards for using combinations during the interim period prior to our resolution of the *Fourth FNPRM*.

IV. PROCEDURAL ISSUES: FINAL REGULATORY FLEXIBILITY CERTIFICATION

34. The Regulatory Flexibility Act (RFA)[91] requires that regulatory flexibility analyses

87 *See, e.g., February 28, 2000 Joint Letter* at 3; *ALTS March 24, 2000 Letter* at 12*; MCI WorldCom Apr. 4, 2000 Letter* at 10.

88 *Bell Atlantic Apr. 11, 2000 Letter* at 3.

89 *US West Apr. 13, 2000 Letter* at 1.

90 *February 28, 2000 Joint Letter* at 3.

91 The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." See 5 U.S.C. § 605(b). The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." See 5 U.S.C. § 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. See 5 U.S.C. § 601(3). A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). See 15 U.S.C. § 632. SBA rules provide that for establishments providing "Telephone Communications Except Radiotelephone," which is Standard Industrial Classification (SIC) Code 4813, a small entity is one employing no more than 1,500 persons.

35. This Clarification of the *Supplemental Order* in CC Docket No. 96-98 (Clarification Order) sets out the criteria under which a requesting carrier may use combinations of unbundled network elements to provide exchange access services. The criteria is consistent with several of the Commission's findings in the *Supplemental Order*.[92] It also extends the date by which the Commission will resolve its *Fourth FNPRM* from June 30, 2000. Until resolution of the *Fourth FNPRM*, IXCs are prohibited from converting special access services that they purchase from the Bell Operating Companies or other incumbent local exchange carriers to combinations of unbundled loops and transport network elements unless they meet the designated criteria. This clarification therefore pertains directly to IXCs, and indirectly to Bell Operating Companies (BOCs), other incumbent local exchange carriers, competitive local exchange carriers, and competitive access providers.

36. We certify that this clarification of the *Supplemental Order* will not have a significant economic impact on a substantial number of small entities because it maintains the status quo regarding the ability of IXCs to purchase special access services for a longer period of time. It also maintains the status quo for any small incumbent local exchange carriers from which interexchange carriers purchase special access services. The Clarification Order also allows some limited auditing by incumbent local exchange carriers to determine whether IXCs that use combinations of unbundled network elements meet the established criteria in the Order. This limited auditing will not have a significant economic impact on a substantial number of small entities because any incumbent LEC that chooses to voluntarily exercise its limited auditing rights will bear all expenses associated with any resulting audit. The Commission has also required that audits be conducted based on the records that a small carrier keeps in the normal course of business. The Commission will send a copy of the Clarification Order, including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, see 5 U.S.C. § 801(a)(1)(A). In addition, the Clarification Order and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. See 5 U.S.C. § 605(b).

[92] *Supplemental Order* at n.9.

V. ORDERING CLAUSES

37. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1,3,4,201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission clarifies the *Supplemental Order* as set out above.

38. IT IS FURTHER ORDERED that the requirements in this order will become effective immediately upon publication in the Federal Register.

39. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Supplemental Order Clarification, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

In his dissenting statement, Commissioner Furchtgott-Roth has suggested that there is a close linkage between questions in this docket and those in a docket considering reform of universal service and interstate access charges.[1] The dissenting statement suggests, incorrectly, that the public has been unaware of any overlapping policy considerations that may exist among the issues in the two dockets, and he has concluded that the public "had no opportunity to comment meaningfully on this issue." I concur in the observation that certain policy considerations are relevant to both dockets. Where I disagree with the dissent is in his perception that the public was unaware of any commonality of policy issues between the dockets. I further disagree with the suggestion that the determination to defer final resolution of the matters in the instant docket was somehow tainted by consideration of policy questions common to both proceedings.

First, the Commission's Local Competition Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FNPRM) in this docket advised the public, very directly, that allowing requesting carriers to use unbundled network elements solely to provide exchange access service would have significant policy ramifications.[2] The Commission stated in those decisions that our determinations regarding the substitution of combinations of unbundled network elements for special access service could significantly reduce the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform.[3] In seeking comment on the policy implications that such a significant reduction would cause, the Commission expressly cited our access charge reform proceeding and noted the relationship between that proceeding and universal service concerns.[4]

The overlapping policy considerations between the two dockets was not lost upon commenters. In fact, MCI expressly requested that its comments addressing the CALLS proposal be made part of the record in this docket, initiated by the Fourth FNPRM, emphasizing that the public should be able to comment on the connection between the special access and CALLS issues.[5] We agreed, and those comments are contained in the

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1 *Access Charge Reform; Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Notice of Proposed Rulemaking (rel. Sept. 15, 1999).

2 *Third Report and Order and Fourth FNPRM*, 15 FCC Rcd at 3912-15, paras. 485, 489, 494-96.

3 *Id.* at 3913, 3915, paras. 489, 496.

4 *Id.* at 3915, para. 496 & n.994.

5 Letter from Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, Attachment at 5-7 (filed Apr. 6, 2000).

record of both proceedings. It is therefore not surprising that, in the record in this docket, several commenters argued that allowing carriers to substitute combinations of unbundled network elements for special access service could affect the ability of the CALLS plan to reform access charges in a predictable, efficient manner.[6] Recognizing the link between special access and switched access, commenters also expressed concern that allowing the use of combinations of unbundled network elements for special access could undercut universal service by inducing carriers to abandon switched access for unbundled network element-based special access.[7] In short, there is no merit to the suggestion that the public was ignorant of the policy considerations common to both dockets.

Finally, I reject Commissioner Furchtgott-Roth's passing suggestion that the CALLS proceedings have improperly "tainted" the Commission's proceedings in this docket. The Order we release today speaks for itself, and it rests on several explicit legal grounds. The most prominent of those is our determination that, in considering whether loop-transport combinations meet the "impairment" standard with respect to the exchange access market, we should first take into account the market effects of the comprehensive unbundling rules that we adopted last fall and that did not become effective until this year. Commissioner Furchtgott-Roth barely addresses our "impairment" analysis on the merits, even though that analysis amply justifies our decision to extend the interim constraint at issue, quite apart from additional concerns about the massive industry dislocations that could result from an immediate lifting of that constraint. I am happy to rest on the reasoning set forth in the Order, and, in the proceedings that follow, I encourage all interested parties to help us fine-tune our implementation of Section 251(d)(2) in the wake of the Supreme Court's decision in *Iowa Utils. Bd. v. FCC.*[8]

Commissioner Furchtgott-Roth apparently expects the Bureau and this Commission to put blinders on and ignore policy considerations that may be relevant to both dockets. While it is true that blinders can help a horse race faster by shielding distractions from its view, we need to see the entire landscape to get to where we want to be. This isn't a race. Time helps, not hurts, our thinking here.

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6 GTE Comments at 20-22; GTE Reply Comments at 13-14; National Exchange Carrier Association, Inc., National Rural Telecom Association, National Telephone Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies Joint Reply Comments at 7; Cf. Sprint Reply Comments at 9-10.

7 *See, e.g.* Bell Atlantic Reply Comments at 5; GTE Reply Comments at 9.

8 119 S. Ct. 721 (1999).

Separate Statement of Commissioner Susan Ness

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification (CC Docket No. 96-98)

I support the steps we have taken to clarify further the interim requirement that a carrier provide a significant amount of local service in order to convert special access services to unbundled network elements. This clarification should reduce disputes by providing a safe harbor for carriers to satisfy this interim requirement. Some carriers however, have indicated that there may be situations in which a carrier is providing a significant amount of local service, but does not fit within any of the safe harbors in this order. As we state in this order, such carriers may petition the Commission for a waiver. Given that this is an interim rule, I would have preferred to adopt a more streamlined waiver process, enabling the Commission to rule on any waiver requests within a short period of time. Nonetheless, I would urge the Commission to act on any such requests as expeditiously as possible.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification, CC Docket 96-98.

This order is procedurally and substantively at odds with the law that Congress has directed this agency to follow. My chief criticism of this decision is that it, like the recently initiated depreciation waiver proceeding, is an integral – but unacknowledged – part of the deal that was struck between the Commission and a select group of parties to the "CALLS negotiations" that were held in January and February of this year. Contrary to Chairman Kennard's separate statement, I do not dispute that there may be "policy considerations" relevant to both dockets. Rather, I object to the Commission's allowing the outcome in this proceeding to become a bargaining chip in what was publicly advertised as an entirely separate proceeding.

This Order Is Illegitimately Linked to the CALLS Negotiations. This order – like the Further Notice of Proposed Rulemaking that the Commission recently issued regarding incumbent local exchange carriers' requests for waivers from this agency's depreciation requirements[1] – is essentially an outgrowth of negotiations between the Commission, acting chiefly through the Common Carrier Bureau, and the Coalition for Affordable Local and Long Distance Service ("CALLS"). A brief description is in order. Last summer, the Coalition submitted to the Commission a proposal for reforming universal service and interstate access charges, and the Commission sought comment on this proposal. *See* Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999).

Rather than simply render a decision on the CALLS proposal based on comments submitted by interested parties, the Commission instead set itself up as a sort of referee of negotiations between a small, select group of some – but by no means all – of the parties with interests in this proceeding, including the members of the Coalition and groups purporting to represent consumer interests. In the early part of this year, a series of meetings between these parties and the Bureau were held. The substance of what was discussed at these meetings was not made

[1] Further Notice of Proposed Rulemaking,*1998 Biennial Regulatory Review -- Review Of Depreciation Requirements For Incumbent Local Exchange Carriers, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et al.*, CC Docket Nos. 98-137, 99-117 (Rel. Apr. 3, 2000).

public, nor were a number of parties with interests in the outcome of this proceeding (including the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, and the Association for Local Telecommunications Services) allowed to participate in these discussions. Although the Commission could legally have attempted to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq*.,[2] it ignored that statute completely.

At some point in this process, proceedings in separate dockets, unrelated to the issue of switched access charge reform, became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters – one relating to the Commission's depreciation requirements and this special access proceeding – would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these separate matters. The Bureau agreed to recommend to the Commission that it approve the incumbents' applications for a modification to the depreciation waiver requirements and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that the Commission "clarify" the existing rules regarding special access and defer further rulemaking until 2001.

The linkage between the depreciation and special access items was utterly clear – at least internally. Indeed, to brief the Commissioners and their staff on the outcome of the CALLS negotiations, the Bureau distributed briefing sheets describing different aspects of the CALLS deal, two of which were entitled "CALLS – Depreciation" and "CALLS – Special Access." The special access briefing sheet stated that the special access rulemaking posed particular financial problems for the ILECs, because they could be hit twice with significant revenue losses due to regulatory action, given that the CALLS proposal required the LECs to make a substantial reduction in access charges this year, and this special access proceeding put a significant amount of annual special access revenues at risk without a possibility to recoup the lost revenues with a low-end adjustment. The briefing sheet went on to say that incumbent carriers initially felt that they could

[2] Section 563 of this statute provides for the establishment of a committee that, with the assistance of the relevant agency, will negotiate to reach a consensus on a given issue. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C.§ 564(a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b).

not agree to the CALLS proposal given the uncertainty relating to the special access issue, and therefore proposed that the Commission deal first with the special access issue, and then the CALLS proposal.

According to the briefing sheet, the Bureau objected to the incumbent carriers' original proposal because it might prevent the implementation of CALLS by July 1 and because with the overhang of a pending CALLS order, the credibility of a decision on the special access issue could be undercut. As a compromise, the ILECs were willing to postpone resolution of the special access rulemaking for a year, but wanted the Commission to clarify the meaning of the term "significant amount of local exchange service," which it used in the November 1999 Supplemental Order in this docket. In the briefing sheet, the Bureau embraced the incumbent carriers' position, recommending that the Commission "clarify" the existing supplemental order to provide a more detailed definition of "significant amount of local exchange service" and defer the further rulemaking until 2001. It therefore comes as no surprise whatsoever to find the Commission a few months later taking precisely this course.

Given these facts, it is simply not plausible to think of this order as anything but a part of the CALLS deal, although the order itself nowhere acknowledges the connection between these two dockets. Under these circumstances, even if I agreed with its substance, which I do not, I would be unable to join this order. The public generally has never been made aware that the outcome of the CALLS proposal hinged on the Commission's resolution of this item, and it therefore had no opportunity to comment meaningfully on this issue. Equally disturbing is the failure of this Commission to maintain the strict neutrality demanded of an agency engaged in rulemaking. Its participation in the CALLS negotiations, however well-meaning, has improperly influenced its decision in a separate docket. The order here is ineradicably tainted by the Commission's participation in the CALLS negotiations, and the process by which this order has been adopted falls short of the principles of openness and transparency that should govern the behavior of all administrative agencies.

Chairman Kennard, in his separate statement, asserts that the Commission has simply considered "overlapping policy considerations" between these separate dockets.[3] To think otherwise, he claims, is "to put blinders on" to avoid "seeing

[3] The Chairman asserts that five parties submitted comments that "recogniz[ed] the link between special access and switched access," which he suggests demonstrates that the public was aware of the "policy considerations" common to both dockets. Notably, three of these commenters (Bell Atlantic, GTE, and Sprint) were members of the Coalition, and therefore well aware of the link that the Commission had drawn internally between these two proceedings. And it is not surprising that MCI and the National Exchange Carriers Association, *et al.*, persons that appear frequently in matters before the Commission, may have gotten wind of the connection between (continued….)

the entire landscape," preventing the Commission from "get[ting] where we want to be." But these metaphors apply far more aptly to the Commission itself. By shielding from public scrutiny the totality of the deal it made with a select group of parties with interests in the CALLS proposal, it is the Commission that wishes to blind the public to the "entire landscape." I certainly have no objection to the Commission's trying to reach a desirable outcome. I would simply like for us to reach our goals through a forthright process that is consistent with the law.

The Use Restrictions that the Commission Places on the Enhanced Extended Link Are Inconsistent with the Statute. The Commission postpones yet again a decision on how to solve a problem created by last year's *UNE Remand Order*,[4] which requires incumbent local exchange carriers to offer loop/transport combinations as unbundled network elements. Incumbent carriers are concerned that competitors will purchase these combinations, at TELRIC rates, and offer the combinations to customers as a substitute for the existing special access services that they currently purchase, at tariffed rates subject to price-cap regulation, from incumbents. Various parties have urged the Commission to restrict the uses to which competitors may put these combinations, in order to prevent competitors from undercutting the prices charged for special access services. In two orders issued last year, the Commission imposed "interim" restrictions on the ways in which carriers could use the loop/transport combinations and postponed deciding whether such restrictions were consistent with the statute. This order again postpones finally resolving the issue.

I disagree with the Commission's decision in two key respects. *First*, I believe that postponing a decision on the merits of this issue violates the timetable for establishing unbundling requirements set forth in the 1996 Act. Specifically, the statute requires the Commission to implement section 251's requirements expeditiously, thereby giving carriers certainty regarding their obligations and rights under the 1996 Act. *See* 47 U.S.C. § 251(d)(1) ("Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."). Since 1996, the Commission has ignored this statutory directive with respect to this special access issue. In the *Local Competition First Report & Order*,[5] it refused to resolve the problem and instead

(Continued from previous page)

this docket and the CALLS proceeding. MCI has, of course, also challenged the propriety of the process by which the Commission conducted the CALLS negotiations.

[4] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket 96-98 (rel. Nov. 5, 1999).

[5] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (1997) (hereinafter *Local Competition First Report and Order*).

asked interested parties to submit comments. It punted again last fall, when it ruled that the record needed further development in order for it to resolve the issue.

Yet again, the Commission avoids answering this question. It claims to need more time to "compile an adequate record for addressing the legal and policy disputes presented here." *Supplemental Order Clarification* ¶ 1. I do not understand why. Both the *Local Competition First Report & Order* and last year's *UNE Remand Order* asked parties to comment on whether there is any statutory basis for "limiting an incumbent LEC's obligation to provide entrance facilities as an unbundled network element." *See id.* ¶ 495. Interested parties have had a more than adequate opportunity to weigh in on the issue, and to the extent that empirical evidence informs this issue, parties have submitted such data. There is no reason why the Commission cannot answer this question today – no reason, that is, other the Commission's agreement with the incumbent carrier members of CALLS that it would delay resolution of this matter until next year. Not only is the Commission's refusal to decide the matter inconsistent with section 251(d)(1), but also it has led to needless litigation on the issue in the D.C. Circuit. *See* Br. of AT&T, *AT&T v. FCC*, No. 99-1538 (D.C. Cir.).

Second, I believe that the "interim" use restrictions imposed by this order are at odds with sections 251(c)(3) and 251(d)(2). As the Commission recognized in the *Local Competition First Report and Order*, 11 FCC Rcd 15499, 15679 [¶ 356], section 251(c)(3) places no restriction on the uses to which a requesting carrier may put an unbundled network element. Nor does the Act authorize the Commission to limit the ways in which a requesting carrier may use an incumbent's network elements. Section 251(c)(3) simply imposes on incumbents the duty to give requesting carriers nondiscriminatory access to unbundled network elements "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Thus, so long as a competitor uses unbundled network elements to provide "a telecommunications service" – and exchange access service is inarguably a telecommunications service – that use is permissible under section 251(c)(3).

The Commission now suggests that a use restriction could be based on language in section 251(d)(2), which provides that the Commission, in determining whether a network element should be unbundled, must consider whether lack of access to that element "would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." *See Supplemental Order Clarification* ¶ 17 (citing 47 U.S.C. § 251(d)(2)(B)). The Commission's reasoning stretches the language of this provision past the breaking point. The straightforward way to apply this subsection is first to identify the service the requesting carrier "seeks to offer" and then to determine whether lack of access to a given network element would "impair" the carrier's ability to provide that service. There is no basis in section 251(d)(2)(B) for then layering restrictions on the requesting carrier's use of the network element.

If there is a problem here, the solution lies not in coming up with detailed and hard-to-enforce definitions of "significant amount of local usage." Instead, the Commission should confront the real problem: whether local transport should be unbundled in all circumstances or whether its UNE pricing rules make sense. I urge the parties to this proceeding to build a record that addresses these issues, rather than urge the Commission to perpetuate its misguided use restrictions.