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WHITE PAPER

Competitive Carrier Strategies

Competitive Local Telecommunications Services and Regulatory Issues

KELLEY DRYE



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This White Paper provides information regarding a wide variety of issues surrounding regulation of telecommunications carriers. It is intended to identify issues facing non-regulated Internet Service Providers ("ISPs") and other telecommunications service providers, making their entry into regulated telecommunications markets. It also identifies areas of opportunity where existing ILECs and CLECs can benefit from providing non-regulated services in existing markets, pointing out efforts by certain ILECs to deregulate data networks. The single most important issue addressed is this: ***becoming a regulated entity brings both substantial benefits and substantial obligations***. By identifying the types of telecommunications services to be offered and the target customer base that will be served, new market entrants can exercise a great deal of control over the types of regulation to which they will be subject, and can minimize the burdens brought by entry into regulated markets.

The regulations discussed in this White Paper vary dramatically from state to state. While many specific regulatory requirements will be discussed in this paper, it is not intended to be an exhaustive catalog of them. Rather, it is intended as a general overview of the issues attendant to the state regulatory process and an issue-spotting tool for companies considering market entry as regulated competitive telecommunications carriers.

1. Executive Summary

- *State Regulators Making Decisions:* Recent regulatory developments have changed the traditional division of regulatory jurisdiction between the Federal Communications Commission ("FCC") and state regulatory commissions. Because competition is moving to the local level, state regulators have taken a much more active and important role in regulating communications carriers.
- *The Deregulation of Data Services and Networks:* Some communications services are not subject to state regulation. Companies can offer service through "private" carriage arrangements, can provide interstate-only service, or can provide "enhanced services" that will not subject them to state regulation. ILECs such as Bell Atlantic have petitioned to deregulate data network based services, including intranets, extranets, and internet.
- *Internet-Based Services Considered "Enhanced" and Unregulated:* The distinction between basic (regulated) and enhanced (unregulated) services is blurring, especially where Internet-based services are concerned. Carriers are becoming increasingly aggressive in using ambiguities in the law to characterize their services as unregulated.
- Internet telephony raises increasingly complex regulatory issues, and possibly arbitrage opportunities, for both domestic and international communications.
- State PUC certification has both benefits and detriments. The decision to obtain certification depends, in part, on the services to be provided and the customers to be served.
- The benefits of being a regulated carrier include the ability to reduce communications costs dramatically, and to generate revenues from functions for which non-carriers must pay. In addition, carriers can obtain "universal service" subsidies for particular kinds of offerings. There may be significant costs associated with each of these benefits, however.
- The downside of being a regulated carrier includes incurring substantial regulatory costs and reporting obligations, and having to obtain prior approval for many important transactions. Proper structuring of the telecommunications subsidiary can alleviate some of these problems.
- A company should not become a certified carrier unless it has fully considered all options, including establishing a regulated subsidiary, or strategic partnering with a regulated carrier.
- The benefits of interconnection may be obtained by going through the negotiation or arbitration procedures established by the Telecom Act. Interconnection requirements and negotiation strategies differ from one carrier to another. Negotiated agreements can be obtained in as little as three months; arbitrated arrangements can take a year or more.

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- Once a company has determined to become a regulated carrier, it must obtain the appropriate authority from all relevant state commissions. Requirements vary dramatically from state to state. In most states, certification can be obtained in 90-120 days, although some states require up to a year, and others impose no delay at all. The costs of certification also vary dramatically from state to state.

2. An Overview of the Bifurcated State/Federal Structure of Regulation Established by the Federal Communications Act

The past decade has seen a dramatic shift of regulatory authority away from federal regulators and toward the states. This Section provides a brief discussion of a rise in the importance of state regulators, and the role they currently play in regulating telecommunications services.

2.1 Origins – the Communications Act of 1934

Congress enacted the first federal Communications Act in 1934, and this Act established a bifurcated system of federal and state jurisdiction over telecommunications carriers that lasted for 62 years. The 1934 Act gave the FCC exclusive jurisdiction over "all interstate and foreign communication by wire or radio." Interstate service was defined as any service that originated in one state and terminated in another. State Public Utility Commissions ("PUCs") held exclusive jurisdiction over services that were purely intrastate – that is, that originated and terminated within the same state.

In cases where it is hard to draw a bright line distinction between federal and state jurisdiction, courts perform an analysis under the Supremacy Clause of Article IV of the U.S. Constitution. The analysis involves a two-prong review: First, the court will determine if a service is jurisdictionally mixed, that is, if it is physically or practically burdensome to separate the interstate and intrastate components. Telephone handsets, for example, are used for both interstate and intrastate calling. Second, the court will inquire whether a particular state regulation conflicts with a valid federal policy. If the answer to both of these inquiries is yes, the state regulation will be preempted.

Federal courts traditionally have taken an expansive view of federal jurisdiction – in cases where a service contained both interstate and intrastate elements, courts were likely to find that federal concerns predominated. One recent example of this analysis is found in the treatment of voice mail. In 1992, the FCC held that voice mail provided by the local telephone companies was not a regulated service. Regulations proposed by the Georgia PSC were inconsistent with the FCC's holding – the Georgia Commission proposed that voice mail service offered within the state had to be tariffed, and would be subject to rate regulation. The FCC preempted the Georgia regulations, arguing that voice mail boxes are accessed both by local calls and by long distance calls, and that it was not practical to establish separate regulations for voice messaging systems based on interstate and intrastate calling. The U.S. Court of Appeals for the 11th Circuit upheld the FCC's decision, finding that interstate and intrastate voice mail systems could not be separated and that the Georgia regulations would impede the FCC's regulatory treatment of voice mail. Based on this analysis, the Court concluded that the service fell under the FCC's exclusive jurisdiction.[1]

2.2 Court Decisions Grant More Power to State Regulators

The traditionally expansive view of federal jurisdiction began to change in the late 1980s. In the case of *Louisiana Public Service Commission vs. F.C.C.*,[2] the U. S. Supreme Court heard a complaint concerning accounting treatment of local telephone company costs incurred when providing mixed interstate and intrastate telephone service. The FCC claimed the exclusive right to determine the accounting standards employed by local telephone companies, arguing that the Supremacy Clause gave them exclusive authority. The Louisiana PSC appealed the FCC order, arguing that

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[1] *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992), *aff'd*, *Georgia Public Service Commission v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

[2] *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986).

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the costs of providing intrastate and interstate services could be segregated and regulated separately by the FCC and the state. The Supreme Court agreed, and found that, as long as the FCC could readily separate inter- and intrastate services, it could only claim jurisdiction over – and prescribe accounting rules for – the costs associated with the carrier's interstate services. This decision marked an end of the expansive application of the Supremacy Clause, and the beginning of a significant expansion of state PUC regulatory authority over telecommunications services. Following the *Louisiana* decision, the FCC exercised preemption much more sparingly, and the states became more aggressive in challenging FCC preemption decisions.

2.3 The Telecommunications Act of 1996 – Establishing a New Federal/State Regulatory Relationship

The Telecommunications Act of 1996 affected the most sweeping reform of the nation's telecom laws since the enactment of the 1934 Act, fundamentally changing the federal/state regulatory relationship, and giving states a much greater role in a variety of telecommunications regulatory matters. The most dramatic aspect of the 1996 Act is a set of rules promoting competition in local service markets by: 1) prohibiting states from keeping new entrants out of local telecom markets, 2) requiring incumbent local telephone carriers ("ILECs") to interconnect with competitive carriers, 3) allowing competitive carriers to collocate (*i.e.,* install network equipment in ILEC offices), and 4) allowing competitive carriers to purchase ILEC services at a discount so that the competitive carriers can resell them to end users.

The 1996 Act profoundly altered the federal/state relationship on several levels. First, the federal Act effectively eliminated any state practices that would keep competitive carriers from entering local markets. This overturned the traditional distinction between federal and state jurisdiction, in which state PUCs had exclusive jurisdiction to determine who could provide intrastate telecom services. Under the old regulatory structure, carriers could provide purely interstate services within a state without state authority, but could not provide intrastate services unless authorized by the state commission. By eliminating state-imposed barriers to local competitive entry, however, the 1996 Act amounted to federal preemption of state regulations that could keep competitors out of local markets – even if such actions were limited purely to intrastate services.

On the other hand, the 1996 Act gave state regulators enormous influence in determining how competitive carriers would interconnect with ILECs. Under the 1996 Act, the rules governing interconnection, collocation and resale are established jointly by the FCC and the state PUCs, with the state PUCs taking the dominant role. In fact, the actual balance of authority between the FCC and the states is still being hotly debated in the courts, and ultimately will be determined by the Supreme Court.

By the end of 1996, the FCC issued a number of rules governing how the 1996 Act would be implemented. Immediately, state regulatory commissions and a number of carriers appealed the FCC's rules to various federal courts of appeals, arguing that the FCC overstepped its authority and attempted to establish rules that were the exclusive province of the states. On July 18, 1997, the U.S. Court of Appeals for the Eighth Circuit issued a decision that generally sided with the state regulators, and severely restricted the scope of the rules that the FCC could impose on ILECs and competitive carriers under the 1996 Act.[3] As a result of the Eighth Circuit decision, states have the exclusive right to set rates for interconnection and collocation, and to make some of the most significant decisions over the terms that govern how competitive carriers interconnect with ILECs. The Eighth Circuit decision has been appealed to the Supreme Court, which will hear the case during the Fall of 1998. There are also a number of other appeals pending before the Eighth Circuit and other federal courts of appeals that will further define the regulatory balance of power between the FCC and the States.

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[3] FCC*, 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 (1996), *aff'd in part and vacated in part sub nom. Iowa Util. Bd. v. FCC, as amended on rehearing Oct. 14, 1997*, 120 F.3d 753 (8th Cir. 1997), *cert. granted,* 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141).

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2.4 Chart – Summary of State/Federal Jurisdictional Roles

Under the law as it now stands, the new shared federal/state jurisdiction over telecom matters generally breaks down as follows:

Matter	Jurisdiction
Interconnection, collocation, and local resale	Joint FCC/PUC regulation. State PUCs have exclusive right to set rates. FCC sets general definitions of what constitutes interconnection, collocation and resale, but states establish the details. State PUCs also exclusively oversee implementation of interconnection arrangements, and resolve related complaints.
Grant of authority to provide service	Federal law predominates: state PUCs may still require carriers to obtain permission to provide local service, but any requirements that constitute a barrier to competitive entry are eliminated by federal law; FCC retains jurisdiction over international and interstate carriers, but imposes minimal regulation.
Carrier's service rates	Traditional separation of jurisdiction remains – FCC oversees rates and tariffs for interstate and international services; state PUCs oversee intrastate service tariffs and rates.
Universal Service subsidies	Joint regulation: FCC sets rules for subsidies to schools, libraries and health care facilities; FCC and states maintain separate subsidy systems for subscribers that have low incomes or live in high cost areas; states determine which carriers can receive subsidy payments.
Slamming	Joint regulation: FCC sets rules; 1996 Act sets penalties; state PUCs can enforce.
Numbering	FCC controls national numbering issues; states generally define local exchange areas and determine how telephone numbers are assigned within them.
Service complaints	Traditional separation of jurisdiction remains – FCC hears complaints over interstate/international service; states hear complaints over intrastate service.
Other consumer issues	Predominantly state jurisdiction: security deposits, types of public notice, when and how service can be terminated, and so on.
Payphones	FCC rules govern payphone rates and blocking issues; states certify payphone operators.
Cellular, PCS, paging, other wireless services	Ostensibly exclusive FCC jurisdiction, but states are setting rates for interconnection and collocation.

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3. Services/Functions That Arguably Are Exempt From State Regulation

The traditional distinction between interstate and intrastate services still applies to most services provided by carriers, and carriers that provide purely interstate or international service are not subject to regulation by state PUCs. In addition, there are several categories of service that are not subject to any regulation, either by the PUCs or the FCC. These offerings are discussed in the following sections.

3.1 Interstate or International Services

Carriers that provide purely interstate or international service are not regulated by the states. The test for whether a communication is interstate or international focuses on the points of origination and termination of the transmission – if the communication originates and terminates in different states or countries, it falls within the exclusive jurisdiction of the FCC; if it originates and terminates in the same state, it is regulable by the state PUC. Note that the actual presence of facilities within a state does not by itself confer jurisdiction upon a PUC – communications over those facilities must originate and terminate within the state to constitute an intrastate transmission. For example, local telephone companies are providing interstate service when they sell local access to long-distance carriers, even though the physical facilities used by the local telephone company are all physically intrastate. Jurisdiction is based on the nature of the communication, not the location of the facilities. The converse is also true: if a communication is routed out of state (for switching, for example), it will still be considered an intrastate call if it ultimately terminates within the state of its origination.

It is not uncommon for some types of carriers to provide exclusively interstate service, and so avoid state regulation altogether. For example, if a carrier provides only high capacity transport to interexchange carriers to transmit their traffic out of state, that service will be deemed exclusively interstate in nature. Similarly, many international "callback" providers sell only international services.

3.2 "Preemptively Deregulated" Services

In a number of cases, the FCC has effectively prevented states from regulating specific services by claiming exclusive jurisdiction over the service, and then deregulating it. This is called "preemptive deregulation" because the FCC effectively preempts state regulatory authority over the particular service. Examples of such service include voice messaging, which was preemptively deregulated by the FCC in 1992. A more recent example is in the case of payphone compensation. The 1996 Telecom Act granted the FCC exclusive jurisdiction to determine the appropriate rates that payphone operators could charge users making coin-paid calls. Using this authority, the FCC recently preempted state rules that placed rate caps on local payphone calls.

The Telecommunications Act of 1996 greatly expanded the ability of the FCC to engage in preemptive deregulation of telecommunications services. Section 10 of the Act directs the FCC to "forbear from applying any regulation or any provision of this Act" to carriers if the FCC finds that such regulations are not necessary. That provision goes on to give the FCC's forbearance decisions preemptive effect over state regulators:

> STATE ENFORCEMENT After COMMISSION FORBEARANCE – A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

To date, the FCC has not been aggressive in exercising its authority under this provision of the Act, so far bringing it to bear only on the interstate access services sold by competitive local exchange carriers to long-distance companies. The ability of the FCC to "preemptively forbear" under this provision is potentially very expansive, however.

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3.3 Enhanced Services

3.3.1 The "Basic" vs. "Enhanced" service dichotomy

The regulatory distinction between "enhanced" and "basic" services is significant because enhanced services are not regulated under either the federal or state jurisdiction, while basic services are regulated under both. As discussed in this section, it is the FCC that traditionally has defined what services are enhanced, and state regulatory commissions – sometimes reluctantly – have adopted the FCC's definitions.

Prior to the adoption of the '96 Telecom Act, the FCC has defined "basic services" as "the common carrier offering of transmission capacity for the movement of information."[4] In general, a basic service transmits information generated by a customer from one point to another, without changing the content of the transmission. Thus, the "basic" service category is intended to define the transparent transmission capacity that makes up conventional communications service. In contrast, the FCC defined unregulated "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information.[5]

In its *Second Computer Inquiry* proceeding, the FCC concluded that regulation of enhanced services is unwarranted because the market for those services is competitive and consumers benefit from that competition. The "enhanced" service category includes, among other services, data or information processing services such as voice storage and electronic mail, and information services such as videotext services. These broad definitions have ensured that such current services as "broadcast fax" and Internet access service are defined as unregulated enhanced services.

To determine the proper classification of an offering containing elements of both basic and enhanced service, the FCC has generally followed a "contamination" approach. The contamination theory is premised on the inability to separate the basic and enhanced elements of the service offering. Under this theory, value-added service providers are classified for regulatory purposes as enhanced service providers to the extent that they offer enhanced services in conjunction with otherwise basic transmission services. The enhanced component of the offering "contaminates" the basic component and the entire offering is treated as an enhanced service. The FCC has held, however, that the enhanced services definition does not include "adjuncts to basic service" which "facilitate the provision of basic service without altering its fundamental character." Such "adjunct services" are instead treated as basic services, even if they fall within possible literal readings of the definition of enhanced services. For example, the FCC has identified call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, and voice encryption as adjunct services. Even though these services are enhanced, the fact that they are offered in conjunction with traditional telephone service does not make the underlying telephone service enhanced.

In a recent decision, however, the FCC took action that may indicate that the "contamination" theory will be severely restricted in the future. In 1995, the FCC issued an order finding that Frame Relay (a packet switched data service that can be used for voice telephony) is a basic service.[6] Prior to this decision, most competitive carriers assumed that Frame Relay was an enhanced service because it employed high-level protocol conversions. The FCC ruling, however, found that the enhanced components of Frame Relay traffic were *de minimis* compared to the basic transport functions that made up most of the service, and found that the contamination theory could not be used to convert the predominantly basic service into an enhanced one. To date, this decision is limited purely to Frame Relay applications,

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[4] FCC, *Second Computer Inquiry,* 77 F.C.C.2nd 384, 420 (1980).

[5] 47 C.F.R. 64.702(a).

[6] FCC, *Independent Data Communications Manufacturers Association, Inc. Petition for a Declaratory Ruling that AT&T's Interspan Frame Relay Service is as Basic Service*, 10 FCC Rcd. 13717 (1995).

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but it is possible that the FCC may be more aggressive in limiting the use of the contamination theory for other enhanced service applications in the future. In fact, the FCC has instituted another rulemaking proceeding to consider a new definition of "enhanced service." If the FCC eventually redefines enhanced service, it may eliminate high level protocol conversion as a defining characteristic.

The Telecommunications Act of 1996 has confused matters somewhat by addressing basic/enhanced issues using different terms without adequate explanation. Specifically, the Act does not use the terms "basic" or "enhanced" per se, but uses other terms that appear to replace them. For example, the Act uses the term "telecommunications service," defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Within this definition, the term "telecommunications" is defined to mean "the transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received." These terms explicitly exclude "information service" which is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." The Telecom Act further mirrors the FCC's deregulation of enhanced services by declaring that common carriers are to be regulated only to the extent that they provide common carrier service: "A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services…" It thus appears that the Act codifies the "basic" vs. "enhanced" regulatory scheme established in the FCC's *Second Computer Inquiry* line of cases, but the fact that the Telecom Act uses different terminology makes this unclear. The FCC currently has pending a rulemaking proceeding that will determine whether "information services" and "telecommunications services" as defined in the Act are in fact equivalent to "enhanced services" and "basic services" as used, respectively, in the FCC's *Computer II* rules.

Finally, federal regulations tend to predominate in this area. State regulatory agencies largely have not attempted to impose their own definitions of "basic" and "enhanced" services on intrastate telecommunications services. Indeed, state attempts to define enhanced services as purely intrastate (and thus subject to state regulation) are likely to be overturned by the FCC.

3.3.2 Issues surrounding telephony over the Internet

Currently, Internet telephony benefits from the distinctions that the FCC now recognizes between enhanced and basic services – because Internet traffic employs high level protocol conversion, it is classified as an enhanced service. As a result, ISPs are free to take an aggressive position in defining any service they provide over the Internet as an enhanced service. ***Under current law, therefore, ISPs may treat Internet telephony as an enhanced service, not subject to the jurisdiction of federal or state regulators.*** This classification would mean that ISPs providing Internet telephony are not required to obtain certification from the states, file tariffs, contribute to universal service funds, pay regulatory fees, or seek international authorization from the FCC. To the extent that ISPs begin to compete with providers of basic telephone service, their nonregulated status may provide the ISPs with a significant advantage.

ISPs also have a more important potential advantage. Currently, providers of traditional, regulated telephone service pay charges to local telephone companies that substantially increase their cost of service. In particular, if a carrier routes a telephone call to a customer on another carrier's network, it must pay "access charges" to the carrier that delivers the call. Similarly, if a carrier transmits an international call, it must pay charges established through the international "settlements" process to the foreign carrier. Because of loopholes in existing regulations, and differences in the signaling data that is processed by ISPs and other telephone carriers, ISPs may be able to circumvent these access and settlement charges, and provide service at substantial cost savings over traditional telephone carriers. This advantage may be eliminated by regulatory action by the FCC over time, but currently, it provides a strong incentive for ISPs to explore the provision of telephone service over the Internet. We note, however, that in its report to Congress on Universal Service implementation released April 10, 1998, the FCC strongly hinted that it would eventually subject "phone-to-phone" IP Telephony to universal service funding obligations, and presumably to access charge payments as well.

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3.3.3 The debate over unregulated "data networks"

In late January 1998, Bell Atlantic filed a petition with the FCC that seeks deregulation of Bell Atlantic's data services. ***In its petition, Bell Atlantic asks the FCC to deregulate its data networks and services, including "Internet, intranet and extranet,"*** and all digital services operating at speeds greater than ISDN, including "all xDSL" services. As Bell Atlantic defines this deregulation, the FCC would exempt these services from pricing and costing regulation. That is, the FCC would not regulate the prices Bell Atlantic charges for these services, and the FCC would not apply its rules on how to account for the costs of these networks and services (including setting depreciation lives, and deciding how costs should be separated between the interstate and intrastate jurisdictions). Bell Atlantic also asks that the FCC specifically find that ***portions of the data network do not have to be offered to competitors as unbundled network elements***. Finally, Bell Atlantic asserts that the FCC should ***eliminate any restrictions that would prohibit it from providing data services across LATA boundaries.***

Subsequently, the FCC received three other petitions, from U S West, Ameritech, and an ad hoc group called the Alliance for Public Technology, that raise similar issues. Together, these initiatives present bold and highly controversial proposals that could have a profound impact on current regulation. If granted, these petitions would eliminate for data networks the obligations that the 1996 Act imposes on ILECs to provide interconnection, collocation and resale to competitive carriers. This matter is particularly important because, with advances in technology, much of today's basic telephone service will eventually be migrated onto data networks. ***If the FCC accepts the proposals made by these four parties, it could create an expansive new class of enhanced, unregulated services.*** The FCC has asked that parties interested in this issue file comments during April and May 1998.

3.4 Wireless Services

The category of carriers that provide wireless services is characterized as commercial mobile radio service ("CMRS") providers. CMRS includes paging service, cellular phone service and digital "personal communications services" or "PCS," and other applications. Section 332(c)(3) of the Communications Act preempts state rate and entry regulation of CMRS carriers – that is, states may not require CMRS carriers to obtain certification before providing service and may not actively regulate the rates they charge. States do, however, retain jurisdiction over other aspects of the performance of CMRS carriers that provide service within the state. For example, they may impose rules governing whether CMRS carriers may require security deposits, and may hear consumer complaints filed against wireless carriers.

The Act does, however, provide that a state may petition the FCC for rate regulation authority by showing that either: (i) market conditions with respect to CMRS fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or (ii) such market conditions exist *and* such CMRS service is a "replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within such state." Thus, states seeking CMRS rate regulation authority from the FCC must make a showing regarding the competitive conditions of CMRS. Note that the landline telephone service "replacement" rule stated above does not apply to fixed wireless data service, because this service is not considered a replacement for landline telephone exchange service.

The FCC decisions concerning state petitions for CMRS rate regulation authority require that state PSCs "clear substantial hurdles" in demonstrating that such regulation is warranted. In order to justify imposing state rate regulation on CMRS under the statutory standard, the state must show that there are "failed market conditions." To date, this standard has proven almost impossible for a state commission to meet. The FCC has denied every state request that it has received.

There is, however, one area in which state regulators do maintain jurisdiction over CMRS rates. Rates for reciprocal compensation and interconnection between cellular and PCS carriers and incumbent LECs are established under the same sections of the Communications Act that govern wireline carriers – Sections 251 and 252. Recent appeals court rulings have provided states with exclusive jurisdiction to establish such rates, and ***state commissions have been active in determining rates for interconnection arrangements between cellular and PCS carriers and ILECs.***

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There is one area of CMRS interconnection that is not settled. Paging carriers differ from other wireless carriers in that their calls are almost always one-way, and typically only last a few seconds. These unique characteristics may result in the FCC exerting authority over paging interconnection rates and charges, and setting national standard rates. There currently are proceedings pending before the FCC that can be used as vehicles to address these matters, but it is not clear at this time how the FCC will proceed.

3.5 Private Carriage

Common carriage is defined as the "indiscriminate holding out to the public" of services for profit, and for years this has been the test of whether a provider of services is subject to regulation. Conversely, a private carrier is one that provides service to an individual or a small group of individuals but not to the "public." The test for this characterization is the offering of customized services at rates that are negotiated with each user. State statutes may contain language that further defines when a carrier is offering service to the public, and so private carriers may be defined differently under the federal, and various state, jurisdictions. Carriers that do not provide service for profit also are not deemed regulated common carriers. Private carriers generally are not subject to state or federal regulation.

A sub-category of private carriage involves a "carriers' carrier." These are carriers that provide high capacity transport and other services to other carriers, and do not provide services to end user customers. Technically, these carriers may be subject to the jurisdiction of the FCC (the transport services they provide typically are interstate, so regulation by state regulators typically is not an issue), but the FCC does not actively regulate them. These carriers generally establish service pursuant to individually-negotiated contracts.

3.6 "Dark Fiber"

"Dark Fiber" is the provision of fiber optic cable between two points, without the electronics at either end of the cable that are necessary to "light" – or provide telecom services over – the cable. Typically, carriers that provide dark fiber impose two charges for it: a nonrecurring charge to cover some of the cost of construction, and a monthly charge that is usually distance sensitive (*i.e.,* per fiber per mile).

Carriers approach dark fiber very differently. About eight years ago, ILECs deployed dark fiber selectively but aggressively, as a means of circumventing tariffing restrictions, and providing inexpensive service to preferred customers. Start-up companies – including competitive local carriers just entering telecom markets – often sell dark fiber as a means of financing the construction of their fiber optic networks. Established competitive carriers that have networks in place, however, generally do not offer dark fiber because it is a very low-margin service. These carriers focus on providing higher-margin value-added services over their facilities.

The regulatory status of dark fiber is fairly confused at this time. As discussed below, most states do not address it at all, a minority of states regulate it as a basic service, the FCC regulates it for some ILECs, but generally not for CLECs, and a federal court of appeals has issued an order suggesting that dark fiber may not be a regulable telecom service at all. In addition, those carriers that do provide dark fiber frequently do so as a "private carriage" service and so avoid regulation on that basis.

3.6.1 Regulation by the FCC

The FCC was the first regulatory agency to deal with the issue of dark fiber. During the mid-1980s, several ILECs began to provide dark fiber to selected large customers through individually negotiated contracts, called individual case basis ("ICB") arrangements. A CLEC filed an objection to this practice, stating that the ILECs were using these dark fiber ICBs to circumvent their tariffed special access transport rates, and to provide high capacity transport to preferred customers at rates that were lower than their tariffed rates. The FCC initiated a three-year investigation in which it ultimately agreed with the CLEC, and ordered four Bell operating companies (Bell Atlantic, BellSouth, Pacific Bell and Southwestern Bell) to tariff their dark fiber offerings at rates prescribed by the FCC.

Rather than tariff their dark fiber services, all four of the BOCs attempted to withdraw the service altogether. (This response reflected the fact that the tariffed rates prescribed by the FCC were comparatively low, and the BOCs feared that generally available dark fiber rates would cause customers using other, more expensive services to switch to dark fiber, causing an overall decline in revenues.) The FCC rejected the BOC attempts to withdraw their tariffs, sparking a debate over the jurisdictional nature of dark fiber.

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The BOCs appealed the FCC decision to the U.S. Court of Appeals for the D.C. Circuit, arguing that dark fiber is not a telecom service at all, but is in fact a "facility" that is not governed by the Communications Act. The Court did not expressly adopt this argument, but reached a conclusion with even broader potential impact. The Court found that the dark fiber arrangements were individually negotiated ICB contracts, and as such may be private carrier contracts that do not fall within the FCC's tariffing jurisdiction. The Court remanded the FCC decision, and instructed the agency to determine whether the BOC dark fiber services were regulated common carrier offerings, or unregulated private carriage. The FCC never had to take this follow-up step, however. Upon the Court's decision, all four BOCs withdrew their tariffed services, thereby mooting the issue, and obviating further action by the FCC. ***To this day, no ILEC offers tariffed dark fiber service to new customers as a tariffed, interstate service***, although at least two BOC tariffs still list "grandfathered" dark fiber arrangements that were in place before the tariffed service was withdrawn. To date, BOCs have not attempted to establish new interstate dark fiber services on an off-tariff, individual case basis.

The regulatory status of dark fiber used for interstate telecom transmission is therefore unclear. Nevertheless, the existing precedent presents a colorable argument that carriers wishing to provide dark fiber may do so through individually-negotiated ICBs, and treat it as an unregulated and untariffed service.

3.6.2 Regulation by the States

Regulation of dark fiber by state public service commissions raises an entirely new set of issues, reflecting the requirements of the Telecommunications Act of 1996. Section 251(c) of the 1996 Act requires that ILECs provide to competitive carriers discrete functions within their networks, known as "unbundled network elements" or UNEs. In proceedings implementing the 1996 Act, a number of state regulators were asked to determine whether dark fiber must be offered by ILECs as an unbundled network element. The states split on this issue. Currently, states including Illinois, Minnesota and Missouri, require that ILECs offer dark fiber as UNEs, while states including Indiana, Maryland, New York and Pennsylvania have found that ILECs are not required to do so. Florida and Ohio attempt to strike a middle ground, finding that the ILECs are only obligated to offer dark fiber as an unbundled network element "if facilities are available." Rates for dark fiber service vary considerably from state to state, but for carriers with a need for very high capacity interoffice transport, dark fiber can provide a very attractive alternative to special access transport where it is available.

In a number of states, dark fiber is considered a regulated telecommunications service. This designation, however, makes regulated carriers out of companies that *use* dark fiber to provide retail services, but *not* to companies that provide dark fiber as a wholesale product. For example, the Washington Utilities and Transportation Commission has found dark fiber to be a regulated service. At the same time, however, the Commission found that its regulations only extend to carriers that provide retail service to the public, and not to private service offerings from one carrier to another. Under this analysis, the Commission found that a cable company that provided dark fiber to a subsidiary was not a regulated carrier. At the same time, the subsidiary used dark fiber to provide retail service to end user customers, and so was deemed a regulated carrier that had to obtain an operating certificate. Similar arrangements between power utilities and their wholly-owned subsidiary (in which the utility providing the dark fiber remained unregulated, and the subsidiary became a certified carrier) have been approved in Ohio. In California, the lease of dark fiber by a power utility to an unaffiliated, regulated carrier was found not to impose carrier regulation on the utility.

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4. Actions That Likely Will Lead to Regulation

There are a number of "regulatory events" that, if undertaken by an otherwise unregulated carrier, likely will trigger regulation by the FCC and/or a state. Some of the most typical regulatory events include:

Providing a facilities-based regulated service: All states regulate facilities-based providers of intrastate service, at least to some degree. This applies even if a small amount of the services provided are intrastate. A primary example is a carrier that provides predominantly interstate service, but uses its facilities to provide a small proportion of its service to intrastate users. Even if the majority of traffic is interstate, the provision of any regulated service to in-state users will subject the carrier to state regulation for those services.

Providing unregulated service that competes directly with a regulated service: As discussed earlier in this White Paper, Internet telephony may soon be marketed as a direct substitute for regulated telephone service. If this happens, it will place significant pressure on regulators to extend the same regulations that apply to traditional telephone service to telephony over the Internet. Similarly, several state PSCs have taken the position that they reserve the right to regulate cellular phone service if it becomes a direct substitute for traditional telephone service.

Reselling a regulated carrier's service: Even if a carrier is unregulated, if it resells a regulated carrier's regulated service, it likely will be considered subject to state regulation. For this reason, a number of wireless carriers that wanted to resell an incumbent telephone company's service have spun off regulated subsidiaries to do so.

Seeking interconnection or wholesale discounts from an ILEC under the Telecommunications Act: As discussed in the following section, the Telecommunications Act of 1996 provides some substantial benefits to competitive carriers that interconnect with incumbent telephone companies. These include the right to reciprocal compensation as part of an interconnection agreement, and the ability to obtain wholesale service discounts of about twenty percent. In order to qualify for such treatment, however, the competitive carrier must be certified as a common carrier by the appropriate state .

5. Weighing the Pros and Cons of Regulation

As with any business decision, determining whether to become a regulated carrier involves a cost-benefit analysis. As discussed in this section, the status of regulated common carrier bestows significant benefits, but also incurs substantial costs. These benefits and costs are summarized below.

5.1 What Are the Benefits of Being a Certificated Carrier?

The benefits of being a regulated carrier center on bottom-line issues: regulated carriers can offer higher-margin services, and can avoid significant costs in interconnecting with, and in reselling the services of, dominant local carriers. Note, however, that in order for a regulated carrier to obtain these benefits, it must incur significant regulatory burdens. As a result, many of the items listed in this section on the benefits of being a carrier have analogs in the following section, which discusses the detriments of being a carrier.

5.1.1 The ability to provide high-margin services

As discussed above, it is possible to enter the telecommunications market while avoiding state or federal regulation by providing *facilities*, and not *services*. For example, the provision of dark fiber alone does not invoke regulation, while the provision of services over those facilities does. This has been an effective entry strategy for some new entrants, such as electric utilities, and has provided valuable funding that has allowed those utilities to construct extensive fiber optic backbone networks.

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Dark fiber, however, is by definition a wholesale product, and has been eschewed by most carriers who prefer to offer more lucrative telecommunications services. For example, several of the Bell operating companies provided dark fiber on an individual contract basis to a few selected customers, but fought vigorously against attempts by the FCC to make dark fiber a tariffed offering, available to any customer. The BOCs resisted making dark fiber a general tariffed offering because it was a low-margin offering that essentially would cannibalize their more lucrative interoffice transport services. Similarly, several competitive local carriers and private carriers have provided dark fiber (especially when building out their initial networks), but most do not actively promote the product, preferring to focus on the higher prices they can obtain by providing regulated services over the fiber facilities.

5.1.2 The ability to receive reciprocal compensation

Background

Sections 251 and 252 of the 1996 Act require that incumbent local exchange carriers interconnect with competitive local exchange carriers. Moreover, a sub-provision imposes upon both ILECs and CLECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" of local telecommunications services. In establishing this requirement, the Act effected a profound change in the status of competitive carriers. Before the Act, competitive carriers were seen as customers of the ILECs – when the two carriers interconnected their networks and exchanged traffic, the interconnection with the ILEC was considered to be a service for which the CLEC had to pay in order to reach telephone users located on the ILEC network. The Act changed this paradigm, however, and recognized CLECs and ILECs as co-carriers. This new co-carrier relationship requires reciprocal compensation – that is, when a subscriber on the CLEC network calls a party on the ILEC network, the CLEC pays the ILEC for transporting and terminating the call over the ILEC network. But the reverse is also true – ***when a caller on the ILEC network calls a party on the CLEC network, the ILEC pays the CLEC for transporting and terminating the call over the CLEC network. The impact of this paradigm shift cannot be overstated – it converts a significant expense for CLECs into a source of revenues, and is one of the most dramatic new benefits of being a regulated competitive carrier.***

After the Telecommunications Act of 1996 was passed, the FCC issued an expansive order attempting to set national guidelines for many aspects of interconnection, including the rates that ILECs had to pay CLECs for reciprocal compensation. On appeal, the 8th Circuit Court of Appeals overturned many of the FCC's interconnection rules, and made clear that the states, and not the FCC, have sole jurisdiction to determine the rates that must be paid for reciprocal compensation.

The Court also found that the state commissions have sole jurisdiction over disputes regarding the implementation of interconnection agreements, including disputes over rates. While the Court of Appeals decision is being appealed to the Supreme Court, it is now the law, and will remain so unless reversed this winter.

Following the 8th Circuit decision, most states held extensive proceedings to determine the rates that ILECs and CLECs must pay each other for reciprocal compensation. Many of these states established interim rates, and are conducting, or will conduct, additional proceedings to establish reciprocal compensation rates. The reciprocal compensation rates vary dramatically from state to state, but typically fall into two categories: per-minute charges, or "Bill and Keep." These types of reciprocal compensation are discussed in the following section.

Types of reciprocal compensation

The majority of states have prescribed rates that carriers must pay on a per-minute basis for reciprocal compensation. Currently, all of these states require that CLECs and ILECs pay each other the same rate per minute of traffic that they terminate on each other's network, although one commission – Hawaii – is considering setting separate reciprocal compensation rates for ILECs and CLECs. On average, the reciprocal compensation rates set by states are about .7¢ per minute, with some states setting rates around .5¢ and others setting rates at 1.0¢ or higher. In some cases, states have established different interconnection rates, depending on the type of switch that the CLECs and ILECs use to interconnect.

The other type of reciprocal compensation arrangement is Bill and Keep. Under this system, ILECs and CLECs do not pay each other for the local traffic that they hand off to terminate on the other carrier's network. Instead, they assume that both carriers will terminate about the same amount of traffic, and that the costs each incur in terminating traffic for the other will balance out. Because Bill and Keep arrangements assume that traffic is roughly in balance, most Bill and

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Keep states require that, if traffic is out of balance by a substantial amount (typically 10-15 percent), the carriers will have to pay actual per-minute rates.

Currently, 15 states require Bill & Keep, at least on an interim basis.[7] For some, such as Texas and Utah, Bill & Keep only lasts for a relatively brief time after an interconnection agreement is established, in order to allow carriers to develop dependable measurements of each other's traffic.[8] In some states, such as Oregon, Bill & Keep will be phased out shortly, as rate cases are completed and compensatory rates are established.

5.1.3 Special issues involving reciprocal compensation for Internet traffic

CLECs that own or provide service to Internet service providers ("ISPs") raise a unique and highly controversial issue regarding reciprocal compensation. The issue stems from the fact that an ISP generates huge amounts of terminating traffic for any carrier that serves it with very little calling in the return direction.

For example, an ISP such as Erol's serves thousands of residential and business users. The vast majority of these users take local service from the incumbent telephone company, and when these users dial into Erol's they are originating local calls on the ILEC network. If a CLEC obtains Erol's as a customer, Erol's is on the CLEC network. This means that the thousands of calls to Erol's originate on the ILEC network and terminate on the CLEC network, and the ILEC has to pay terminating compensation to the CLEC for each minute of this traffic. Because these calls are one way – Erol's subscribers call Erol's, but Erol's generally does not call its subscribers back – this generates substantially more terminating traffic – and more reciprocal compensation revenues –for the CLEC than for the ILEC.

Note that ***ISPs only serve as generators of net reciprocal compensation profits in states that have established per-minute rates for reciprocal compensation*** – in pure Bill and Keep arrangements, they do not provide a net benefit to CLECs or ILECs.

Of course, ILECs can purchase ISPs also but, to date, CLECs have been aggressive in purchasing the largest ISPs in the country, and so have become net beneficiaries of the disproportionate reciprocal compensation revenues that ISPs can generate. In cases where CLECs have purchased large ISPs, the terminating compensation can generate net payments of hundreds of thousands of dollars per month to CLECs. When ISP traffic started to generate such substantial reciprocal compensation revenues for CLECs, the ILECs began to argue that they were not required to pay reciprocal compensation for such traffic, and cited allegedly ambiguous language in the Telecommunications Act in an attempt to support their case. ***Over the last six months, CLECs have filed complaints before numerous states, asking state regulators to compel payment of reciprocal compensation for ISP traffic. To date, over a dozen states have issued rulings in favor of the CLECs, and have compelled ILECs to pay full reciprocal compensation for calls to ISPs.***[9] No state commission has issued a final order to the contrary.

5.1.4 The ability to obtain unbundled network elements at incremental cost

Under Section 251(c)(3) of the Telecommunications Act of 1996, competitive regulated carriers have the right to purchase functions and facilities that are part of the incumbent telephone company's network at substantially reduced

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[7] The states establishing temporary or permanent Bill and Keep arrangements are: Arizona, California, Colorado, the District of Columbia, Hawaii, Iowa, Maine, Michigan, Missouri, New Mexico, Oregon, Texas, Utah, Vermont and Washington.

[8] The minority of states have established bill-and-keep as a mandatory form of reciprocal compensation for the first year. Most states have adopted specific per minute rates for reciprocal compensation.

[9] The states that have required incumbent local exchange carriers to pay reciprocal compensation for local calls to ISPs served by CLECs include Arizona, Colorado, Connecticut, Illinois, Maryland, Michigan, Minnesota, New York, North Carolina, Oklahoma, Oregon, Texas, Virginia, Washington, and West Virginia.

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rates. These specific components of the ILEC network are called unbundled network elements ("UNEs"), and correspond to specific functions performed by the ILEC networks, including transport from the customer's home or office to the ILEC's network, transport across the ILEC network to other carrier's facilities, switching, and so on. The FCC and states both have authority to define which ILEC network components must be unbundled into separate UNEs, and the states have exclusive jurisdiction to set rates for them.

Under the Act, UNEs must be priced at rates that reflect incremental cost. As a result, a carrier purchasing UNEs receives a discount, on average, of 40-50 percent below the ILEC's retail prices for services that provide the same functions. UNEs are available to regulated carriers only. Because UNEs offer such a significant discount below ILEC tariffed rates, they are one of the most significant benefits of being a carrier.

Because UNEs have such a dramatic cost impact on both CLECs and ILECs, they are highly controversial and currently are mired in litigation. Specifically, issues concerning how UNEs are defined, how CLECs can obtain access to the UNEs, and whether CLECs must incur additional costs when they seek to recombine the unbundled elements are all being litigated in a number of forums. In fact, a critical argument regarding the definition of UNEs has been appealed to the Supreme Court, which is expected to issue a ruling on the matter late this year or early in 1999). Specifically, the 8th Circuit Court of Appeals decided that ILECs cannot be compelled to combine UNEs on request without additional payment, and that ILECs are not required to provide a series of connected UNEs that provides the same functions as a complete, tariffed access service. This decision will be reviewed by the Supreme Court, and the ultimate resolution of this decision will have important cost impacts on ILECs, CLECs and IXCs. As a result of this pending litigation, it is impossible to determine exactly how much money a CLEC can save by purchasing UNEs instead of retail services. Substantial cost savings are available, however, and prospective new CLECs can perform a "what if" analysis to review the range of possible savings available through a series of possible scenarios.

5.1.5 The ability to resell ILEC services at wholesale rates

Under Section 252(c)(4) of the Telecommunications Act, ILECs are obligated to provide their retail services to CLECs at wholesale discount rates in order to encourage resale of ILEC services. The actual amount of the discounts are determined by the states, and vary from state to state. The wholesale discounts typically average around 17-22 percent below retail tariffed rates, however. Many carriers have found that these discounts, while attractive, do not generate sufficient revenues to justify an entry strategy based solely on resale. Many CLECs do, however, use resale as a means of entering a market before they have completed constructing their own networks, or to supplement services that they provide over their own facilities. Note that these discounts are available only when the service is resold, and are not applied to services that a carrier obtains for its own use.

5.1.6 The ability to obtain universal service subsidy payments

Section 254 of the Communications Act requires that the FCC and states work together to establish "universal service" funding mechanisms. These are subsidies generated from regulated phone service revenues that perform several functions: 1) defray the cost of providing Internet access and other advanced services to primary and secondary schools, libraries and rural health care facilities; 2) to help keep affordable the cost of telephone service in high-cost areas such as rural communities, islands and mountainous areas; and 3) to subsidize basic telephone service for low-income users. The FCC maintains two separate universal service pools, one governing subsidies to schools, libraries and health centers, and another governing subsidies to high cost/low income subscribers. In addition, many states have established, or are in the process of establishing, their own universal service subsidy pools.

Different sets of rules determine whether a regulated carrier can receive subsidy payments for providing service to the three target groups discussed above. For the federal universal service subsidies to schools, libraries, and rural health centers, the FCC has determined that any carrier that provides services or facilities to these institutions may obtain payments from the federal universal service fund. For the federal high cost/low income subsidies, individual states determine which carriers can obtain funding from these universal service pools. These rules vary substantially from state to state: in some states (such as Kansas), only the incumbent local telephone company qualifies to receive subsidy payments; while in others (such as New York), competitive carriers are also eligible. Similarly, states differ as to whether wireless carriers can obtain universal service funding. Finally, for subsidy pools maintained by the states, the rules governing which carriers may be eligible to receive universal service payments also vary extensively from

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state to state. If a carrier qualifies as a recipient for such subsidy payments, these can be an attractive source of revenues, particularly for carriers providing service in rural areas.

5.2 What Are the Costs of Being a Certificated Carrier?

There are a number of costs associated with being a regulated carrier. These include the legal costs of preparing applications and tariffs, the regulatory fees charged by state PSCs, and franchise fees imposed by municipal governments. There are "opportunity" costs as well – regulated carriers must make public certain information that unregulated businesses do not; and regulated carriers may require regulatory approval before conducting significant transactions, thereby incurring substantial delay. A brief overview of these costs is included below.

5.2.1 The costs of interconnection

In the previous section, we noted that a regulated carrier can realize significant cost savings and increased revenues through obtaining reciprocal compensation, unbundled network elements and resale at wholesale rates from incumbent telephone carriers. In order to do so, however, a competing carrier must interconnect its facilities with those of the ILEC. Under current interpretations of the Telecommunications Act, interconnection generally requires some level of investment in local network facilities by the regulated carrier. The most expensive form of such interconnection involves a local carrier laying fiber optic cable or constructing microwave facilities to an ILEC office, and constructing an enclosure within the office to house the competitive carrier's equipment. The latter is generally referred to as physical collocation, and can cost from $100,000 - $500,000 or more per ILEC central office.

Other forms of interconnection are currently the subject of court actions and regulatory proceedings, and are likely to be established in the near future. The most immediate likely source of alternatives to physical collocation is the New York Public Service Commission ("NYPSC"). That Commission currently is conducting an extensive proceeding that likely will result in Bell Atlantic/NYNEX adopting several alternatives to physical collocation that could allow competitive carriers to obtain the benefits of reciprocal compensation, UNEs and resale with much less expense than is now possible through physical collocation.[10] The NYPSC is expected to issue a decision shortly. If the NYPSC does establish new, less expensive methods by which CLECs can interconnect with ILECs, this approach likely will be adopted by other states during the course of the year. Indeed, the Pennsylvania PUC already has opened proceedings to consider taking similar action.

Similarly, as discussed above, the Supreme Court will hear appeals of the 8th Circuit's Court interpretation of the Telecommunications Act this coming Fall. As part of this appeal, the Supreme Court will decide whether the 8th Circuit was correct in holding that competing carriers must install their own facilities in order to obtain the full benefits of interconnection with ILECs. If the Supreme Court overturns this aspect of the 8th Circuit order, the costs of interconnection with ILECs will be reduced dramatically. The Supreme Court likely will not make a final decision on this issue for at least a year, however.

5.2.2 The costs of certification

The process of obtaining a certificate of public convenience and necessity ("CPCN") to operate as a regulated communications carrier varies dramatically from state to state. As a precondition to certification, a carrier must obtain an authorization to do business. This typically is obtained from the Secretary of State's office, costs a nominal amount, and may be obtained in two weeks or less. This is a requirement, not just for carriers, but for all companies doing business in a state, and essentially announces that the company is doing business in the state for taxing purposes.

Most states also require communications carriers to obtain a certificate of public convenience and necessity. The requirements for a CPCN vary dramatically from state to state, and are discussed in more detail in following sections.

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[10] New York Public Service Commission, *Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Case 97-C-0291.

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The costs of certification are reasonable in most states. The preparation and filing of a typical certification application and accompanying tariff can be accomplished for under $4,000. The costs can be significantly larger in states that require a formal hearing to grant the application, and are significantly lower in states that allow registration in lieu of certification. In addition, some states, such as New York, require the new carrier to publish notice that it has filed for a certificate in local newspapers. Depending on the size of the market the carrier will enter, this type of notice requirement may add several hundred dollars to the application process.

Finally, while it is unusual, some states may impose unique charges on carriers. For example, the District of Columbia recently concluded a hearing that established the rates for interconnection for all certficated carriers. The D.C. PSC hired its own consultants to assist it in the proceeding, and imposed a pro-rata share of the cost of the consultants on all parties that participated in the hearing.

Prospective regulated carriers should also consider "opportunity costs" associated with a regulated status. First of these opportunity costs is the disclosure of service descriptions and prices. In increasingly competitive environments, some service providers prefer anonymity in their dealings with other parties, and prefer not to announce their services and rates in public tariffs. On the other hand, however, while tariffs are required in most states, carriers are being granted increasing flexibility to establish customer-specific service arrangements that may depart from general tariffed rate schedules. In addition, regulated carriers are often required to obtain regulatory approval before they issue significant amounts of new debt or equity, or make major acquisitions. This requirement both imposes real costs – in terms of due diligence and filing fees, and opportunity costs – in terms of delay in significant transactions.

5.2.3 Compliance with post-certification reporting and fee requirements

After the applications to provide competitive local exchange services have been approved, the carrier will have to comply with the various reporting and fee requirements unique to each state.

Reports

Most commissions require some kind of annual report on the status of the regulated company. Some states, such as California and Michigan, require quarterly reports. These reports almost always require disclosure of all revenues earned from the provision of regulated services, and form the basis upon which the regulatory fees and contributions discussed below are calculated. In addition, states typically require reporting of full financial reports, 10-Ks for publicly traded companies, information concerning the board and officers, and any information reported to the FCC. States also often require reporting of transactions with affiliated companies. Many states require the regulated carrier to file reports on all customer complaints filed against the carrier with the PSC, agreements made in settlement of customer disputes, and service discontinuations. Failure to submit reports in a timely manner may result in the cancellation of a carrier's certificate, the imposition of a fine, or both.

Fees and Contributions

Regulated carriers generally must pay some form of fees, and often must pay a variety of them. While states vary widely on their policies, the fees fall into several categories: regulatory fees, contributions to state-sponsored subsidies, municipal fees and taxes. Each is discussed in turn.

Regulatory Fees. Many states charge an annual fee to regulated carriers to help them recover the cost of the PSC's operations. A number of these states define these fees as a fixed percentage of regulated intrastate revenues. For example, the Florida PSC imposes a fee of 0.15 percent of gross intrastate regulated revenues on telephone carriers. Other states, such as Nevada, calculate their fee requirements every year, and send a letter to each carrier that identifies the size of its regulatory payment for that year.

Universal Service Contribution: State-sponsored subsidies are established to provide discounted communications service to specific groups or geographic areas. The most common example is a universal service fund to subsidize service to low income persons, or to subscribers that live in high cost areas (such as rural areas, mountainous areas or on islands). Carriers' mandatory contributions to these universal service subsidy pools are also generally stated as a percentage of regulated interstate revenues. For example, California imposes a contribution fee equal to 2.87 percent of revenues, which is fairly typical of state requirements. The most extreme example is Kansas, which recently adopted rules imposing a universal service fee equal to 14.1 percent of a carrier's regulated intrastate revenues. This is an abnormally high formula, and undoubtedly will be contested by a number of affected parties.

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Other Subsidies: Besides universal service subsidies, many states require regulated carriers to pay a contribution to systems to assist hearing-impaired subscribers. These systems are often called Telephone Relay Services ("TRS"), or Telephone Devices for the Deaf ("TDD"), and support the cost of operators and software that convert voice calls to text messages. Similarly, carriers are often required to contribute to 911 funds, which support the development and maintenance of emergency call databases and switching systems.

Franchise Fees and Taxes: In some states, municipalities are empowered to impose their own "franchise fees" on carriers that use public rights of way. Such fees typically run in the neighborhood of 5 percent of gross communications revenues derived from customers in the municipal area. While these charges are routinely passed through to customers, they can still be enormously burdensome, especially when paid on top of state regulatory fees. The extent to which municipalities may impose franchise fees is generally governed by state legislation, and can be highly controversial. Many municipalities see newly entering communications carriers as significant sources of revenues, and are becoming more aggressive in imposing franchise fees. As a result, this is an area that will see increasing litigation in the future.

Finally, while tax matters are beyond the scope of this White Paper, state, and often local taxes also usually apply to certified carriers. State tax policy varies widely from state to state.

5.2.4 Services and functions that regulated carriers must provide

States generally impose a series of obligations on carriers to ensure that they provide their customers with services and functions that are deemed critical (such as the ability to make a 911 emergency call), to ensure general fairness (such as ensuring that customers have the right to choose their long distance carrier), and to ensure nondiscriminatory treatment to other carriers. A list of typical requirements is provided below.

Number portability – This is required of local service providers that maintain their own switches. Number portability allows customers to retain their existing telephone number if they switch from one carrier to another.

- Presubscribed Interexchange Carrier ("PIC") changes – This allows customers to determine that their long distance calls are automatically routed to a particular long distance carrier. Both federal and state rules apply that ensure that a customer has authorized a change from one presubscribed long distance carrier to another.[11] Changing a customer's presubscribed long distance carrier without the customer's express permission – a process known as "slamming" – is punishable under both federal and state law, and fines for slamming can be severe. Some states require local service providers to provide carriers with "2 PICs", *i.e.,* and the ability to select different long distance providers for interstate and intrastate long distance calls.

- Equal access – This applies to carries that maintain their own switches. It ensures that all carriers that are served out of the same switch obtain the same quality of service. Service quality is measured by the length of time it takes to hear a dialtone after the handset is picked up, dialing parity (how many numbers must be dialed to reach a long distance carrier), access to the same features and functions at the same rates, and similar criteria.

- Directory services – Most states require that all carriers provide their customers with the ability to access an operator for director assistance and operator assisted calls. Most carriers meet this obligation by reselling the services of a separate operator services company.

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[11] See generally, FCC*, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, FCC 95-225 (June 14, 1995); *Implementation of the Subscriber Carrier Section Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* Further Notice of Proposed Rulemaking and Memorandum Opinion and Order on Reconsideration, CC Docket No. 94-129 (released July 15, 1997). See*, e.g.,* Florida Administrative Code, Rule 25-4.118; Illinois Administrative Code, § 773.14; Pennsylvania Code, § 63.118.

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- Call blocking (caller I.D. and 900) – Many states require that carriers provide their customers with the ability to block on request calls to 900 numbers, or to prevent their names and numbers from being displayed on caller I.D. equipment.
- 911 and E911 – Providers of competitive local service must provide their customers with access to 911 emergency numbers, or E911 (which automatically display the caller's number and address). Most carriers fulfill this obligation by purchasing 911 and E911 service from an established vendor that serves the local calling area, often the ILEC.

5.2.5 Effective Alternatives to Becoming a Certificated Carrier

There are ways to become actively involved in the provisioning of communications services, and of benefiting from the interconnection, unbundled network element, and resale provisions of the Communications Act without becoming a fully regulated carrier.

Unregulated Subsidiaries: An unregulated party can spin off a separate subsidiary that will provide regulated services and hold all the necessary certificates. This approach is being taken by a number of utilities, cellular phone companies, and others that heretofore have not been subject to state telecommunications regulation.

Strategic Alliances: Another approach is to establish strategic partnering agreements with regulated carriers. This approach has long been practiced by operators of private backbone networks and equipment manufacturers, which frequently enter into close working relationships with regulated carriers. In these arrangements, CLECs and ILECs purchase high capacity transport on an unregulated basis from the backbone service provider, and network equipment from the manufacturer. In return, the regulated carrier often enters into special service contracts that provide favorable rates for regulated services to the backbone operator and equipment manufacturer. Internet service providers are also increasingly adopting strategic relationships with CLECs. In these arrangements, the ISP often obtains favorable rates for the local and long distance service it purchases from a CLEC, while the CLEC benefits from increased reciprocal compensation revenues generated by having the ISP on its network.

6. Interconnecting Through The Negotiation and Arbitration Processes Established Under the Telecom Act of 1996

As mentioned above, certified carriers can take advantage of substantial benefits that have been established under the Telecom Act of 1996. These benefits include obtaining reciprocal compensation for local traffic terminated on the carrier's network, the ability to obtain portions of the ILEC services at unbundled network elements at incremental (*i.e.*, low) cost, and the right to resell ILEC services at wholesale discounts of about 20 percent. In this section, we provide a brief overview of the interconnection process established by the Act, and discuss some of the major terms of interconnection arrangements.

6.1 The Interconnection Agreement Negotiation and Arbitration Process Established by the Telecom Act of 1996

The procedures for negotiating or arbitrating interconnection agreements are contained in Sections 251 and 252 of the Telecom Act. The procedural steps, and their corresponding sections of the Act, are listed in Attachment A. Essentially, the Act provides for two methods of achieving interconnection. The first is negotiation, through which the ILEC and the competitive carrier voluntarily reach agreement on the rates, terms and conditions of interconnection. Because so many terms have become standardized following rulings by state commissions, in recent months some competitive carriers have been able to avoid significant controversy and reach negotiated agreements with ILECs. This process is further expedited if the competitive carrier simply wishes to accept the same interconnection agreement that the ILEC has already signed with another carrier. This is by far the quickest means of obtaining an interconnection agreement. Whether a new agreement is negotiated, or an existing agreement adopted, the entire process is voluntary, and does not involve PSC intervention until the agreement is submitted to the PSC for approval. Negotiated agreements can take as little as three months to complete, although they may take considerably longer.

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The second means of obtaining an interconnection agreement is arbitration. This results in a formal proceeding before a state PUC. If an interconnection arrangement has to go to arbitration, it will take the full nine months permitted by the 1996 Act, and may take longer -- several states have gone over the 9-month deadline by 1-3 months or more.

If time is of the essence, and the ILEC has an arbitrated agreement that has already been approved by a state PUC that meets the ILEC's needs, simply ask for the same agreement. Most ILECs will be willing to expedite these agreements, and typically will sign within several months. Under the Act, a requesting carrier can file for arbitration 135-160 days after requesting interconnection negotiations.

6.1.1 Terms and Conditions

Term and termination of agreement
Parties have negotiated various lengths of term for the contract, but two years is typical. Some ILECs have recently evinced intent to migrate carriers from negotiated/arbitrated agreements to General Statements, so interconnectors must pay specific attention to provisions allowing the ILEC to unilaterally substitute a Statement or tariff for the agreement.

Reciprocal compensation for transport and termination
The minority of states have established bill-and-keep as a mandatory form of reciprocal compensation for the first year. Most states have adopted specific per minute rates for reciprocal compensation.

In the majority of states, the reciprocal compensation rates are interim -- almost all of these states are, or will be, conducting rate cases to establish permanent rates in the future. The interim nature of the rates has lead to the adoption of "true-up" provisions in most agreements.

Most CLECs originally preferred bill-and-keep because they thought they would have lower percentages of terminating traffic than the ILEC. These CLECs have since found that they can increase the amount of traffic that terminates on their networks (and that earns them compensation) by selling Internet access, and so prefer compensation rates to bill-and-keep.

A number of states have adopted different compensation rates for traffic interconnected at tandems (higher compensation) and end offices (lower compensation). States have differed, however, in determining whether competitive carrier switches are equivalent to ILEC tandems or end offices. Typically, the determination is based on the geographic area served by the switch, by the functions it performs, or both.

Transiting arrangements
Transiting occurs when a competitive carrier accepts local traffic from a third party and hands it off to the ILEC, or vice versa. Typically, transiting traffic is handed off by CMRS carriers (note that all wireless traffic within a major trading area ("MTA") is deemed local) or by ILECs that have extended area service ("EAS") arrangements with other ILECs. Agreements may impose a charge in lieu of other charges in the agreement, or may impose a surcharge on top of typical reciprocal compensation rates.

Nonrecurring charges
All nonrecurring charges should be specified and identified in the agreement. In particular, the ILECs' policy on "rollover" or "move" charges should be clarified. A rollover occurs when a customer changes office location, upgrades to a different class of service, or re-directs a circuit from the ILEC to a collocated competitor. Some ILECs treat such changes as a termination of existing service and a new installation. This not only imposes considerable installation charges, but triggers termination liability provisions if the customer had signed a long-term contract. Other ILECs tariff specific rollover or move charges that are less expensive than new installs, but are still burdensome. Some interconnection agreements establish new nonrecurring charges that replace these traditional tariffed charges. The ILEC's policy should be made explicit and should be referenced in the agreement.

Collocation
There are two types of collocation: Physical and Virtual. The primary difference is access to the ILEC central office – under physical collocation, a carrier can send its own technician into the ILEC office to install and maintain equipment. Under virtual collocation, ILEC technicians perform these functions for the competitive carriers.

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"Most favored nation" provision
Even with the stay of the FCC's "pick and choose" rules, many interconnection agreements contain most favored nation clauses that grant interconnectors the right to benefit from lower prices or preferable terms. These vary widely by ILEC, although most will allow interconnectors to choose provisions from other agreements. Note that individual clauses or rates generally may not be selected from other interconnection agreements, but self-contained segments of agreements (such as rates, terms and conditions for unbundled loops, or rates and terms for 911 services) generally may be obtained.

Liquidated damages, provisioning intervals and service quality standards
Ameritech, NYNEX and Southwestern Bell have agreed to liquidated damages provisions that guarantee payment of specific amounts if firm order commitment dates are missed. These provisions include a commitment to respond to requests for new circuits within specified time periods, and to meet other specified service quality standards. Most other ILECs will not agree to similar provisions. It is important both to identify the standard of service a carrier requires, and to identify specific timeframes for provisioning new circuits, collocation arrangements, or access to ILEC systems. A number of state PSCs are establishing standards of performance, and these will become increasingly important in defining ILEC behavior.

If an ILEC will not commit to specific service quality standards, it is still subject to the nondiscrimination provisions of the 1996 Act. Sources of performance information – such as standard provisioning intervals for different types of services – should be identified so that discriminatory ILEC behavior can be deterred. In particular, ILECs should be asked to put in writing their position on whether unbundled loops will be provisioned using the same time intervals that the ILEC uses for installation of new circuits to its end user customers.

Special attention must also be given to the issue of limitations in liability. The ILECs typically will attempt to limit their liability to amounts for services rendered under the agreement, and seek total absolution from any incidental or consequential damages, including lost revenue or profits. The ILECs should at least be willing to make an exception for willful or intentional misconduct, gross negligence and repeated breach.

Number portability, dialing parity
These provisions are rapidly becoming standardized. Note that, if remote call forwarding is used for interim number portability, the ILEC and interconnector need to coordinate simultaneous updates to both the database housing the original number and the database housing the new number. For dialing parity issues, measures for post-dial delay and other performance standards should be discussed expressly.

Directory listings and directories
ILECs differ on the rates and terms for directories and listings. Most will list competitive carriers' customers in white pages for free, but impose a charge for Yellow Pages listings. Carriers should clarify their right of access to the information page section. Most provide free directories to competitive carriers' customers, including multiple copies for multi-line businesses. Special arrangements for "reverse white pages" may be negotiated.

Dispute Resolution and Escalation
Escalation procedures should be defined. In addition, rights to seek redress at regulatory agencies, courts and via binding arbitration should be specified. Also, interconnectors should pay attention to ILEC choice of forum clauses.

6.1.2 Unbundled Network Elements

True-ups and other pricing issues
As noted above, virtually all states have established interim rates for unbundled elements and reciprocal compensation, subject to change pending completion of rate cases. In light of this environment, most parties consider true-up provisions that would provide for retroactive payment of changed rates to be reasonable. Carriers may wish to consider language that rate changes will only have retroactive effect if specifically ordered by the state PUC or other regulatory or judicial body.

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To date, ILECs have resisted establishing volume and term discounted rate structures for unbundled elements, but it is worth raising the issue during negotiations and obtaining a written statement of the ILEC position on the matter.

Similarly, ILECs have been avoiding geographically deaveraged rate structures for unbundled elements, although it may be worthwhile to obtain a written statement of the ILEC's position.

Loops

As noted above, ILECs are resisting establishing geographically deaveraged rates for unbundled elements, including local loops. WorldCom/MFS recently filed with the FCC a petition asking the FCC to mandate such deaveraging in cases where ILECs have deaveraged access charges. It is not clear at this time whether the FCC is inclined to take action on this matter. Several state PSCs are also considering this issue.

Some states (Texas, Georgia) have mandated subloop unbundling and interconnection at controlled environmental vaults, "green boxes" and other points of aggregation along the loop. The General Statement filed by BellSouth in Georgia contains very attractive rates for such unbundled elements. Note that, unless compelled to unbundle by state regulators, all ILECs have been vociferously opposed to subloop unbundling. Also note that, in cases where subloop unbundling is mandated, the type of aggregation equipment used in the loop (integrated vs. universal digital loop carriers) could have a substantial impact on the costs of loop unbundling.

Operation and Support Systems

To date, OSS access issues have not been defined with specificity, and the language in most interconnection agreements is vague. Carriers should determine their needs with as much specificity as possible and engage the ILECs with specific technical proposals and timetables. Moreover, different ILECs have made different arguments regarding billing and trunk inventory systems, including: 1) unbundled element billing will be done through CABS, but this requires major modification, and will not be available any time soon; 2) element billing will be done through CRIS, which also requires major modification; 3) subloop unbundling cannot be accomplished at this time because TIRKS cannot allocate subloop elements. The FCC recently issued model OSS guidelines, but it is not yet clear whether states will adopt them.

6.1.3 Resale Issues

Nonrecurring charges ("NRCs")

While ILECs must provide retail services for resale by carriers at wholesale rates, there is some debate as to whether this requirement applies only to recurring charges, or whether it includes nonrecurring charges. ILECs differ on their position, with some arguing that NRCs already are priced at cost, and include no avoidable cost elements to discount. Other ILECs (such as BellSouth in Georgia) have confirmed that they will provide the full avoided cost discount to NRCs.

Customer-specific arrangements ("CSAs")

Like the debate over wholesale discounts for NRCs, ILECs are resisting providing individually negotiated contracts for resale at the wholesale discount level prescribed by the relevant state PSC. Some states (including Georgia and Florida) have ruled on this issue, finding that CSAs must be made available for resale, but <u>not</u> at wholesale discounted rates. Competitive carriers are likely to ask the FCC to rule on this issue, and to preempt adverse state decisions.

Termination liability issues

Note that ILECs are increasingly using long service terms – both in customer-specific pricing arrangements, and in tariffed term discount rate structures – to lock-in customers. In both cases, an interconnector that resells the service should be able to step into a customer's shoes and assume the remainder of the term commitment. This simply involves a transfer of the customer's long term contract to the interconnected carrier. This issue has just recently emerged, and so it is important to have the ILEC state its long-term resale policy in writing.

If interconnectors do not have an explicit right to assume long-term contracts, ILEC tariffed termination liability provisions may act as an absolute barrier to resale. While some ILECs have termination liability provisions that are relatively mild (NYNEX) others have extremely punitive termination liability provisions (BellSouth) that prevent customers from switching to interconnected competitors. Note that CLECs have asked the FCC and some states to adopt a "fresh look" rule to eliminate this barrier to competitive entry, but we do not anticipate at this time that most regulators are inclined to grant such relief.

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Volume and term discounted services
ILECs should be asked to state in writing that they will provide all retail services – including those subject to volume and term discounts – at the wholesale discount rates prescribed by the state PSCs. Note that some ILECs have additional discount plans, such as NYNEX's customer incentive plan that awards discounts based on growth in the number of circuits purchased over time. These also should be applied to interconnectors.

Sales agency agreements
The issue of whether an interconnector can obtain standard ILEC sales agency agreements – complete with sales commissions – has just begun to arise. Predictably, the ILECs are resisting, and this issue is being brought to state PUCs for resolution. Note that in identifying avoided costs for purposes of setting wholesale discounted rates, recurring sales commissions, or a pro-rated nonrecurring commission, should be included.

End user authorizations
Interconnectors should specify precisely what type of end user authorization is required for customer changeovers, and all such obligations should be symmetrical. Special care should be taken to avoid committing to providing written LOAs in support of every order.

6.2 Some Important Elements of Interconnection Agreements

Typical interconnection agreements can run well over a hundred pages, and contain provisions detailing the technical, operational and legal relationships between the parties. While many of these terms have become fairly standardized through the arbitration processes established in the various states, there remains significant opportunities to establish interconnection terms that are uniquely tailored to a company's needs. Moreover, the regulatory playing field keeps changing as the FCC, state commissions and the courts issue new rulings on interconnection. These regulatory and judicial decisions also provide substantial new opportunities for interconnecting parties to negotiate new arrangements. While the number of issues that may be addressed during the negotiation or arbitration processes is too large to address in this White Paper, the following section discusses some of the most important features of an interconnection agreement.

Note that, if an interconnection arrangement is arbitrated, it goes through three stages: 1) parties draft a statement of issues that are agreed to, 2) the arbiter issues a decision on disputed issues, and 3) the parties submit a final statement that incorporates the arbitration award with the undisputed issues. The drafting of the final document may take an additional 1-3 months. Indeed, in Texas, for example, after the arbitration was completed, AT&T, MCI and Southwestern Bell could not agree on a final document, the resulting dispute over final language had to be settled by the Texas PSC, and further delayed the process.

Note that completion of an agreement is only step 1: implementation of an agreement after it is approved can take six months or longer, even for such basic arrangements as unbundled loops. Establishing working arrangements for OSS access or unbundled switching platforms may take considerably longer.

7. Issues Surrounding The Unbundled Network Element Platform

An important issue now pending before the states and courts centers on the "unbundled network element platform," also known as UNE-P. This issue has actually been around since the Telecommunications Act was passed in February 1996, but is now moving to center stage in a number of federal court and state regulatory proceedings. It is also dividing competitive carriers that typically are staunch allies on most issues. Below, we provide a brief summary of the issues surrounding UNE-P and discuss its current procedural status.

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7.1 UNE-P Defined

The 1996 Act requires incumbent local exchange carriers to unbundle their networks into discrete elements (unbundled network elements or UNEs), and to sell those elements to competitive carriers at rates based on incremental cost. To date, the FCC and various state commissions have defined a large number of unbundled network elements, and state commissions have established corresponding rates. The diagram below shows an illustrative list of UNEs, and the functions they perform in a typical network application:

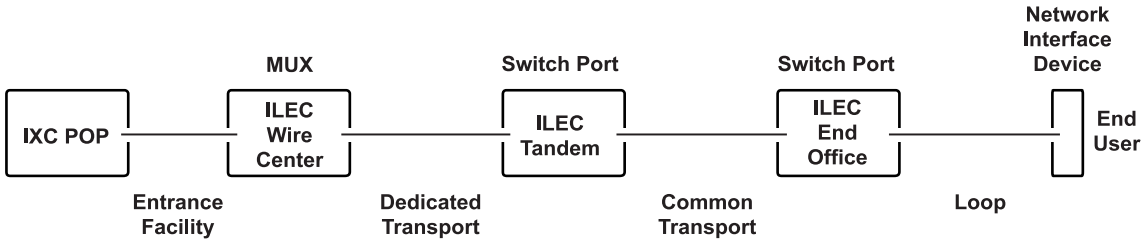


Diagram 1: Unbundled Network Elements in a Typical Network Application

The unbundled network element platform would combine a whole series of UNEs to create the complete circuit between the end user and the IXC point of presence. In the diagram above, an IXC could purchase the UNE-P by ordering the ILEC to provide a combination of the NID, loop, local and tandem switch ports, common and dedicated interoffice transport, and entrance facility.

7.1.1 How the industry players view the UNE-P

The debate over UNE-P reflects a dispute over how competitive carriers obtain combinations of these elements from ILECs. There are essentially three different views, reflecting the perspectives of ILECs, interexchange carriers ("IXCs") and facilities-based competitive local exchange carriers ("CLECs").

ILEC view: ILECs acknowledge that the Act requires them to unbundle their networks, but argue that the Act never anticipated that they would be required to provide a series of UNEs to reconstitute an entire circuit from the end user to the IXC POP. ILECs argue that the UNE-P would provide IXCs with the exact same functions that they now purchase as access service, and would effectively eliminate the distinction between UNEs and resale. Moreover, ILECs note that UNEs are priced at incremental cost – on average, about 40-50 percent below the price of access charge elements that serve the same purpose. They argue that, if IXCs can simply change all of their access circuits to UNE-Ps, it would dramatically cut ILEC access revenues overnight.

The IXC view: IXCs cite the language of Section 251(c)(3) of the Telecom Act, stating that: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." They argue that this plain language does not include any restrictions on the ability of a requesting carrier to recombine as many different UNEs as it wants, and that there is no basis in the Act for preventing them from reconstituting the entire platform. As a policy matter, IXCs argue that UNE-P may be the only way to bring competitive service alternatives to residential users and to users in rural areas, because it is unlikely that facilities-based CLECs will build networks to serve these customers anytime soon.

The CLEC view: CLECs support the availability of extensive combinations of UNEs, but many of them do not go so far as the UNE-P. CLECs generally agree with ILECs that the Telecom Act makes a bright line distinction between resale under Section 251(c)(4) and UNEs under Section 251(c)(3) and that the UNE-P would eliminate the distinction between these two provisions of the Act. As a policy matter, CLECs argue that the fundamental goal of the Telecom Act is to promote facilities-based competition, and if competitors can build their own local networks completely out of incrementally-priced ILEC network elements, carriers will have no incentive to build their own networks.

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7.1.2 Miscellaneous related issues

With these various positions on the legality of UNE-P come some fairly complicated issues that have spawned their own series of arguments and counter-arguments.

"N-1": If the entire platform is unlawful under the Act, how do you define what series of combined UNEs is lawful? "N minus 1" is a term used by some as a means of defining what is *not* the platform – the "1" designates one portion of the end user-to-IXC POP circuit that is a facility provided by the competitive carrier. The theory is that as long as a carrier provides one piece of equipment in the loop, it is a facilities-based carrier, and the rest of the combined UNEs that it purchases cannot be considered a full platform. This attempt to distinguish between platform and non-platform combinations of UNEs raises some fairly testy questions, however. Specifically, what would prevent a carrier from providing one small segment of a circuit – say, a network interface device or a single line card – in order to avoid the UNE-P label?

"Glue" Charges: Although the Act requires ILECs to provide UNEs to competitive carriers, it is not precise about how they do it. This raises the question – can ILECs charge a new fee for combining UNEs – *i.e.*, a "glue charge"? To date, the state commissions that have set prices for UNEs have not addressed this issue; it appears that most states expected that ILECs would provide the UNEs on a combined basis, at the rates established by the commissions. We may anticipate that at least some ILECs will now go back to their state commissions, arguing that new "glue charges" must be established in addition to the UNE rates. If they do so, this will initiate a debate over the appropriate pricing rules – do glue charges have to reflect incremental costs, as UNEs do, or can the ILECs load additional costs into these new rate elements? Relatively modest "glue" charges were included in the recent New York pre-filing statement for Bell Atlantic.

7.1.3 How regulators and the courts view the UNE-P

The fight over UNE-P originally was between the FCC and the U. S. Court of Appeals for the Eighth Circuit – the FCC was for it, but the Eighth Circuit was against it. This dispute has now been escalated to the Supreme Court. In addition, state commissions may become increasingly active in addressing this issue.

The FCC: The FCC under former Chairman Hundt initially interpreted the Telecom Act to require ILECs to provide the entire UNE-P to requesting carriers. Presumably, the FCC found the arguments for bringing competition to residential and rural subscribers to be compelling. Since the FCC released its initial interpretation of the Act, however, the Commission has changed – four out of five commissioners are new. Unless the FCC has an opportunity to address the UNE-P issue after the Supreme Court has ruled on the matter, the view of some of the new FCC commissioners will remain unclear.

The Eighth Circuit: The Eighth Circuit rejected the FCC's interpretation of the interconnection provisions of the Act, and found that, while ILECs are required to provide UNEs, they are not required to connect them together. In a subsequent decision, the Court went further and specifically held that the UNE-P was tantamount to resale, and that any carrier that wanted an ILEC to provide the entire circuit from end user to IXC POP had to pay access charges, or at a minimum, wholesale rates. (For perspective, note that wholesale rates are on average about 20 percent below tariffed access charges, while functionally equivalent UNEs are about 40-50 percent below tariffed retail rates.)

The Supreme Court: The Supreme Court has granted *certiorari* to (*i.e.*, agreed to hear) the FCC's appeal of the Eighth Circuit decision overturning its interconnection rules. A whole host of issues will be raised before the Court, not the least of which will be the UNE-P. The Court will hear oral argument on the appeal in the Fall, and likely will issue a final order next Spring. The UNE-P issue will be brought before the Court expressly in briefs and arguments, so the Court almost certainly will decide its fate.

State Public Service Commissions: CLECs have filed complaints before a number of state commissions, asking them to order ILECs to combine UNEs. Several state PUCs already have required ILECs to provide various combinations of UNEs. These decisions typically have not addressed the UNE-P issue directly, however.

One notable exception is likely to be the New York Public Service Commission. Recently, the General Counsel's Office of the NYPSC issued a draft proposed recommendation in the proceeding that is now considering whether Bell Atlantic/NYNEX ("BANY") should be allowed to provide in-region long distance service in New York. In the draft,

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the General Counsel's Office proposed to approve long distance authority for the ILEC if, among other things, BANY provided the UNE-P. While this draft recommendation does support the UNE-P, however, it does so only in a limited manner. Specifically, the draft would only require BANY to provide the UNE-P for "plain old telephone service" to residential customers throughout the state. UNE-P will also be available for business customers, although a "glue" charge of $2.00-$6.00 per line will apply. In addition, this requirement would expire after three-to-five years.

This recommendation, if adopted by the full NYPSC, would take a limited approach to the UNE-P, making it only available for those markets that are not likely to be served by facilities-based competitive carriers in the near future. The NYPSC is expected to make a final decision on this matter by the Fall. The Pennsylvania, Texas and other state PUCs have similar proposals under active consideration.

8. What You Need To Do – To Become A Regulated CLEC

A summary overview of the major regulatory requirements involved in becoming a certificated competitive carrier is provided below. In addition, we append a chart that lists specific certification requirements as Attachment B, with the estimated time required to obtain a certificate for all 50 states and the District of Columbia.

8.1 State Authorization to Do Business

The first step in obtaining certified carrier status is to obtain a certificate of authorization to do business in the state (frequently known as certification as a "foreign corporation"). Essentially, the purpose of this authorization is to formally announce to the state that you will be doing business within the state, and that you will be subject to state taxes. Most state PUCs require that a copy of the authorization to do business be submitted with the certification application, making this authorization a necessary precondition to becoming a certified carrier.

The authorization to do business is generally issued by the state corporation office, and is a purely pro-forma process. Applications are processed by mail, minimal paperwork is necessary, and the authorization typically is issued in 30 days or less. States frequently assess a reasonable processing charge of $100 or less, although a few states may charge several hundred dollars. For companies seeking certification in a large number of states, there are several commercial ventures that will obtain foreign corporation authorizations in multiple states. Many of these services are both quick and reasonably priced.

8.2 Certificate of Public Convenience and Necessity

Most states require that communications carriers obtain a certificate of public convenience and necessity. The different states' handling of the certification process can generally be broken down into three categories:

1. States that have only a nominal certification process that involves little delay and little cost. Often, these states simply require the carrier to file a letter registering as a communications carrier. These registration letters typically involve no or little cost, and often can be done after a carrier has begun providing service. Most of these states require tariffs (Massachusetts, Montana, South Dakota), but at least two (New Jersey, Wyoming) do not.

2. States that require certification and process it reasonably quickly. These states typically take 90-120 days to process the certification application. Some do not require a filing fee (Connecticut, Idaho); some impose a modest filing fee of $50-$500; and some impose substantial fees of $1,000 (the District of Columbia) or $3,000 (Delaware). Some PSCs, like New York, require the publication of an announcement that a carrier is entering the market in local newspapers. Some require hearings to formally grant the certificate (North Carolina, Tennessee), but most do not, and some hold only perfunctory hearings that can be attended by phone (Illinois). Most of these states require the carrier to file a tariff showing rates and terms for all regulated services.

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3. Finally, a minority of states take an inordinate amount of time to process an application for certification. These states generally impose the same hearing and tariffing obligations that other states impose, but evince extraordinary delay in processing the applications. These states include Louisiana and Colorado (up to a year) and California (typically six months).

It should also be noted that the amount of information that a carrier must provide, and often the amount of time necessary to obtain a certificate, often depends on the types of service that will be provided. In general, the most detailed applications must be filed by carriers seeking to become facilities based providers of local, as well as long distance service. These applications generally also take the longest to process. Carriers that simply wish to resell long distance service generally are not subject to the same level of scrutiny and have their applications processed more quickly.

We have attached to this White Paper a list that summarizes the certification requirements, and typical processing time, in all 50 states and the District of Columbia. Note that these summaries are estimates, based on our recent experience in filing certification applications for a variety of clients. As competition has grown, states are becoming more familiar with competitive carriers, and the certification process has been becoming more and more expedited. For example, last year, a CLEC certification in New Jersey required a full hearing and could take nine months to approve. Today, CLECs simply go through a pro forma registration process, and can provide service in New Jersey with minimal delay. As a result, different states may very recently have adopted more streamlined procedures than are listed in our attachment.

8.3 Tariffs

In most states, certified carriers are required to maintain tariffs on file that contain descriptions of services, prices, and terms and conditions of service. Most carriers employ a single model tariff that is used for all states. This model tariff must be modified, however, to reflect some specific regulations that are unique to each state. For example: the New York Public Service Commission requires the inclusion of specific language referencing state sales taxes that may be included in telecommunications services; most states have statutory limits on the amount of interest that can be charged to a customer that pays its bill late; many states require carriers to pay a specific rate of interest on any deposits that are required of customers and require the inclusion of tariff language that guarantees payment of such interest.

Recently, the Pennsylvania PUC found that competitive carriers are required to submit cost data to demonstrate that their rates are reasonable. Pennsylvania is unique in this regard – virtually all other states only require incumbent, dominant carriers to submit cost data, and assume that competitive carriers do not have adequate market power to be able to charge excessive rates.

Most states require that a tariff be filed with the certification application. In such cases, the tariff is reviewed along with the application, and the two are granted together. A few states, including New York and Kansas, require that the carrier obtain certification first, and then file its tariff afterward. In such states, the tariff review process may add another 60-90 days before a carrier can initiate service, in comparison to states where review of the certification application and the tariff take place concurrently.

A small number of states, such as Utah (and Texas for interexchange service), allow the filing of simple price lists in lieu of full tariffs. These are minimal documents that simply list service names and the maximum price that will be charged. Typically, these price lists take effect immediately upon filing.

Still other states, such as Montana, North Dakota and Oregon, have no tariff or price list requirements.

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9. How the Newly-Entering Competitive Carrier Should Structure Its Telecom Activities

9.1 Establishment of a Separate Subsidiary Is Recommended

We have found that the establishment of a separate subsidiary for the provision of regulated telecommunications services provides unequivocal benefits, in terms of limiting regulatory burdens, making regulatory compliance easier to manage and facilitating transactions. While corporate structure decisions must be made on a case-by-case basis, we anticipate that most corporations will benefit from spinning off a separate telecommunications subsidiary to provide their regulated telecommunications services.

9.1.1 Insulates core services and revenues from regulation and aids regulatory compliance

The threat of "creeping regulation" is a concern for all carriers. In particular, as state governments and the FCC establish universal service subsidy pools into which carriers pay on the basis of regulated revenues, maintaining a "bright line" distinction between regulated telecommunications investments and revenues and non-communications revenues and activities is highly recommended.

This is particularly true in the case of commercial mobile radio services (including cellular and personal communication service). As noted above, rates for CMRS services are not subject to state regulation, but are the sole jurisdiction of the FCC. In cases where a CMRS carrier provides wireline telecommunications services over its own facilities or resells services from a wireline carrier, however, the lines between the wireless and wireline services can begin to blur. In these cases, many CMRS carriers have chosen to spin off separate subsidiaries to provide wireline and resale services, in order avoid the provision of hybrid CMRS/wireline services and to maintain the "bright line" distinction between the two categories of service. Such separation is intended to prevent the encroachment of state regulation over CMRS services.

In addition, many states – such as California – have detailed regulations to ensure that utilities do not discriminate in favor of their own competitive service offerings, and against those of competing carriers. The establishment of a separate subsidiary makes compliance with such regulations easier to achieve, and easier to demonstrate.

9.1.2 Facilitates mergers, acquisitions, issuance of debt or equity

To the extent an intrastate certificate holder desires to issue securities or incur debt, the certificating states may require prior approval for such transactions. This is a considerable problem in some states with lengthy regulatory procedures, such as Indiana, where an actual hearing may be required. There are a dozen or more states requiring some sort of registration or approval for securities issuances and it is entirely possible that as states gain more experience with the regulation of competitive local exchange carriers, additional states will require approval for issuance of debt or equity by entities holding such certificates. The filing requirements in some cases are quite burdensome and the regulatory process typically takes several months. As a result, the timing of bringing new issues to market can be severely impacted by these regulatory requirements.

Most companies avoid this problem by adopting a two-tiered structure with one entity holding the certificates issued by the state for intrastate service, while a parent company holds most of the assets and is the entity issuing stock or debt securities. Although it seems obvious that this change in structure should not affect the company's basic business plan, states generally do not assert the right to regulate the activities of the parent company. This two-tiered structure provides an opportunity for companies to minimize state regulation of their financing activity.

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These types of structures are typically arranged so that customer contracts are in the name of the intrastate provider, which would bill for intrastate services. A company doing business in multiple states has the option of using a separate corporation as the intrastate provider in each state or having a single corporation certificated to conduct all state operations. All of the physical assets of the company could be held by the parent entity with the subsidiary having a right to use the facilities to provide the service for which it is certificated. As the subsidiary will not be issuing stock or notes, such transactions by the parent typically do not require state approval. However, where the subsidiary is guaranteeing notes issued by its parent, as is sometimes the case, state approval may still be required. Similarly, where there is bank borrowing by the parent, if the bank is satisfied with the security interest granted by the parent company, no state approvals would be required. However, where the lending entity also will want to have a guarantee by the subsidiary, the possibility of state regulatory approval for such guarantees would be raised.

10. A Final Note on Federal Regulation

While this White Paper has focused primarily on state regulatory requirements for telecommunications carriers, note that federal regulations also apply to carriers providing interstate service. The federal regulatory burden on competitive carriers is much lighter than state regulation; nevertheless, some significant regulatory requirements remain. A very brief summary of these regulations follows:

International Service: Any carrier involved in the provision of international service must obtain authorization from the FCC. This is the case whether the carrier uses its own facilities, or merely resells another carrier's service. International authority is granted under Section 214 of the Telecommunications Act and comes in three varieties. Simple resale authorization can be obtained in about 30 days. Two types of facilities-based service authorization can take 90 days or more – or can be refused altogether – depending on the country served and the types of service involved. A $745 filing fee must be filed with Section 214 applications.

Tariffing: As a result of court challenges to the FCC's tariffing policies, an odd loophole exists in FCC regulations that requires providers of interexchange service to file tariffs, but allows providers of competitive interstate interexchange access services to refrain from filing tariffs, at their option. All carriers providing international services, including carriers that simply resell other carriers' international services, must file a tariff. In addition, all carriers that provide operator services must file illustrative tariffs with the FCC. Tariffs take effect on one day's notice, and incur a filing fee of $600.

Federal Regulatory Fee: The FCC imposes a relatively modest regulatory fee on interstate service carriers. The fee may vary from year to year, and is currently set at 0.116 percent of gross regulated interstate service revenues. In addition, all carriers regulated by the FCC must report their revenues from regulated services to the FCC on a regular basis.

Universal Service Fee: All regulated interstate carriers must contribute to the FCC's two universal service funds. One fund is required by the Telecommunications Act and funds primary and secondary schools, libraries, and rural health care facilities. The second fund subsidizes services provided in high cost (typically rural) areas, and services to low income residential customers. The FCC has just completed its rules regarding these subsidies, and they are substantial. The total contribution required of a carrier can equal over two percent of regulated interstate and international revenues, and 0.5 percent of intrastate revenues. Recent action taken by the FCC substantially reduces the amount of universal service contribution that carriers will have to pay in 1998, but the amount could increase substantially during 1999.

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Attachment A: The Interconnection Process Established by the Communications Act of 1996

The Negotiation and Arbitration Process Under the 1996 Act

Step One:

Competitive Local Exchange Carrier makes bona fide request for interconnection/collocation/unbundled network elements to the ILEC.
[47 U.S.C. Section 251(1)]

- ILECS are interpreting the 1996 Act to require a bona fide request in order to trigger their obligations under the Act.
- A bona fide request is a written request to the designated ILEC contact person that references interconnection pursuant to sections 251/252 of the 1996 Act.
- State CLEC certificate is not required in order to initiate negotiations with the ILEC.
- ILECs may require State certificate prior to providing actual service pursuant to any negotiated/arbitrated agreements

Step Two:

Parties may negotiate and enter into binding agreement without regard to the standards in Sections 251(b) and (c).
[47 U.S.C. Section 252(a)(1)]

- Either party may request the State Commission to mediate the negotiations.
  [47 U.S.C. Section 252(a)(2)]
- If the State Commission fails to act on request for mediation, the FCC may preempt the State Commission's jurisdiction, within 90 days after notice of such failure, and mediate a voluntary agreement between the parties.
  [47 U.S.C. Section 252(e)(5)]

Step Three:

Voluntary Agreement is negotiated and submitted to the State Commission for Approval.
[47 U.S.C. Section 252(a)(2)]

- Agreement is approved and goes into effect.
  [47 U.S.C. Section 252(e)]
- Agreement is rejected. Parties may appeal to Federal Court.
  [47 U.S.C. Section 252(e)(6)]
- State Commission fails to act and negotiated agreement goes into effect within 90 days.
  [47 U.S.C. Section 252(e)(4)]

Step Four:

If negotiation or mediation fails, either party may petition the State Commission to arbitrate any open issues.
[47 U.S.C. Section 252(b)]

Step Five:

The State Commission must resolve open issues submitted for arbitration within 9 months after the date that the ILEC received the request for negotiation pursuant to Section 252(a).
[47 U.S.C. Section 251(b)(4)(c)]

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Attachment B: Survey of State Certification Requirements for Competitive Local Exchange Carriers

The following summary of state CLEC certification requirements includes: (i) whether the state requires the issuance of a certificate or merely a registration statement; (ii) tariff filing requirements; (iii) application fees; (iv) whether the application process includes data requests and/or a hearing; and (v) the approximate time-frame for approval. As indicated in the attached summaries, certification can be obtained in most states in 3-4 months. Some notable exceptions include Connecticut, Washington, D.C. and Pennsylvania, where carriers can start service almost immediately; and states with inordinate delays in approving certifications, such as California (up to 6 months), Colorado (up to 9 months) and Louisiana (up to a year).

Note 1: Times for processing certification applications are estimates. Actual processing can vary according to the complexity or completeness of application, whether oppositions are filed against the petition, and even the personalities of the state staffer reviewing the application. The time estimates provided below reflect the recent experience of Kelley Drye and Warren.

Note 2: This chart reflects certification statistics for facilities-based competitive local exchange carriers. Certificates for non-facilities-based resellers and carriers that provide only inter-exchange service typically are processed more quickly. In some cases, certification is not required for these latter classes of carrier.

ALABAMA

- Application – Yes
- Fee – None
- Tariff – No – must be filed within one year after CLEC approval
- Timeframe – 2-3 months
- Hearing – Yes

ALASKA

- Application – Yes
- Fee – $100.00
- Tariff – Yes
- Timeframe – 6-9 months
- Hearing – No

ARIZONA

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 4-6 months
- Hearing – Yes (facilities based carriers)

ARKANSAS

- Application – Yes
- Fee – $200.00
- Tariff – Yes
- Timeframe – Approximately 6-8 weeks if have interconnection agreement. May file application without such agreement, but Commission will not act on application without it.
- Hearing – There is a hearing unless party files a waiver request (which is standard).

CALIFORNIA

- Application – Yes
- Fee – $75.00
- Tariff – Yes
- Time frame – approximately 2-3 months minimum; however 6+ months not unusual.
- Hearing – No

COLORADO

- Application – Yes
- Fee – No
- Tariff – Yes
- Timeframe – Approx. 1-3 months if uncontested; 7 months if contested.
- Hearing – Only if intervention is filed

CONNECTICUT

- Application – Yes
- Fee – None
- Tariff – No – required after approval; may file with application and have time to make edits during process
- Timeframe – 3-4 months
- Hearing – Yes (note: most are telephonic)

DELAWARE

- Application – Yes
- Fee – $3,000.00
- Tariff – Illustrative
- Timeframe – 1-4 months
- Hearing – No

DISTRICT OF COLUMBIA

- Application – Yes
- Fee – $1,000
- Tariff – No
- Timeframe – 15 days (if application complete)
- Hearing – No

FLORIDA

- Application – Yes
- Fee – $250.00
- Tariff – No, but must be filed prior to providing service
- Timeframe – 6-8 months
- Hearing – No

GEORGIA

- Application – Yes
- Fee – None
- Tariff – No, but must be filed prior to providing service and filing an illustrative is recommended
- Timeframe – 4 months
- Hearing – Yes

HAWAII

- Application – Yes
- Fee – $30.00
- Tariff – No, but must be filed prior to providing service
- Timeframe – approx. 1-2 months
- Hearing – No unless intervention is filed

IDAHO

- Application – Yes
- Fee – None
- Tariff – Illustrative
- Timeframe – 2-3 months
- Hearing – No

ILLINOIS

- Application – Yes
- Fee – No
- Tariff – No, but suggested that file illustrative tariff.
- Timeframe – Approx. 3-4 months
- Hearing – Yes; can attend by conference call

INDIANA

- Application – Yes
- Fee – None
- Tariff – No
- Timeframe – 4-6 months
- Hearing – Yes (if contested, commission could also call for hearing on its own motion)

IOWA

- Application – Yes
- Fee – none (but billed for analyst's review time of application and for other costs once approved)
- Tariff – Not required for approval of application, but need tariff to receive actual operating authority.
- Timeframe – 90 days or less if uncontested (if contested, will generally be because not in US West territory and will involve service to areas served by rural carriers — then may take 10+ months).
- Hearing – Yes if someone intervenes; no otherwise

KANSAS

- Application – Yes
- Fee – yes; based on amount of time analysts spend reviewing application
- Tariff – No, but must be on file before start service
- Timeframe – approx. 3-6 months
- Hearing – No

KENTUCKY

- Application – Yes
- Fee – None
- Tariff – No, but must have tariff on file before start service.
- Timeframe – 2-3 months
- Hearing – No

LOUISIANA

- Application – Yes
- Fee – $250.00
- Tariff – Yes
- Timeframe – 2-5 months
- Hearing – Yes (if contested)

MAINE

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 1 month if standard; up to 1 year if not
- Hearing – Yes (if providing rural service; but very brief if application is standard)

MARYLAND

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 2-3 months
- Hearing – No

MASSACHUSETTS

- Application – No – registration
- Fee – $15.00
- Tariff – Yes
- Timeframe – tariff effective 30 days after filing
- Hearing – No

MICHIGAN

- Application – Yes
- Fee – None
- Tariff – Illustrative
- Timeframe – 3 months if standard; 6 months is maximum allowed by law
- Hearing – Yes

MINNESOTA

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 3-4 months
- Hearing – No

MISSISSIPPI

- Application – Yes
- Fee – None
- Tariff – No
- Timeframe – 2-3 months
- Hearing – Yes (they had a hearing on the first application; they are at the beginning stages of this process)

MISSOURI

- Application – Yes
- Fee – None
- Tariff – Yes, but may request a waiver to file it subsequently
- Timeframe – 3-12 months, depending on opposition
- Hearing – Only if party intervenes

MONTANA

- Application – No; Registration only
- Fee – None
- Tariff – Not with registration but must be filed at time service is provided
- Timeframe – Effective immediately if done through website
- Hearing – No

NEBRASKA

- Application – Yes
- Fee – $50.00
- Tariff – No, but recommended
- Timeframe – 3-4 months
- Hearing – Yes

NEVADA

- Application – Yes
- Fee – $200.00
- Tariff – Illustrative
- Timeframe – 45-90 days
- Hearing – Only 1 in 50; this depends on individual circumstances

NEW HAMPSHIRE

- Application – Yes
- Fee – None
- Tariff – Illustrative
- Timeframe – 3 months
- Hearing – No

NEW JERSEY

- Application – No, Notice to Bell Atlantic only for resellers, but facilities–based requires full application
- Fee – None
- Tariff – No
- Timeframe – Immediate
- Hearing – No

NEW MEXICO

- Application – Yes
- Fee – No
- Tariff – yes
- Timeframe – 4-6 months
- Hearing – Yes (only for hearing)

NEW YORK

- Application – Yes
- Fee – None
- Tariff – No
- Timeframe – 2-4 months
- Hearing – No

NORTH CAROLINA

- Application – Yes
- Fee – $250.00
- Tariff – No. File a price list after certification.
- Timeframe – 3-4 months
- Hearing – Yes

NORTH DAKOTA

- Application – Yes; must submit pleading addressing issues in state rules
- Fee – None
- Tariff – No
- Timeframe – 1-3 months
- Hearing – No

OHIO

- Application – Yes
- Fee – None
- Tariff – Yes, as final as possible.
- Timeframe – 2 months
- Hearing – No

OKLAHOMA

- Application – Yes
- Fee – $35.00
- Tariff – Illustrative or can request waiver
- Timeframe – 3-4 months
- Hearing – Yes (if contested)

OREGON

- Application – Yes
- Fee – None
- Tariff – No
- Timeframe – 1-2 months
- Hearing – No

PENNSYLVANIA

- Application – Yes
- Fee – $350.00
- Tariff – Illustrative
- Timeframe – May commence operations upon filing until final approval is granted.
- Hearing – No

RHODE ISLAND

- Application – Yes
- Fee – $300.00
- Tariff – Yes
- Timeframe – 1-2 months
- Hearing – Yes (if contested)

SOUTH CAROLINA

- Application – Yes
- Fee – None
- Tariff – Illustrative
- Timeframe – 3-4 months
- Hearing – Yes

SOUTH DAKOTA

- Application – No; submit documents required in ARSD 2410 Sec. 2402
- Fee – $250
- Tariff – Yes
- Timeframe – 2-3 months if uncontested; 6 months if contested
- Hearing – Yes (if contested)

TENNESSEE

- Application – Yes
- Fee – $50.00
- Tariff – If facilities–based, Yes.
- If resale, may file after certification, but before initiating service.
- Timeframe – 1-2 months
- Hearing – Yes

TEXAS

- Application – Yes
- Fee – None
- Tariff – No, but price list must be filed when CLEC begins providing service
- Timeframe – 2 months
- Hearing – No

UTAH

- Application – Yes
- Fee – $100.00
- Tariff – No
- Timeframe – 3-6 months
- Hearing – No

VERMONT

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 6-9 months
- Hearing – Yes (if contested)

VIRGINIA

- Application – Yes
- Fee – None (but $75.00 to incorporate as public service corporation)
- Tariff – Illustrative
- Timeframe – 3-4 months
- Hearing – No

WASHINGTON

- Application – Yes (plus Petition for Competitive Classification).
- Fee – None
- Tariff – Yes
- Timeframe – 3-4 months
- Hearing – Yes (if contested)

WEST VIRGINIA

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 3-4 months
- Hearing – Yes (if contested)

WISCONSIN

- Application – Yes
- Fee – None
- Tariff – Yes
- Timeframe – 2-3 months
- Hearing – No

WYOMING

- Application – No; registration
- Fee – $15.00
- Tariff – No
- Timeframe – 2-3 months
- Hearing – Yes

Attachment C: List of Acronyms and Significant Terms

Act	Also "1996 Act," "Telecommunications Act". The federal Communications Act of 1934, as amended by the Telecommunications Act of 1996. This is the federal statute that defines the relative jurisdiction of the FCC and state PSCs.
BOC	Bell Operating Company: Ameritech, Bell Atlantic, BellSouth, Southwestern Bell and U S West. A subcategory of ILECs.
CLEC	Competitive Local Exchange Carrier. These are the new entrants that have begun to offer local telephone and data services in direct competition to BOCs and other ILECs.
CMRS	Commercial Mobile Radio Service. Includes cellular telephone service, paging and PCS service.
Collocation	The process by which one carrier installs its equipment in the office of another carrier to interconnect their networks.
Dark fiber	The provision of fiber optic cable between two locations.
FCC	Federal Communications Commission
Frame relay	A packet-switched data service, used for local area networks, wide area networks, internet access, etc.
ICB	Individual Case Basis. Individually negotiated contract with customer-specific prices for telecommunications services.
ILEC	Incumbent Local Exchange Carrier. The incumbent local telephone companies, including the BOCs, GTE, and a host of smaller carriers.
Interconnection	The process by which two carriers interconnect their networks. Usually achieved by collocation, it includes the payment of reciprocal compensation and access to UNEs and resale services.
ISDN	Integrated Services Digital Network. An advanced data service that can provide integrated voice, data and video communications over the same circuit.
ISP	Internet Service Provider.
IXC	Interexchange Carrier. Long distance carriers, such as AT&T.
Reciprocal compensation	The rate paid between interconnected carriers for terminating and transporting traffic of the other carrier. When a call originates on a Carrier A's network and is delivered to a customer on Carrier B's network, Carrier A pays carrier B for terminating the call.
PCS	Personal Communications Service. The next generation of cellular service frequently provided over digital facilities. Typically includes cellular-like telephone service, paging and voice messaging in a single service package.
PIC	Presubscribed Interexchange Carrier. End users designate a long distance carrier to which they are automatically linked as soon as they dial a long distance number. This is presubscription.
PIC Change	When a customer switches from one presubscribed long distance carrier to another. A PIC change that occurs without a customer's authorization is called "slamming."
PSC	Public Service Commission. Generic term for state regulatory agency.
POP	Point of Presence. An office maintained by a carrier that houses switching or other network equipment.
SGATC	Statement of Generally Available Terms and Conditions. A tariff-like public document in which a BOC lists rates, terms and conditions for interconnection and resale.

Slamming	A change in a customer's presubscribed long distance carrier without the customer's permission.
Tariff	A public contract that lists the rates, terms and conditions under which a carrier offers its services.
UNE	Unbundled Network Element. The Act requires that ILECs break down their networks into discrete functional components and provide them to competitive carriers on request. Each discrete component is a UNE.
UNE-P	The Unbundled Network Element Platform. A combination of UNEs that reassemble all of the switching and transport functions that an ILEC provides between a customer premises and an IXC point of presence.
Universal service	Federal and state subsidy programs to reduce the cost of service to schools, libraries, people living in rural areas, and low-income and hearing-impaired subscribers.
xDSL	Digital Subscriber Line. The "x" is a generic reference to a variety of DSL technologies that greatly expand the capacity of the existing copper facilities that bring telephone service into homes and offices.

KELLEY
DRYE

Attachment D: Overview of the Kelley Drye & Warren Telecommunications Practice

In addition to the Telecommunications Group, Kelley Drye & Warren boasts a full-service practice that provides a powerful set of resources for our clients. The firm was founded in 1875, and Kelley Drye has been an institution in financial and corporate circles ever since. With over 320 attorneys, Kelley Drye's home office is located at 101 Park Avenue, New York. In all, the firm maintains offices, or relations with affiliate offices, in:

New York	Washington, D.C.
Los Angeles	Chicago
Miami	Stamford, Connecticut
Parsippany, New Jersey	Brussels
Hong Kong	Tokyo (affiliate)
New Delhi (affiliate)	Jakarta (affiliate)

The firm's practice groups include corporate finance, domestic and international transactions, intellectual property, health care, employment law, environmental law, immigration, products liability, securities, tax, white collar crime, real estate and general litigation.

Kelley Drye's corporate clients include such companies as:

Nations Bank	Paine Weber
Sumitomo Bank	Equitable Life
Johnson & Johnson	Allied Signal
SmithKline Beechum	Matsushita Electric

The Telecom Group at Kelley Drye did not exist prior to February 1996. It was formed in February 1996 when seven attorneys left Wiley, Rein and Fielding (D.C.'s largest telecommunications practice). In February 1997, this core group was joined by eight attorneys from Reed Smith Shaw & McClay (D.C.'s oldest telecommunications practice). With additional hires, we now number 27 attorneys and are continuing to grow at a dramatic pace -- in only our second year of existence, we rank as the third largest telecommunications practice in D.C.

The breadth and depth of experience in the Telecom Group is unparalleled. The nine most senior attorneys in the group *average* 19 years of telecommunications experience. This seasoned group has generated incredible synergies, both in terms of legal and technical expertise, and in knowledge of industry players in both the domestic and international markets. Brief biographies of the senior members of the Group are attached. We are actively involved in the full spectrum of telecommunications business and regulatory matters, representing clients in the following areas:

Negotiations With Incumbent Local Exchange Carriers ("ILECs")

We have negotiated, and continue to negotiate, interconnection agreements with every Tier 1 ILEC (the Bell Operating Companies, GTE, Rochester Tel., Cincinnati Bell, Southern New England Telephone) and Sprint, on behalf of Competitive Local Exchange Carriers ("CLECs"), Interexchange Carriers ("IXCs"), internet service providers and wireless carriers.

Contract Negotiations With Other Carriers

We advise our clients on strategic partnering, joint service provisioning, and purchases of services and network capacity. We have negotiated and drafted contracts for a wide variety of ventures involving ILECs, CLECs, IXCs, wireless carriers, equipment manufacturers, and shared tenant service providers.

Arbitrations

We have conducted interconnection arbitrations for CLECs in 20 states across the country. These are formal regulatory proceedings that determine the rates, terms and conditions under which competitive carriers interconnect their networks with ILEC networks.

ILEC Long-Distance Authorization Proceedings

We are currently representing CLECs in Section 271 proceedings (in which ILECs are attempting to obtain authority to enter long-distance markets in their service areas) in 12 states, and before the FCC and the Department of Justice. These proceedings focus on the implementation of interconnection agreements.

Business/Strategic Advice

We advise a wide range of CLECs, IXCs, wireless carriers, and resellers on developing and revising business plans. This advice typically involves in-depth analysis of FCC access charge rules and Universal Service issues, analysis of ILEC tariffed rates, state and federal regulatory forecasting, etc.

Complaints/Actions for Damages

On behalf of CLEC clients, we are prosecuting complaints against ILECs before a number of state regulatory commissions and the FCC, and litigating before several state courts.

Judicial Appeals

We are currently representing CLECs and IXCs in appeals of state arbitration decisions in federal district courts in nine states, and in appeals of FCC decisions before the U.S. Courts of Appeals for the Eighth Circuit, the D.C. Circuit, and the U.S. Supreme Court. We also are representing a coalition of 25 foreign governments, international carriers and trade associations – representing over 50 countries on five continents – in an appeal of the FCC's settlement rate policies before the U.S. Court of Appeals for the D.C. Circuit.

State and Federal Regulatory Authorizations and Tariffing

We routinely assist our clients in obtaining requisite state and federal authorizations to provide domestic and international wireline, wireless and resale-based telecommunications services. We have prepared certification applications in all 50 states, and have on file a variety of template tariffs for use by new entrants.

Transactional Practice

Working in conjunction with our Corporate Finance practice groups in New York and Connecticut, we assist our clients in identifying sources of financing, and provide the full range of transactional, litigation and regulatory support for mergers, acquisitions, transfers of control, and issuance of new debt and equity.

International Matters

We maintain one of the largest international telecom practices in D.C., with full support for international transactions, acquisition of satellite and undersea cable capacity, settlements negotiations, and strategic partnering.

Representative Clients

Below is a representative list of telecommunications clients:

British Telecom	(largest British telco)
Cable & Wireless	(multinational telco, in 50 countries)
Comcast	(Cable conglomerate)
CompTel	(ICX trade association)
COMSAT	(US signatory to INTELSAT/INMARSAT)
DIGEX	(6th largest internet network provider)
Deutsche Telecom	(largest German telco)
Fujitsu	(equipment manufacturer)
Intermedia Communications Inc.	(largest independent CLEC)
KDD	(international arm of largest Japan telco)
LCI International, Inc.	(5th largest IXC)
Paging Network, Inc. (Pagenet)	(largest paging carrier)
PowerTel	(2nd largest PCS carrier in Southeast)
PSInet	(3rd largest internet content provider)
Split Rock (owners of Prodigy)	(2nd largest internet content provider)
Western Wireless	(2nd largest cellular/PCS carrier in West)

And dozens of other IXCs, CLECs and international carriers.

Below are summary biographies of the senior attorneys in the Telecommunications Practice:

Bob Aamoth has served as outside counsel since 1983 to numerous domestic and foreign interexchange carriers and their industry associations. He has experience with virtually all facets of international and domestic telecommunications regulation, focusing upon access and interconnection, universal service, and accounting rates and market entry policies. In the antitrust field, Bob has represented long-distance carriers before the courts, the Department of Justice and the FCC regarding the AT&T divestiture and Bell entry into the long-distance market under the 1996 Telecommunications Act. Bob also has experience in federal appeals, primarily involving telecommunications issues, before the U.S. Court of Appeals for the District of Columbia, 4th, 8th and 9th Circuits.

Danny Adams served as an attorney at the FCC from 1975-1978, his last position being that of Special Assistant to the Chief, Common Carrier Bureau. Since his entry into private practice in 1978, Danny has represented long distance companies, wireless carriers, billing clearinghouses, information service companies and local service providers on both federal and state matters. He also assists clients in specialized telecommunications litigation matters, including FTC and State Attorney General enforcement actions.

Bob Boehm has been involved in a broad variety of telecommunications and other transactions and contract preparation since 1981 and provides corporate, securities and contract law support to the KDW Telecom Group. Mr. Boehm has represented a variety of issuers of securities and underwriters in equity and debt transactions, including venture capital transactions and initial public offerings. He has also represented numerous publicly held and private companies in mergers and acquisitions and service and other contract negotiations related to, among other things, telecommunications services, including internet services. Mr. Boehm also served as a staff attorney with the Securities and Exchange Commission and has lectured on the college and law school levels on business law topics.

Jon Canis served in the Tariff Division and the Accounting and Audits Division of the FCC from 1984 to 1987. Since entering private practice in 1987, Jon has represented competitive local service providers, interexchange carriers, information service providers and large users of communications services. In this practice, he assists new competitive companies in developing their business plans and obtaining necessary state and federal authorizations, negotiates and litigates network interconnection agreements, represents clients before the FCC and numerous state regulatory commissions, and specializes in analyzing and litigating matters involving the tariffs, rates and service contracts of both dominant and competitive carriers. Jon served as Counsel to the Association for Local Telecommunications Services, the trade association for the competitive local service industry, during its first two years of existence, and remains an active member of that organization.

Jim Freeman has practiced Communications Law for more than thirty years, first with Pierson Ball & Dowd and after 1989 with Reed Smith Shaw & McClay into which the Pierson firm merged. Jim initially concentrated on the representation of broadcast clients, including general regulatory representation as well as handling transactional matters, bankruptcy and litigation for licensees seeking the renewal of their licenses and those engaged in comparative hearings for new stations. While continuing to represent broadcast clients, Jim has more recently also represented various wireless carriers, service providers, and others in regulatory and transactional matters affecting the telecom industry, including hearings before state commissions.

Joan M. Griffin has practiced both domestic and international communications law in a variety of positions since 1981. In her current position as Senior Counsel in the Telecommunications Practice Group, Joan advises foreign carriers on international policy issues and FCC regulatory requirements. Previously, Joan served as Chief U.S. Regulatory Counsel to British Telecommunications and Concert Communications Company, where her responsibilities included establishing BT North America as a U.S. carrier and advising on regulatory issues associated with the merger and joint venture activities of BT and MCI. Joan has also served as regulatory counsel at in-house positions in GTE Corporation and Contel Corporation and as Assistant General Counsel to American Satellite Company.

Brad Mutschelknaus has served as both outside and in-house counsel to communications companies since 1980. These include in-house attorney positions with Satellite Business Systems and Sprint Corp., as well as service as General Counsel of National Telephone Services, Inc. Brad was in the private practice of law from 1980-1983 and continuously since 1990. He represents numerous companies before state PUCs and the FCC, and in contract negotiations. Brad has supervised dozens of nationwide campaigns for PUC approvals of mergers and acquisitions.

Phil Permut served as an attorney for the Federal Communications Commission from 1968-1977, working in both the broadcasting and common carrier areas. During that time, Phil served as trial counsel for dozens of FCC administrative hearings and appeared before U.S. Courts of Appeals on behalf of the FCC on numerous occasions. During his time in the Common Carrier Bureau, Phil served as Special Counsel to the Chief, Common Carrier Bureau; Chief, Policy and Rules Division; and Deputy Chief. After a year as Washington counsel to RCA Global Communications, Phil entered private practice in 1979. Over the last 19 years, he has represented a wide array of clients, including foreign carriers and governments, international satellite companies, interexchange carriers, wireless carriers, investors, cable companies and programmers, and entities seeking radio spectrum allocations for new services.

Aileen A. Pisciotta has over 20 years experience in all aspects of U.S. domestic and international common carrier, mass media and satellite communications regulation. From 1994-96 Aileen was a Division Chief with the International Bureau of the Federal Communications Commission, responsible for international telecommunications policy planning and negotiation of cross-border spectrum agreements. From 1983-94 Aileen was in private practice, and before that served as Special Assistant to the Chief, Common Carrier Bureau, as Assistant Director for Economic Policy in the State of Alaska Office of Telecommunications and in the Justice Department Antitrust division. Aileen advises U.S. and foreign clients on U.S. international and satellite policies and authorizations, including foreign ownership and market access issues, spectrum planning, foreign telecom privatization and regulatory developments and commercial and finance strategies, including project finance.

Judith St. Ledger-Roty, after serving as an attorney at the FCC, entered private practice in 1982 and subsequently headed up the Communications Practice Group at Reed Smith Shaw & McClay for nearly ten years. Judith focuses upon domestic common carrier regulation, with emphasis upon spectrum and wireless issues. She also provides strategic advice and consultation for both wireless and wireline clients to assist them in devising long-term market entry and participation plans in the domestic telecommunications industry.

Chip Yorkgitis has 11 years experience in FCC and state PUC matters, including interconnection negotiation, arbitration and litigation, spectrum allocation proceedings and technical equipment-oriented regulatory issues. Chip also has extensive experience representing clients in common carrier, wireless, satellite and international matters and in telecommunications-related litigation matters