BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter Of The Application Of Cincinnati Bell Telephone Company For Approval Of A Retail Pricing Plan Which May Result In Future Rate Increases	))))	Case No. 96-899-TP-ALT

MEMORANDUM CONTRA OF AT&T COMMUNICATIONS OF OHIO, INC., CORECOMM NEWCO, INC. AND MCImetro ACCESS TRANSMISSION SERVICES, LLC TO THE APPLICATION FOR REHEARING OF CINCINNATI BELL TELEPHONE COMPANY

(PUBLIC VERSION)

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(PUBLIC VERSION)

On December 6, 1999 applications for rehearing of the Commission's November 4, 1999 Supplemental Opinion and Order (Order) were filed by Cincinnati Bell Telephone Company (CBT) and jointly by AT&T Communications of Ohio, Inc. (AT&T), CoreComm Newco (CoreComm), Inc. and MCImetro Access Transmission Services, LLC (MCIm)[hereinafter collectively referred to as " Joint Interveners"]. In accordance with Rule 4901-1-35 Ohio Administrative Code, the Joint Interveners hereby submit their memorandum contra the ground for rehearing raised by CBT. The Commission is urged to reject the issues discussed in CBT's application for rehearing for the reasons set forth below.

I. COST OF CAPITAL

A. <u>CBT's Claim that the Commission Erred by Failing to Approve a Cost of Capital of at Least 11.25% Has No Legal, Logical, or Evidentiary Basis, Is Expressly Contradicted by the Testimony of its Own Cost of Capital</u>

Witness, and Is Totally Inconsistent with Another of its Own Assignments of Error.

CBT opens its memorandum in support of its application for rehearing ("CBT Memorandum") with the assertion that the cost of capital input adopted by the Commission for use in establishing TELRIC pricing for unbundled network elements is unreasonably low (CBT Memorandum, 3). This claim is not based on the Commission's failure to accept the overall cost of capital recommendation of its own expert witness, Dr. Vander Weide (*id.*), but on four specific assignments of error set out in its first ground for rehearing. None of these has merit.

In its first assignment of error, CBT contends that it should be allowed a rate of return of at least 11.25%, based on the provision in Commission Local Service Guideline V.B.4.b.3 which states that "(t)he currently Commission-authorized rate of return shall be a starting point for the TELRIC calculation," and the fact that "the FCC has also endorsed the use of the currently authorized rate of return at the state or federal level as a beginning point" in determining the cost of capital input for TELRIC studies (CBT Memorandum, 3, citing the August 8, 1996 FCC First Report and Order, ¶ 702). Noting that CBT does not have a "currently Commission-authorized rate of return" at the state level,[1] but that "CBT's most recent authorized rate of return is 11.25% for federal purposes," CBT contends that, because the Commission did not find that its risk of doing business had decreased, there is no reason this "most recent authorized rate of return would no longer be appropriate" (CBT Memorandum, 3-4). This CBT argument is wrong on so many counts that one hardly knows where to begin.

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[1] There was no explicit rate of return finding in the phase of this proceeding in which CBT's current alternative regulation plan was established (*see* Opinion and Order dated April 9, 1998).

First, the 11.25% figure which CBT describes as "CBT's most *recent* authorized rate of return" (emphasis supplied) is actually the generic default rate of return adopted by the FCC nearly ten years ago for use in establishing interstate access charges (*see* 48 FCC Order 90-315, *In the Matter of Represcribing the Authorized Rate of Return for Interstate Access Services of Local Exchange Carriers*, Adopted: September 19, 1990; Released: December 7, 1990 [CC Docket No. 89-624]). Thus, not only does this 1990 number have nothing whatever to do with CBT's current cost of capital, but, because it was not determined based on CBT-specific data, it had nothing to do with CBT's cost of capital at the time it was adopted. This does not mean that the references to the currently authorized rate of return as a starting point for the TELRIC calculation in Commission Local Service Guideline V.B.4.b.3 and ¶ 702 of the FCC's First Report and Order are meaningless. Indeed, we agree with Dr. Vander Weide's assessment that these provisions were intended to establish a procedure which serves to limit controversy by creating a benchmark which, in the absence of a showing that the last authorized rate of return is inappropriate, can be plugged into TELRIC studies without the necessity of performing a complete cost of capital analysis each time a TELRIC price is established or changed (Tr. I, 22-23). However, we submit that it is obvious that neither this Commission nor the FCC ever contemplated that the last authorized rate of return should be adopted as the cost of capital input in establishing TELRIC prices where, as here, new company-specific cost of capital analyses based on more recent market data are available.

Second, CBT's notion that the Commission's failure to find that CBT's risks of doing business had decreased somehow supports the continued use of the last authorized rate of return completely mistakes the nature of the exercise. Although it is true that, under Local Service

Guideline V.B.4.b.3, the ILEC has the burden of proving that if faces increased business risks if it wishes to use a cost of capital input other than its currently authorized rate of return, this does not mean that the currently authorized rate of return can only be raised and not lowered as CBT appears to suggest. In setting TELRIC prices, the Commission cannot simply ignore evidence which demonstrates that the cost of capital to CBT is lower than when its currently authorized rate of return was established. The point CBT continues to miss is that it is simply not possible to start with the last authorized rate of return and perform some discrete adjustment which captures nothing but the impact of changes in risk due solely to changes in the competitive environment in which an ILEC operates, but ignores all other factors that have changed over the past decade. None of the cost of capital witnesses, including Dr. Vander Weide, started with the last authorized rate of return and attempted to adjust it for changes in risk related to competition. How one would do this is beyond us and, more importantly, there is no reason one should try.

The issue before the Commission was not whether CBT's risk of doing business has increased or decreased since the FCC established its 11.25% default rate of return in 1990. Even if the Commission had made a finding that CBT's business risk has not decreased,[2] that does not mean, as CBT would have it, that its cost of capital cannot have decreased over the same period. The difference between CBT's cost of capital today and its cost of capital at the time the Commission and the FCC last examined the issue is the product of a vast range of micro and macro economic changes, not just changes in the business risk confronting CBT. The evidence before the Commission clearly showed that these changes, taken together, have resulted in a

[2] The fact is that the Commission made no affirmative finding one way or the other, nor was there a reason for it to have done so.

substantial reduction in CBT's overall cost of capital, notwithstanding whether there was an increase or decrease in the business risks faced by CBT.

The evidence showed that long-term treasury bond yields had fallen on the order of 300 to 400 basis points between 1990 when the FCC adopted the 11.25 percent default rate of return and the time this case was heard, implying, under a rough risk premium approach, that the cost of equity has fallen by a similar amount (MCI/AT&T Jt. Ex. 3, at 52-53; MCI/AT&T Jt. Ex. 4, at 19; Tr. XVIII, 36-37).[3] In addition, CBT's current cost of debt, pegged by Staff witness Chaney at 7.07 percent (Staff Ex. 8, at 2; Staff Ex. 8, Schedule 1), is far below the 8.82 percent the Commission adopted the last time it specifically examined the issue in a CBT rate case [*see Cincinnati Bell Telephone Company*, Case No. 84-1272-TP-AIR (October 29, 1985), at 26] or the 8.46 percent cost of debt implicit in the stipulation approved by the Commission in CBT's initial alternative regulation proceeding [*see Cincinnati Bell Telephone Company*, Case No. 93-432-TP-ALT (May 5, 1994), Stipulation and Recommendation, 6, and Staff Report of Investigation, 19). As CBT witness Vander Weide readily acknowledged, the cost of capital is not static (Tr. I, 22). The current cost of capital to CBT can only be determined by examining current market data and bears no necessary relationship to the cost of capital to CBT at any point in the past. The evidence here clearly demonstrates that, regardless of the impact of competition, the overall cost of capital to CBT has declined since the issue was last addressed by this

[3] If long-term treasuries are viewed as the risk-free rate and the equity risk premium is constant, the implied cost of equity is obviously lower than it was in 1990 when long-term treasury bond yields were 300 to 400 basis points higher.

Commission and the FCC.[4]

This is not to say that the impact of changes in the business risks confronting CBT should not be recognized in the cost of capital determination. Of course they should. However, this impact can only be captured through the use of current market measures of the cost of capital, such as those employed by staff witness Chaney in developing the cost of capital adopted by the Commission in this case. CBT's recitation of factors which suggest that it is, or will become, subject to increasing competition (CBT Memorandum, 4) has nothing to do with this process.[5]

CBT's contention that the Commission adopted an inconsistent set of competitive assumptions by ordering the use of fill factors which assumed the impact of competition while simultaneously approving a "low cost of capital because of the absence of competition (*id.*) (emphasis original) completely mischaracterizes the Commission's finding and reveals a fundamental misunderstanding of the TELRIC theory. TELRIC pricing attempts to identify current economic value based on forward-looking economic costs, including the forward-looking cost of capital. As the Commission correctly recognized in its order, "the forward-looking cost of

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[4] Indeed, the FCC noted in its First Report and Order that it is in the process of considering whether the current federally-authorized default rate of return of 11.25 percent is too high "given the current marketplace cost of equity and debt" (FCC August 8, 1996 First Report and Order, ¶ 702).

[5] We would note, in passing, that even on the qualitative level on which CBT wants to discuss the subject of competition, there is no basis for assuming that the business of leasing unbundled network elements subjects CBT to increased business risks. Regardless of the level of competition for local service customers, CBT remains the only firm in its service area which leases unbundled network elements to competitors (Tr. XVIII, 16-17). Indeed, not only is there no competition in this business segment, but the ability to lease unbundled network elements provides CBT an earnings opportunity, without additional investment, on plant which would have been idled had the customer in question been lost to a facilities-based competitor (MCIm/AT&T Jt. Ex. 3, Appendix 1; MCIm/AT&T Jt. Ex. 4, at 25).

capital does not assume the presence or absence of competition but, rather, it reflects the market's current expectations regarding the impact of competition now and into the future" (Opinion and Order, 12). Thus, using the current cost of capital as a TELRIC input is no different than using current prices for the other TELRIC inputs considered in valuing the network. In both instances, the current value is the product of current expectations as to future conditions. CBT continues to confuse "forward-looking" with "future."

Commission Local Service Guideline V.B.4.b.3 and ¶ 702 of the FCC's August 8, 1996 First Report and Order pull the rug from under CBT's claim that TELRIC pricing presumes the existence of competition. Both place the burden of proof on the ILEC to show that the business risks it faces in providing unbundled network elements justify a different cost of capital input than that embodied in their latest authorized rate of return. If these agencies had intended to require that the cost of capital input be based on an assumption of full competition, surely they would simply have said so rather than imposing this burden on the ILEC. Its arguments to the contrary notwithstanding, it is clear that CBT understands this. If TELRIC presumes the existence of competition, why has CBT devoted so much effort to trying to prove it exists?[6]

Finally, CBT's argument that the cost of capital should be at least 11.25% is totally inconsistent with its fourth assignment of error in which it contends that the staff witness Chaney's analysis of the cost of capital -- the analysis the Commission accepted in determining the cost of

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[6] In this connection, we would note that the Massachusetts Department of Public Utilities order [*Re New England Telephone and Telegraph Company dba NYNEX*, D.P.U. 96-73/74, D.P.U. 96-75, 96-80-81, D.P.U. 96-83, 96-94-Phase 4 (December 4, 1996), at 26, 27] upon which CBT relies for support for the notion that the use of a hypothetical, future cost of capital is mandated by TELRIC theory (CBT Memorandum, 5) is clearly a minority view (*see* cases collected at CoreComm Ex. 2, at 10-12).

capital input for purposes of this case -- should be updated to take into account more current data. Although, as discussed *infra*, that assignment of error is also totally without merit, the point, for purposes at hand, is that, in one breath, CBT asks the Commission to base the cost of capital on pre-1990 data, while, in the next, it complains that year-end 1998 data is not current enough. There is no legal or logical justification for the 11.25% cost of capital CBT now contends is appropriate. Rehearing on this ground should be denied.

B. CBT's Allegation that the DCF Calculations Performed by Staff Witness Chaney Contain Mathematical Errors Is Not Timely.

In its second assignment of error, CBT alleges that the DCF component of staff witness Chaney's cost of equity analysis contains mathematical errors which the Commission should correct before relying on this analysis in establishing the cost of capital input for purposes of CBT's TELRIC studies. Specifically, CBT charges that Mr. Chaney's calculation of the second-stage growth rate used in his three-stage DCF model was incorrect, an error which, according to CBT, ultimately resulted in understating CBT's overall cost of capital by 21 basis points (CBT Memorandum, 7). The problem with CBT's complaint regarding this supposed error is that it comes way too late. CBT had every opportunity to cross-examine Mr. Chaney on his calculation and/or to present rebuttal testimony by its own expert showing how, in its assessment, the calculation was in error. However, at this juncture, all the Commission has before it is the "testimony" of the author of CBT's rehearing application that an error was committed with no way to determine, on the existing evidentiary record, that said author knows how the challenged calculation was actually performed or, for that matter, how it should be performed. This is not a sufficient basis upon which to grant rehearing, let alone to "automatically" increase the cost of

capital as CBT would have the Commission do (*see* CBT Memorandum, 7).

Allowing a party to raise issues on rehearing that could have been, but were not raised on the record upon which the case was decided is also inappropriate because it prejudices other parties to the proceeding. In this instance, Joint Interveners did not file for rehearing with respect to the Commission's adoption of Mr. Chaney's cost of capital recommendation, not because we agreed with every element of his analysis, but because we did not regard the ultimate result to be so unreasonable as to warrant devoting additional resources to such a challenge. Based on the arguments CBT had theretofore advanced, Joint Interveners were confident that the Commission would not change its finding on the cost of capital issue. However, had we had any reason to believe that Mr. Chaney's second-stage growth rate was to be placed in issue on these new grounds, we most certainly would have joined the debate by applying for rehearing of the Commission's finding accepting that aspect of Mr. Chaney's analysis. Indeed, as a review of the MCI/AT&T post-hearing briefs will demonstrate, we regarded two of the most important inputs to Mr. Chaney's determination of the stage two growth rate -- the length of the period before the CBT growth rate would converge with the growth rate of the U.S. economy as a whole and Mr. Chaney's determination of the growth rate of the economy as whole -- to be two of the least defensible elements of Mr. Chaney's analysis. After having accepted a 14-year second stage in the Ameritech Ohio TELRIC proceeding (*see In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*, Case No. 96-922-TP-UNC (Opinion and Order dated June 19, 1997), the Commission, without explanation, departed from that precedent and accepted the 19-year second stage proposed by

Mr. Chaney, even though Mr. Chaney had specifically agreed that the 14-year second stage used by MCI/AT&T witness Hirshleifer was not unreasonable (Tr. XV, 59). Unlike the length of the second stage, which we concede is a matter of judgment,[7] the rate used by Mr. Chaney as the growth rate of the economy was not only woefully outdated, but was not calculated in accordance with procedure established for use prospectively by the very FERC decision from which Mr. Chaney obtained it (Tr. XV, 52-55, 60-66).[8] Moreover, as a review of this FERC order denying rehearing will reveal, there was an issue raised by the parties seeking rehearing in that proceeding as to the accuracy of the calculation which produced the growth rate adopted in the initial decision. Ironically, the FERC declined to correct the alleged error precisely because the issue had not been timely raised (Order Denying Rehearing, 5-6, 39-40). This Commission should do so here as well. However, in the event the Commission should decide to permit CBT to pursue this alleged "error" by granting rehearing, fairness requires that Joint Interveners be given the opportunity to pursue these related issues.

Obviously, it would not be sound policy for the Commission, as a matter of course, simply to overlook errors in any analysis it accepts. However, even if Mr. Chaney did inadvertently err in this aspect of his calculation in this case,[9] the cost of capital approved by the Commission is still well within the range CBT claims would result if the alleged error were corrected. Under

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[7] This does not mean that the Commission may ignore its own precedent and, without explanation, apply different standards to different companies.

[8] Mr. Chaney obtained his estimate of projected nominal growth in the GDP from an October 16, 1997 FERC Order Denying Rehearing in *Northwest Pipeline Company*, Docket Nos. RP93-5-027, RP93-96-007, 81 F.E.R.C. P61.036, 1997 Lexis 2198.

[9] In so stating, Joint Interveners in no way intend to suggest that he did. Like the Commission, we have no way to test CBT's allegation based on the existing evidentiary record.

circumstances, where, for those reasons stated above, the midpoint of the Chaney range is biased upward, the use of a cost of capital below the midpoint of the range as recalculated by CBT is certainly not unreasonable. Rehearing on this ground should be denied.

C. CBT's Contention that the Commission Erred by Failing to Substitute Certain Assumptions Made by Its Own Cost of Capital Witness for Certain Assumptions Made by Staff Witness Chaney Is Not Supported by the Evidence of Record.

1. The Commission's Acceptance of Mr. Chaney's Use of a Book Capital Structure Was Not Unreasonable Under the Circumstances of This Case.

CBT prefaces its discussion of its next assignment of error with the observation that, in determining the appropriate cost of capital input, the Commission was not required to choose among the cost of capital recommendations of Messrs. Chaney, Vander Weide, and Hirshleifer, but could have chosen among the various elements of their respective analyses so as to produce an appropriate methodology and instructed CBT to apply that methodology in calculating a new cost of capital (CBT Memorandum, 7). Leaving aside why the Commission would ever instruct CBT to calculate a new cost of capital rather than performing the task itself, the short answer here is that the Commission did not adopt this mix-and-match approach because it did not agree that Mr. Chaney's analysis was incorrect in the two areas specifically cited by CBT.[10] Moreover, once the Commission concluded that Dr. Vander Weide's objective, which was to determine a future cost of capital rather than the current, forward-looking cost of capital, was not consistent with the TELRIC methodology, almost everything he had to say went by the boards because his study

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[10] Joint Interveners would note that there are some mixes and matches that are not theoretically permissible, such as the use of Mr. Chaney's recommended cost of debt, which CBT specifically endorsed on brief (CBT Initial Brief, 21), with the debt component of Dr. Vander Weide's capital structure, which was not based on CBT at all, but rather on the S&P Industrials.

focused on an analysis of the S&P Industrials, companies operating in fully competitive markets, rather than CBT and firms like CBT (*see* Opinion and Order, 12).

CBT begins its criticism of the Commission's acceptance of the use of the book capital structure as advocated by Mr. Chaney, with the claim that the Commission adopted the book capital structure without addressing any of CBT's economic arguments as to why the use of book capitalization ratios is inappropriate in the TELRIC context (CBT Memorandum, 8). This statement is only partially correct. Although it is true that the Commission did not make a specific finding as to whether the use of a book or market capital structure was theoretically correct, there was no need for it to do so in view of the record before it.

As the Commission observed (*see* Opinion and Order, 13), MCI/AT&T witness Hirshleifer, who agreed that, from a purely theoretical standpoint, market value weights provide the most appropriate estimate of the forward-looking cost of capital (*see, e.g.,* Tr. XII, 72), did not oppose the use of the CBT book capital structure *as a proxy for the market capital structure* based on the circumstances presented by this case (Tr. XII, 84-85). As Mr. Hirshleifer explained, the problem here is that there is no observable capital structure -- be it market or book -- for an entity engaged solely in the business of leasing unbundled network elements (Tr. XII, 84-85). Because his own proxy group, due to market data availability constraints, had to be evaluated at the holding company level, his sample companies, while as closely comparable as possible to CBT, were diversified firms which operated many businesses, most, if not all of which are riskier than the business of leasing unbundled network elements (MCC/AT&T Jt. Ex. 3, at 13). Because the goal is to estimate the capital structure a rational management team would deploy for a firm engaged in the network element leasing business (MCC/AT&T Jt. Ex. 3, at 41), and because

businesses which face less operating risk can prudently utilize more lower-cost debt financing than riskier enterprises without raising total risk above acceptable levels (*id.;* MCC/AT&T Jt. Ex. 3, at 12), Mr. Hirshleifer chose to use the book capital structure as the lower bound of the appropriate range for the weighted average cost of capital for CBT's network element leasing business (MCI/AT&T Jt. Ex. 3, at 43).[11] Consistent with approach advocated by CBT, the upper bound of his range was based on the market capital structure displayed by his proxy group. However, as the Commission found, Mr. Chaney's capital structure approximated the midpoint of Mr. Hirshleifer's proposed range (Opinion and Order, 13). Accordingly, both of these capital structures could be viewed as a proxy for the market capital structure of a firm engaged in the network element leasing business, making it unnecessary for the Commission to make a specific finding as to whether Mr. Chaney's justification for the use of a book capital structure was theoretically correct. In short, on these facts, it simply did not matter.

As described by the Commission in its order, Mr. Chaney's justification for using a book capital structure was that the unbundled network element leasing business is a monopoly service and that the use of a market-based capital structure would constitute an unwarranted risk adjustment which would produce a cost of capital in excess of that required by investors in a monopoly service (Opinion and Order, 11). CBT argues that, regardless whether the provision of unbundled network elements is a monopoly service, TELRIC requires the use of forward-looking

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[11] In fact, Mr. Hirshleifer's rationale for using the book capital structure as the lower bound of his recommended capital structure range is consistent, in principle, with decisions of this Commission finding it appropriate to include only the investment in domestic telephone operating subsidiaries in instances where the total consolidated capital structure reflects investment in substantial non-regulated business activities [*see, e.g., General Telephone Company*, Case No. 81-383-TP-AIR (April 26, 1982), at 35, and *United Telephone Company,* Case No. 81-627-TP-AIR (June 23, 1982), at 25-26].

costs rather than embedded book costs as used by Mr. Chaney. Again, CBT misses the point. As discussed above, there is no identifiable capital structure for CBT's network element leasing business. However, as Mr. Hirshleifer explained, a monopoly business can prudently support significantly more debt than highly competitive businesses and the capital structure of a monopoly would typically reflect this fact. Thus, it is reasonable to assume that, if CBT's unbundled network element leasing business were a stand-alone entity, its capital structure would contain a higher debt ratio than that of the integrated firm. The goal of this proceeding is to establish fair prices for network elements provided to NECs. TELRIC prices for unbundled network elements should not be inflated to account for the risks of other CBT business lines. Accordingly, using the book capital structure -- a capital structure which contains no adjustment for the risks of competition -- as a proxy for the capital structure of the network element leasing business is both fair and reasonable. Rehearing on this ground should be denied.

2. The Commission Did Not Err by Failing to Apply the Adjustment for Flotation Costs to All CBT Common Equity.

Consistent with the Commission's customary practice in traditional rate cases, Mr. Chaney, while recommending an adjustment for stock issuance costs, limited this 3.5% adjustment to the portion of CBT's common equity balance raised externally to recognize that there are no such costs associated with retained earnings (Staff Ex. 8, at 5-7). CBT contends that the flotation cost adjustment should have been applied to all common equity, claiming that TELRIC theory, which entails a "long-run" analysis, requires the assumption that all equity would be externally generated (CBT Memorandum, 10). We disagree. In fact, as explained by MCI/AT&T witness Hirshleifer (*see* MCI/AT&T Jt. Ex. 3, at 53-55), the case for a flotation cost adjustment is much

weaker in a TELRIC setting than in a traditional rate case. In the rate case context, commissions typically do not include flotation costs as an allowable expense to be recovered through rates because to do so would burden the current rate payer with costs which might not be representative on an ongoing basis. Thus, commissions approve flotation cost adjustments to the cost of equity in the traditional rate case as a way to "amortize" these *embedded* costs perpetually in very small increments. This is not an issue in a TELRIC proceeding where the purpose of the exercise is to establish a forward-looking cost of capital which fairly compensates for the riskiness of the business. The market's assessment of that risk would already include an evaluation of prospective cash flows, including issuance costs, in determining its estimate of the fair price.

Although the Commission did not approve any adjustment for flotation costs in its order in the Ameritech Ohio TELRIC proceeding, *supra*, it accepted Mr. Chaney's flotation cost recommendation in this case without discussion. At minimum, the Commission should at least give recognition to the foregoing principle -- a principle it implicitly accepted in the Ameritech Ohio case -- by again rejecting CBT's argument that the flotation cost adjustment should be made to the entire equity component of the capital structure. Rehearing on this ground should be denied.

D. CBT's Proposal that It Be Permitted to Update the Cost of Capital Analysis Approved by the Commission to Incorporate the Most Current Data Available Is Unreasonable and Inappropriate.

CBT's final assignment of error in the cost of capital area is not really an assignment of error at all, but a proposal which would rewrite the Local Service Guidelines and undo longstanding Commission practice in ratemaking proceedings. After correctly noting that one of

the reasons the Commission gave for adopting Mr. Chaney's capital structure over that recommended by MCI/AT&T witness Hirshleifer was that Mr. Chaney's calculation was based on more current data (*see* Opinion and Order, 13), CBT suggests that the Commission should extend this principle so far as to permit CBT to recalculate its overall cost of capital using Mr. Chaney's methodology but inputting current market data (CBT Memorandum, 10). Left unexplained, of course, is precisely how, when, or under whose scrutiny CBT would do this.

Although it is true that, in the context of general rate cases, this Commission has consistently found it appropriate to base its cost of capital analysis on the most current data available in order that the authorized rate of return will reflect, to the extent possible, the cost of capital to the applicant utility during the period the new rates will be in effect [*see, e.g., Cleveland Electric Illuminating Company*, Case No. 81-146-EL-AIR (March 17, 1982), at 31], the Commission has never found -- or even vaguely suggested -- that the applicant utility should be permitted to recalculate its cost of capital based on data that becomes available after the Commission issues its order. The "most current data available" means the most current data available in the evidentiary record before the Commission at the time of its decision. Otherwise, the process would be never ending, for the parties would continuously be entitled to their day in court to challenge one another's updates.

This CBT proposal is also wrong from a theoretical standpoint. As anyone versed in the economics of rate of return regulation well knows, regulatory lag -- the interval between the implementation of rates and the vintage of the data on which they are based -- is one of the regulatory risks that investors discount in determining the price at which they will invest in a regulated utility. Thus, in theory, the procedure suggested by CBT would, all else being equal,

imply a reduction in CBT's cost of capital.

Of course, all else is not equal, for CBT has obviously already performed the recalculation it now proposes under the guise that it is a matter of principle.[12] Thus, no one will be surprised to learn that, *in this instance*, such an update will produce a higher indicated cost of equity than that determined based on the evidence of record. If CBT truly believed this use of post-hearing market data to be an essential principle, it would have made the staff's failure to recommend this procedure the subject of an objection to the Staff Report of Investigation in the alternative regulation portion of the proceeding and would have pursued the matter in the TELRIC hearing through filed testimony and/or the cross-examination of the cost of capital witnesses. Obviously, this proposal is not the product of CBT's devotion to theoretical integrity, but is purely results driven.[13] Had CBT's recalculation produced a lower indicated cost of capital, we are confident that this CBT proposal would never have seen the light of day.

As noted above, the use of the current cost of capital as a TELRIC input is no different than using current prices for the other TELRIC inputs considered in valuing CBT's network. If the Commission, for some unfathomable reason, were to begin to descend the slippery slope CBT

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[12] It was in performing this update that CBT discovered the alleged error in Mr. Chaney's stage two growth rate (CBT Memorandum, 6).

[13] Indeed, elsewhere in its memorandum, CBT complains that the weighted average cost of capital recommended by Mr. Chaney "is lower than the Staff Report recommendation for establishing retail rates" (CBT Memorandum, 9). Of course, the reason it is lower is because the Staff Report numbers were based on older market data, plainly indicating that the cost of capital had fallen between the time the Staff Report was prepared and the hearing in the TELRIC phase of the case. In fact, as MCI and AT&T pointed out on brief, had the staff used the same cost of equity methodology used in the Staff Report, the indicated cost of capital would have been even lower. Plainly, CBT's complaint that Mr. Chaney's cost of capital recommendation is lower that the Staff Report is clear evidence that its new suggestion for a post-hearing update is totally results driven.

is trying to lead it down by finding that CBT's indicated cost of capital should be updated to reflect post-order developments, logic would require that all other pricing inputs, such as the costs of switching equipment and fiber, also be recalculated on this same basis. Such a procedure is obviously neither feasible nor fair. Rehearing on this ground should be denied.

II. THE COMMISSION SHOULD REJECT CBT'S PROPOSED FILL FACTORS FOR LOOP DISTRIBUTION AND ELECTRONICS.

In its Opinion, the Commission found that "fill factors based on CBT's historical network engineering and deployment practices do not reflect a forward-looking approach for operating an efficient network in a competitive environment." (Opinion, p. 23.) Instead, citing to the record, the Commission rightly found that "CBT's witness conceded that the company's proposed fills were not based on either the FCC's or this Commission's rules regarding fill factors or TELRIC pricing, but instead were based upon a sampling of the fill factors that currently exist in CBT's network." (Opinion, p. 23.)

Offering absolutely no new arguments, CBT urges the Commission to ignore these findings and accept its outlandishly low fill factor recommendations for distribution and loop electronics. Whatever the Commission should choose to do on rehearing,[14] the one thing it cannot do is change course and accept CBT's off the wall fill factor proposals for copper

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[14] CBT seeks rehearing on the Commission's acceptance of Staff's fill factor recommendations for loop distribution and interoffice electronics. Joint Interveners have also sought rehearing on the Commission's acceptance of Staff's fill recommendations in regard to loop distribution, feeder and dedicated interoffice electronics. Unlike CBT, however, which raised nothing new in its application for rehearing, Joint Interveners have raised new, alternative middle-ground approaches to these fill factors that are grounded in the record. (See Joint Interveners' Application for Rehearing, pp.6-11.)

distribution and loop electronics. As the Commission has already found, CBT's fill recommendations are based on a snapshot of its current embedded network, which is wholly inconsistent with the TELRIC methodology.

Based on the governing TELRIC rules, the key question is as follows: what is a reasonable projection of network fill assuming that CBT has rebuilt its network from scratch in a least-cost, most efficient manner? But CBT has offered no evidence in this regard and its witnesses have not even considered the question, as evidenced by the fact its fill factor witness was totally unaware of the forward-looking assumptions dictated by the Commission's TELRIC rules. No CBT witness testified that CBT's embedded fill factors would remain constant if its network was redesigned to be a least-cost, most efficient network – the only relevant network for TELRIC purposes. But it is CBT's burden, and CBT's burden alone, to prove just that. In fact, the record demonstrated that CBT's historical network engineering practices are inefficient and incompatible with the TELRIC cost methodology.

Based on this evidence, Joint Interveners urge the Commission to reject CBT's rehearing application and adopt the middle-ground set of fill factors for distribution, feeder, and loop electronics as proposed in Joint Interveners application for rehearing. Unlike Staff's artificial "middle-ground" fill recommendations, which were based on the mid-point of the parties' recommendations, Joint Interveners' fill recommendations are grounded in the record and are, therefore, appropriate for CBT. Joint Interveners refer the Commission to their application for rehearing for further support for these recommendations.

A. <u>The Applicable TELRIC Rules</u>.

In its governing TELRIC rules, the FCC made it abundantly clear that the forward-looking

costs of a network element, such as a loop, must be derived using reasonable projections of fill factors, or the proportion of a particular network element that will be filled with network usage. First Report and Order, ¶ 682.[15] In addition, the FCC provided that the TELRIC "cost of an element should be measured based on the use of the most efficient technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505. Thus, the FCC directed state commissions to set TELRIC costs assuming that the incumbent LEC's wire centers (or central offices) remain in their existing locations and that the LEC otherwise should "reconstruct" its network from scratch in the least-cost, most efficient manner. These assumptions are the building blocks that establish forward-looking TELRIC costs.

Although CBT repeatedly objected to these assumptions as "unrealistic," and its fill factor witness Mr. Meir mockingly referred to them as "the perfect network," they are exactly the assumptions that the FCC's TELRIC methodology dictates. The FCC could not have been more clear:

> We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers be placed at the incumbent LEC's current wire center locations, but that the reconstructed network will employ the most efficient technology for reasonably foreseeable capacity requirements.

First Report and Order, ¶ 685; 47 C.F.R. § 51.505.

In fact, the Commission's Local Service Guidelines direct the use of these same forward-

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[15] Similarly, in relation to fill factors, the Commission's Local Service Guidelines provide that "fill factors are the proportion of a facility that will be filled with network usage". Local Service Guideline, § V.B.8.

looking assumptions. Local Service Guidelines, § V.B.4. In addition, the FCC and this Commission place the burden squarely on the ILEC to establish the appropriateness of their proposed fill factors: "The ILEC shall have the burden to justify the reasonableness of the fill factors used in its TELRIC studies." (Local Service Guidelines, §V.B.4.b.8.; First Report and Order, ¶ 670; Ameritech TELRIC Order, p. 24; Staff Ex. 5.0, p. 24;)

The TELRIC methodology is designed to avoid having NECs pay for gold-plated, inefficient networks, rife with excess capacity, that ILECs constructed when they were the incumbent monopoly. In the past, CBT, as a rate-of-return regulated company, had little reason to minimize the deployment of spare facilities since all facilities – used or spare – would generate an equal return. CBT similarly did not have the incentive to be the least-cost and most efficient provider, since it faced no competition and was otherwise guaranteed a rate of return on its investment, no matter its efficiency. Thus, in order to foster an efficient marketplace, the TELRIC methodology dictates that state commissions price network elements based on a theoretical network that best replicates the conditions of a competitive marketplace. And the Commission properly found that in such a marketplace CBT could not carry millions of dollars in excess spare capacity that would likely never be utilized.

B. CBT's Proposed Fill Factors Are Not Forward-Looking

Despite these unambiguous rules, the one thing that the record made perfectly clear is that CBT's proposed loop fill factors are not based on any type of forward-looking assessment of what its fill factors would be if it rebuilt its network in the least-cost, most efficient manner. In fact, CBT readily concedes that its proposed loop fill factors simply reflect a "snapshot" of its embedded network usage, which includes excess spare capacity that will likely never be used.

Indeed, the record is clear that CBT's proposed loop fills are nothing more than a reflection of its historical network usage in a monopoly market. CBT's loop fill factors were supported by the testimony of CBT engineer Mr. Paul Meier. But Mr. Meier admitted that he had no knowledge of either the FCC or Commission rules regarding fill factors or TELRIC pricing. (Tr. Vol. II, 127). Mr. Meier further admitted that in determining CBT's loop fill factors, he simply took a sampling of what fill factors currently existed in CBT's network and reported that information to CBT cost witness Mr. Mette, who inputted those results into CBT's cost studies. (Tr. Vol. II, 184; Tr. Vol. III, 27.)

Mr. Meier went on to state that an analysis of whether these fills were the least-cost, most efficient fill factors "was not part of [his group's] study." (Tr. Vol. II, 27.) Mr. Meier conceded that CBT's fill were not a product of an analysis that assumed that CBT's wire centers (or central offices) remain in their existing locations and that it otherwise reconstructed its network from scratch using the least-cost, most efficient technology available. (Tr. Vol. II, 184, Vol. III, 27.) Strikingly, Mr. Meier could only defend CBT's proposed loop fills based on his belief that those fills would remain stable on a "going-forward" basis:

> Q: The fills that you're proposing here aren't based on an assumption that CBT has rebuilt its network from scratch?
>
> A: They are based on what we have in our network. And since we have not seen change in that, we feel that they're on a going-forward basis.

(Tr. Vol. II, 184.)

Indeed, CBT's entire justification of the use of its actual loop fill factors in its TELRIC study is that CBT expects those fills to remain stable on a "going-forward" basis. Mr. Meier's

entire direct testimony is devoted to explaining how CBT's loop fills have remained stable over time. (CBT Ex. 4) Based on this past history, Mr. Meier concluded that he expects these fills to remain the same "going-forward." Mr. Mette, CBT's cost witness, similarly opined that "[b]ecause there are no modifications or changes that will alter the way that CBT provisions new plant in the future, CBT's actual fill factors represent forward-looking fill factors for use in a TELRIC study." (CBT Ex. 7[Mette September 23, 1998], 16)

This testimony is, of course, based upon CBT's continued use of its existing network, and does not support a conclusion that if CBT were to rebuild its network from scratch in the least-cost most efficient manner, that its loop fills would remain the same. CBT has offered no evidence in this regard.[16] The point CBT misses is that just because it anticipates that its inefficient fill factors will remain the same in its embedded network does not magically make them forward-looking. The TELRIC forward-looking cost methodology is based on a set of assumptions wholly ignored by CBT (e.g. that CBT is to rebuild its network from scratch in a least-cost, most efficient manner).

Reliance on embedded fill factors is contrary to the entire goal of the TELRIC pricing methodology: to avoid having NECs pay for network inefficiencies inherent in ILEC networks

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[16] CBT's reasoning is internally inconsistent. On one hand, CBT claims that its low fill factors are necessary to account for future growth, yet on the other hand it concedes that most such growth takes place in areas where it does not have facilities. However, if CBT's fills have remained unaffected by growth, and growth is taking place in areas where CBT does not currently have facilities, it is a reasonable conclusion to be drawn that CBT should drastically increase its loop fills much closer to maximum utilization (Tr. Vol. II, p. 144; Webber direct, 12.) Put simply, as AT&T witness Mr. Webber concluded, if CBT's fills are stable, it is economically reasonable to place facilities in the ground with fill rates close to maximum utilization. (*id.* 11-12.)

constructed under monopoly market conditions. CBT's past history of stable fill factors is irrelevant. The fact that CBT's drastically low fill factors were stable in a historically monopoly environment, and may continue to be stable in future years, is no evidence of what a fill factor would be in a least-cost, most efficient network. In fact, when questioned regarding the TELRIC methodology, Mr. Meier conceded that if he had attempted to reconstruct his network from scratch – a proposition that he repeatedly and mockingly referred to as the "perfect network" -- he would rebuild it differently. (Tr. Vol. III, 137-38.) Mr. Meier also conceded that CBT should reduce its costs when faced with competition (Tr. Vol. III, 124-25.)

But the TERLIC methodology is intended to force CBT to redesign its network and reduce its costs in a manner that already reflects competitive pressures and new technology, and to avoid having NECs pay for gold-plated networks designed in a monopoly marketplace. As the FCC aptly held: "Adopting a pricing methodology based on forward-looking, economic costs best replicates, to the extent possible, the conditions of a competitive marketplace." First Report and Order, ¶ 679.

Perhaps the best example of CBT's failure to conduct a forward-looking analysis of its loop fills is its dogmatic adherence to the assumption that it must design its distribution network to account for "maximum possible demand." (Tr. Vol. II, 135.) In practice, this means that when placing distribution cables, CBT puts in the amount of cable necessary to meet the maximum possible demand in an area for the rest of human existence. (Tr. Vol. II, 135.) CBT does not even attempt to determine what the demand will be in a particular area over the life of distribution cable serving that area. (Tr. Vol. II, 137-38.) In other words, CBT puts in enough cable in a serving area in order to serve demand into infinity despite the fact that the cable lasts for a limited

– finite -- amount of time.

In relation to residential customers, CBT attempts to meet this "maximum demand" by placing two copper cables to every household. CBT wishes to be ready just in case 100% of the population demands a second line. CBT has followed this ancient practice since the *late 1960's* solely because it is the "industry standard" contained in manuals all predating the 1996 Telecom Act. (Tr. Vol. II, p. 164.) While bell-bottom pants, platform shoes and bubble-gum rock have long gone out of style, CBT has stuck by its 2 for 1 assumption. CBT, however, could offer no analysis demonstrating that this 2 for 1 assumption reflects the least-cost, most efficient network usage. In fact, CBT has done no cost-benefit analysis to determine if this assumption actually reflects least-cost, most efficient network usage. (Tr. Vol. II, 169-170.) But it is CBT's burden to prove that this 2 for 1 assumption is the least-cost, most efficient manner to design its network. Claiming that it "just the way we've always done it" simply does not meet this burden.

In fact, the evidence demonstrated that the costs of carrying the unused excess capacity caused by CBT's low loop fill factors are far higher than the costs of reinforcing those facilities. MCIm witness Dr. Ankum did conduct just such a cost/benefit analysis, which demonstrated that it costs many times more for CBT to incur the carrying charges for unused spare distribution facilities based on its embedded fill factor than it costs it to build new facilities. (MCIm Ex. 18, [Ankum direct], 39-48.) As Dr. Ankum correctly noted, CBT's extremely low distribution fill factors leave ***% of its distribution network unused *at all times*. The key issue is whether it is cheaper to place facilities now and incur the costs of carrying this idle capacity, or is it cheaper to come back at a later point in time and increase capacity as demand may materialize. (*id.*, 39-40.) In the past, CBT, as a rate-of-return regulated company, had little reason to minimize the

deployment of spare facilities since all facilities – used or spare – would generate an equal return. (*id.*, 41-42.) The TELRIC methodology is intended to overcome these inefficiencies by forcing incumbent LECs to price UNEs based on a theoretical, least-cost, most efficient network.

Dr. Ankum calculated that in relation to copper cable used in distribution plant, if demand for the cable materialized after three years, CBT would have paid more in carrying charges than it would have cost the company to build facilities in the first place. (*id.*, 44.) If demand materialized after ten years, almost halfway through the economic life of the cable, CBT would have spend 3 to 4 times as much on carrying the idle facilities than it would have cost it to build new facilities with a full economic life. (*id.*) Finally, if demand materialized at the end of the cables' economic life, CBT would have spent 7 to 8 times as much as it costs to construct new facilities but will have only a few years left to recoup those enormous costs before the cable is removed. (*id.* 45.)[17]

AT&T witness Mr. Webber confirmed Dr. Ankum's conclusions, finding that over the economic life of CBT's distribution facilities, the incremental cost of carrying this additional capacity of ***% -- as opposed to using the fills recommended by AT&T and MCIm – is six times greater than the initial cable investment. (AT&T Ex. 10, [Webber direct], 11.)[18] Dr.

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[17] Based on CBT's past growth rate and proposed economic life, the record established that if CBT placed copper distribution at a ***% fill, based on CBT's historic demand data, at the end of the life of that cable its fill would only rise to ***%, leaving almost half of the distribution cable never used. (Tr. Vol. IV, p. 121.) This cannot be the least-cost, most efficient manner to design a network, with nearly half of the network plant going unused at the time of its retirement.

[18] CBT, in fact, admitted that it does not take the economic life into account when placing copper. (Tr. Vol. II, 137-38.)

Ankum concluded that these inefficiencies hold equally true for feeder, as well as distribution.

CBT's 2 for 1 assumption in regard to copper distribution is not only inefficient, but it also is contradicted by its network design in relation to copper feeder. While CBT designs its copper distribution to meet 100% demand for second lines, CBT's feeder plant is designed to meet a 50% demand for second lines. (Tr. Vol. II, 144-45.) It makes no sense for CBT to design a distribution network ready to serve 100% of second line takers when its feeder network could not handle this demand even if it materialized.[19] Yet CBT continues to stand by its antiquated 2 for 1 assumption.

Moreover, the record established that this 100% demand is highly unlikely to materialize. CBT's percentage of second line takers is only ***%, and CBT's records indicate a ***% increase in second-line takers from 1992 to 1998. (Tr. Vol. II, 138-39.) Thus, there is absolutely no basis for CBT to assume 100% demand for second lines, certainly not within the economic life of its distribution facilities . Yet this is exactly the assumption that CBT's fills are based on.

In short, CBT has failed to present any evidence that its fill factors comport with the FCC's or the Commission's pricing rules. CBT has failed to conduct any analysis that its loop fills reflect the least-cost, most efficient network design assuming that CBT has rebuilt its network from scratch. These facts dictate that the Commission reject CBT's proposed loop fills in their entirety.

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[19] Assuming that CBT built its distribution network to be able to serve 50% of second line takers, CBT's distribution fills could rise to 75%. (Tr. Vol. II, 144-45.) This is the exact fill factor recommended by Joint Interveners in their application for rehearing and further highlights its reasonableness.

In realization of this lack of evidence, on rehearing, CBT claims that the way it is administering its network today is the "most effective way to handle *that* network." (CBT Rehearing Brief p. 12 and testimony cited therein (emphasis added).) But this claim is irrelevant because "*that* network" is CBT's *embedded* network. -- not a newly deployed network based on the least-cost, most efficient technology available.

Indeed, in other venues, CBT has admitted that its embedded network is not the least-cost and most efficient. Shortly after the passage of the Telecom Act, CBT filed various pleadings and affidavits with the Eighth Circuit Court of Appeals in Case No. 96-3436. In that docket the Eighth Circuit was reviewing the legality of the FCC's TELRIC pricing methodology. In one particular affidavit, Mr. Donald I. Marshall, Vice President-Regulatory Planning of CBT quite aptly summarized the requirements of the TELRIC methodology and correctly pointed out that *no incumbent LEC, including CBT*, could actually be deploying the least-cost, most efficient network:

> The costs to be used in the TELRIC model mandated by the FCC are not even CBT's actual forward-looking costs but rather are the costs of a hypothetical entity that employs only the most efficient technology, standards that ensure that CBT (and any other incumbent LEC) cannot recover its actual costs. Because of the long lead times associated with network deployment, *it is never possible to have an entire network "least-cost" at any given point in time*.

Affidavit of Donald Marshall, Case No. 96-3436, Eighth Circuit Court of Appeals, September 1996 (emphasis added). By CBT's own admission, therefore, its embedded network does not reflect a least-cost most efficient network. As such, CBT's embedded network cannot be the basis of forward-looking fill factors.

Based on its findings that CBT's fill factors are simply a reflection of its embedded

network, the Commission should affirm its previous holding and reject CBT's proposed fill factors in their entirety.[20] Joint Interveners urge the Commission to adopt the middle ground fill recommendations for distribution, feeder, and loop electronics contained in Joint Interveners' application for rehearing.

C. The Commission Should Reject CBT's Proposed Loop Electronics Fill Factor

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[20] As noted, Joint Interveners agree with CBT that Staff's fill proposals are unsupported by the record, but for different reasons. CBT claims that Staff's "splitting the difference" approach is inherently unreasonable because of what CBT refers to as the "inherently unreasonable" recommendations of Joint Interveners. However, it is important to note that Joint Interveners' original fill recommendations were inherently reasonable, as they were the exact same fills that the Commission approved in the Ameritech TELRIC case. CBT, however, has recommended fill factors for distribution, for example, that are lower than any state commission-approved distribution fill factor in the country. CBT cited to many of the "lowest" fill factors found in out-of-state and out-of-region Commission orders (New Jersey, Missouri, Texas, Georgia, New York, and Maryland). However, even though CBT admits that these are the "lowest" fill factors in the country, none of those states adopted a distribution fill factor even close to CBT's recommendation herein. And CBT failed to mention that the New Jersey Commission did not specifically apply TELRIC. Case No. TD95120631. What is more relevant are the fill factors approved in this region for comparable companies in states where TELRIC was applied, all of which are in line with Joint Interveners' recommendations. The Indiana Utility Regulatory Commission required GTE to apply an 80% fill factor to its outside plant and electronic equipment. (Webber direct, 7). Similarly, the Michigan Public Utilities Commission (MPSC) required an association of small local exchange (MECA) companies to utilize an 80% fill factor for outside plant and a 90% fill factor for electronics. (*id.*,. 7-8.) The MPSC also required GTE of Michigan to apply an 80% fill factor for outside plant and a 90% fill factor for electronics. (*id.*) GTE, in both Indiana and Michigan, serves a physically larger and less densely populated territory than CBT in Ohio. In fact, GTE's service territory in Indiana is several times larger than CBT's, yet the two companies serve roughly the same number of customers. MECA is a group of rurally located telephone companies whose access lines number between 600 to 50,000. (AT&T Ex. 11.0, pp. 7-10.) Hence, CBT is substantially more urban than these companies. With this in mind, it is reasonable to conclude that CBT's fills should be as high, if not higher, than the fills for GTE and the MECA companies. Thus, it is CBT's unreasonable and unprecedented recommendation that makes the Staff's "splitting the difference" recommendation untenable.

CBT also seeks rehearing on the Commission's acceptance of Staff's proposed loop electronics fill factor of 88%. CBT requests that the Commission instead order the use of their proposed ***% fill factor.

For all of the reasons detailed above, CBT's fill recommendation for loop electronics should be rejected. Like all of its proposed loop fills, CBT's proposal for loop electronics is based on a snapshot of CBT's embedded fill factor, with little derivation. (CBT Opening Brief, p. 60.) In fact, MCIm witness Dr. Ankum did a specific analysis of CBT's electronics fill factors and determined that a higher fill factor in the range of Staff's 88% recommendation would result in significant cost savings for CBT and would, therefore, be consistent with a least-cost, most efficient network design. (Ankum rebuttal, pp. 10-13.)

In addition, CBT's criticism of Staff's proposed electronics fill factor is misplaced. Unlike its recommendations for loop distribution and feeder fill, which were based on the mid-point of the parties' recommendations, in regard to electronics Staff did conduct an independent analysis to determine a forward-looking electronics fill factor. Specifically, Staff witness Ms. Soliman studied the annual growth in CBT's interoffice electronics fill factors to determine that, for DSO facilities, the proper fill factor at the mid-point of the study period to be 88% for DSO facilities. Since the same facilities are used in the loop plant, Mr. Francis recommended the same fill factor for loop electronics.

CBT criticizes Staff for utilizing the same fill factor for loop and interoffice electronics. The crux of CBT's argument is that Staff's loop electronics fill factor is unreasonable because it is identical to Staff's proposed fill factor for interoffice electronic equipment. Specifically, CBT argued that "[b]ecause there is no direct relationship between DLC and interoffice equipment, it is

unreasonable to assume that utilization would be the same." (CBT Application for Rehearing, pp. 19-20). Based on this arguments, CBT urges the Commission to accept its recommendations for loop electronics and reject Staff's.

The Commission should reject CBT's self-serving argument out of hand and affirm its finding concerning loop electronics. First, it is important to note that it is CBT's failure to even attempt to conduct a study to determine forward-looking fill factor which has forced interveners and Staff to search for reasonable forward-looking fill factors. Faced with this lack of evidence, Staff should certainly not be criticized for using interoffice electronics fill as a surrogate for CBT's loop electronics fill. Indeed, it is entirely reasonable and appropriate for this Commission to rely on the "best information available" in instances, like here, where an ILEC has wholly refused to conduct the type of forward-looking cost study dictated by the Commission's rules. See, *e.g.*, 47 U.S.C. Section 252(b)(4)(B) (allowing a state commission, when making a 252 determination, to rely on the "best information available" when an arbitrating party refuses to provide information requested by the Commission).

Indeed, *while CBT strongly criticizes Staff for utilizing the same fill factors for loop and interoffice electronics, CBT has done the exact same thing.* CBT itself has recommended that "a forward-looking fill factor of ***% is reasonable for loop electronics" (CBT Initial Brief, p. 60), while it also has recommended "that ***% is a forward-looking fill factor for the electronics used for dedicated interoffice transport." (CBT Initial Brief, p. 63.) It is wholly disingenuous for CBT on the one hand to criticize Staff's use of consistent fill factors for loop and interoffice electronics, when CBT has done that exact same thing. The fact that CBT has recommended identical fill factors for DLC and dedicated interoffice electronics only serves to highlight the

reasonableness of Staff's recommendation.

Staff has a reasonable basis to believe that the fill factors for loop and interoffice electronics would be consistent, and certainly within the same range. MCIm witness Dr. Ankum pointed out that the same technologies are used in both the I/O network and in the feeder portion of the loop plant; for example, the DLC system used in the feeder portion of the loop is OC-3 SONET technology. (MCIm Ex. 22 [Ankum rebuttal], 8). In addition, these technologies are used in similar ways. While CBT cites to MCIm witness Dr. Ankum for the proposition that its feeder and interoffice electronics fill should differ, Dr. Ankum only testified that at the very least the interoffice fill factor should not be lower than the feeder electronics fill. (Ankum rebuttal, 8) Staff's recommendation does not conflict with Dr. Ankum's testimony. *In short, it is reasonable for the Commission to conclude that the Staff's recommendation is the "best information available".*

Thus, it is Joint Interveners' position on rehearing that the electronics fill for all equipment be set at 88%. (See Joint Interveners' Application for Rehearing, pp. 10-11.) As discussed by the Joint Interveners in their application for rehearing, the Staff has recommended that a 70% fill factor be adopted for all SONET equipment in the interoffice network, whereas an 88% fill factor should be used for all DLC equipment (including SONET) for the loop study and other interoffice transport. This anomalous result was refuted by the rebuttal testimony of Dr. Ankum, and simply cannot be supported by the record. The Joint Interveners recommend that the Commissions reject CBT's application for rehearing and adopt a consistent 88% fill factor to be applied to all electronics, and under no circumstances should the fill factor for SONET equipment in the interoffice network be less than 88%.

III. IT WAS REASONABLE FOR THE COMMISSION TO ADOPT THE STAFF RECOMMENDATION WITH RESPECT TO CBT'S PROPOSED LINE CONNECTION CHARGE FOR MIGRATION LOOPS.

As part of its proposed non-recurring charges (NRCs) for the loop, CBT included service order and line connection charges for "new loops" and for existing (migration) loops involving a customer transfer from CBT to a competitive carrier. The line connection charge for both new and migration loops reflects costs associated with a field visit by a technician to physically make the loop connection between CBT's network and the NEC's network (Order, 27). According to supporting documentation provided by CBT to the Staff, the descriptions of the duties performed by the technicians for both new and migration loops were very similar, yet CBT proposed a line connection charge for migration loops which was four times higher than the line connection charge for new loops (Staff Ex. 4 [Francis Direct], 15). Mr. Francis testified that such a difference in time estimates to perform substantially the same functions was not reasonable, and that the shorter time estimate used for the connection of new loops should also be used for migration loops (*Id.*).

The only justification provided by CBT for the substantial difference in the line connection charge for migration loops was a statement made by Mr. Mette in his rebuttal testimony that the difference in the two charges was caused by the need for co-ordination with the NEC during a live customer cutover. This statement has been repeated by CBT in its application for rehearing at page 22, and it should be rejected once again as being insufficient to support such a cost difference. As noted by both the Staff and the Joint Interveners, CBT did not provide a time and motion study to support any of the time estimates included in its NRCs, and this particular item is

a glaring example of an obviously unreasonable and unsupported time estimate (*Id.*).

The Commission correctly recognized that CBT inflated the line connection charge for migration loops to capture *only* the travel time of an unspecified number of technicians involved in live customer cutovers, and that an increase of four times over the labor time estimates for actually connecting the loop was not reasonable. CBT was unable to adequately support such a difference in charges, and it has failed to provide any new or additional information which should cause the Commission to reconsider its decision on this issue. Adoption of the Staff recommendation was reasonable and it should not be changed.

IV. THE COMMISSION CORRECTLY DECIDED THAT CBT SHOULD CONDUCT TIME AND MOTION STUDIES FOR THE PURPOSES OF DETERMINING NON-RECURRING CHARGES.

CBT has taken issue with the Commission decision, at page 30 of the Order, that time and motion studies should be conducted for all of the tasks associated with its proposed NRCs. Although expressing dissatisfaction with this determination, CBT has presented no additional reasons for Commission reconsideration. In fact, CBT has conveniently overlooked most of the record evidence supporting the Commission's decision.

As part of the TELRIC studies initially filed in the MCIm/CBT arbitration and this docket, CBT developed NRCs for approximately twenty-eight items, including the loop, ports and interim number portability (CBT Ex. 5 [Mette Supplemental Direct, 5/22/97], Ex. 2, parts 7 and 8). Along with the development of pricing for interoffice transport, entrance facilities and the loop/transport combination, CBT also proposed an additional twenty-four NRCs, as set forth on the price list contained at Exhibit 3 of Mr. Mette's September 28, 1998 Supplemental Direct

Testimony (CBT Ex. 7). The sheer number of such charges, as well as the substantial level of most of them, caused not only the Staff but also the interveners to recommend that the labor time estimates used by CBT in developing the NRCs be supported by time and motion studies. Contrary to the assertions made by CBT at page 23 of its Application for Rehearing, the interveners did submit ample testimony as to why CBT's labor time estimates were incorrect and should be disregarded.

MCIm witness Michael Starkey submitted detailed direct testimony, supplemental testimony and rebuttal testimony on the issue of NRCs and CBT's failure to meet its burden of proof as to the reasonableness of these charges. In particular, in his supplemental testimony at page 54 (MCIm Ex. 21), Mr. Starkey specifically stated that "no credible information exists in this proceeding to support CBT's non-recurring rates" until CBT provides a time and motion study specific to the forward looking manner by which CBT should accept orders and provision its unbundled network elements. In addition to recommending that a time and motion study be performed, Mr. Starkey removed some of the unreasonable assumptions used by CBT in deriving its labor time estimates (*Id., 55*). Similarly, CoreComm witness Peter Gose submitted direct testimony on CBT's NRCs which also criticized the labor time estimates used by CBT in developing the charges (CoreComm Ex. 2 [Gose Direct], 45-56). Thus, CBT's statements in its application for rehearing that "no witness has presented testimony that the provisioning times proposed by CBT were incorrect" and "no one provided any reason why CBT's time estimates were not reliable for determining the cost of non-recurring activities" are completely disingenuous and misleading (CBT Application for Rehearing, 23).

Just as was done in the brief in this proceeding, CBT has made the astonishing statements

in its application for rehearing that the joint interveners did not cite decisions from other jurisdictions in support of their NRC arguments, and also that the Commission did not order Ameritech to conduct time and motion studies in Case No. 96-922-TP-UNC (*Id.*). Such comments are truly ironic in light of CBT's criticism of the Joint Interveners' rate comparisons with respect to CBT's DA listings and also the proposed use of Ameritech's fill factors. In response to the latter argument, the Commission is well aware that some of Ameritech's NRCs were reduced by 50% in accordance with the recommendations made by the interveners in that case and in recognition of the fact that Ameritech's NRCs suffered from the same infirmities that CBT's do (June 17, 1997 Order in Case No. 96-922-TP-UNC).

In sum, the only argument which CBT was able to muster for rehearing purposes was based on the comments made by Mr. Mette in his direct testimony (CBT Ex. 22) that performing a time and motion study would be "cost prohibitive" and might involve the use of special consultants. These observations were considered by the Staff witness Allen Francis, who wisely commented that the competitive carriers would most likely have a different view of "cost prohibitive" (Staff Ex.4, 20). The Joint Interveners certainly do have a different viewpoint. As explained by Mr. Starkey at page 9 of his rebuttal testimony (MCIm Ex.23), CBT's NRCs, which are unsupported on the record of the case, are an impediment to competition because they make it "cost prohibitive" to enter the local exchange market. The Commission declined to take the Joint Interveners' full recommendation and reduce such charges by 50% until the time and motion studies are submitted and the NRCs can be adjusted to reflect labor times which are factually supported. Since CBT is being permitted to charge the higher NRCs until the time and motion studies are completed in 2001, it would be unreasonable for the Commission now to remove the

requirement that CBT conduct time and motion studies.

Moreover, CBT's suggestion that it be permitted to recover the costs of conducting time and motion studies in its nonrecurring charges is absurd. (*See* CBT application for rehearing, 24). At that rate, the Commission might as well allow CBT to set its nonrecurring charges to recover its attorneys' fees and even the salaries of its cost witnesses. Manifestly, such costs are not incremental to the cost of network elements, and the Commission should disallow their recovery.

In short, the Commission made the correct decision when it considered CBT's arguments the first time, and there is no reason to consider the same arguments once more on rehearing.

V. THE COMMISSION PROPERLY ORDERED CBT TO EXCLUDE THE ***% *MISCELLANEOUS LOOP INVESTMENT COST FROM ITS TELRIC* COMPLIANCE RUNS.

The Staff and the intervener witnesses took issue with CBT's ***% mark-up of its cable investment for "miscellaneous cost" items such as "transportation and taxes on material plus additional costs associated with garage time and interruptions" (MCIm/AT&T Ex. 20 [Starkey Direct], 44-45, citing CBT's response to Staff Data Request 79). CBT has explained that these costs are ones that supposedly could not be itemized but that are nonetheless "real costs" which should be included in the cost studies.

Staff witness Allen Francis explained in his testimony that the Staff repeatedly requested supporting information for this miscellaneous mark-up, and that the explanations which were provided were not sufficient for the Staff to recommend its inclusion (Staff Ex. 4 [Francis Direct], 40-41). As was done in its brief at pages 81-82, CBT has disputed Mr. Francis' conclusion that the company did not adequately justify such a mark-up by pointing to information attached to

CBT Exhibit 6, which supported only half of CBT's requested ***% mark-up, and noting that Mr. Francis did not specifically consider this information in making his recommendation (Application for Rehearing, 25). CBT then criticizes the Commission for also not taking this information into account in reaching its decision (*Id.*).

Because CBT briefed this issue and directed the Commission to the information provided by Mr. Mette regarding the miscellaneous mark-up, there is no reason to assume that the Commission did not take into consideration the entire record in reaching its conclusion that CBT did not adequately support its proposed mark-up. Plainly, the Commission found Mr. Francis's testimony to be more persuasive than CBT's, especially considering CBT could muster support for only half of its requested mark-up. Essentially, CBT is asking the Commission to go back and look at the record one more time, even though CBT has presented nothing new for the Commission to review.

Furthermore, it is important to remember that CoreComm witness Peter Gose, on whose testimony the Commission relied in reaching a conclusion on this issue, explained that the miscellaneous cost mark-up should not be permitted even if CBT had adequately justified these costs, because miscellaneous cost savings would offset such costs (CoreComm Ex. 2, [Gose Direct], 42). Therefore the Commission's analysis did not necessarily stop at a simply review of supporting documentation. The Commission correctly concluded that CBT had not supported the mark-up by providing a sound policy reason for the recovery of these costs, as stated by Mr. Gose, and that CBT's "assumption" that the costs would occur was not sufficient (Order, 35). The Commission's decision was amply supported by the record and it should not be revisited on rehearing.

As to CBT's argument that the denominator of the calculations used to determine ACFs should be reduced by ***% due to the exclusion of the mark-up from the cable capital investment account (CBT Application for Rehearing, 26), the Joint Interveners would note that this argument surely should have been made before the rehearing stage of this case. CBT has known since the issuance of the Staff Report in the fall of 1997 that the Staff recommended the exclusion of this item, and CBT therefore had plenty of opportunity to address the issue in testimony. CBT should now be precluded from raising an issue that should have been brought to the attention of the Commission much earlier. At this point CBT should simply remove the ***% cable mark-up for the purposes of the compliance runs and not make other adjustments based on the potential "downward effect" of the Commission's Order. If CBT is permitted to make such adjustments to compensate for the effects of the Commission's decision, the compliance phase of the case will last as long as a new TELRIC proceeding. Such delay is not in the best interest of competition and should not be tolerated by the Commission.

VI. TO THE EXTENT THAT ONLY THREE RATE BANDS ARE USED FOR PURPOSES OF PRICING UNBUNDLED LOOPS, THE COMMISSION CORRECTLY ADOPTED THE *** WEIGHTING OF THE LOOPS ORIGINALLY PROPOSED BY CBT.

At page 27 of the Application for Rehearing, CBT requests a rehearing of the Commission's decision to adopt CBT's original weighting of its loop cost studies to reflect the forecasted demand for business/ residential loops which CBT determined would be ordered by competitive carriers. CBT changed this weighting when it submitted supplemental testimony in September, 1998, supposedly because it did not comply with the Commission's TELRIC

methodology (CBT Ex. 7, [Mette Supplemental], 37). CBT has repeated this argument at this rehearing stage of the process, and it should rejected again as it was rejected at page 32 of the Order.

The Commission's basis for adopting the original *** loop weighting proposed by CBT was contained not only in Staff witness Francis' testimony but in MCIm/AT&T witness Starkey's supplemental direct testimony. In his earlier-filed direct testimony Mr. Starkey recommended that CBT be ordered to establish a separate rate band for the West 7th central office to reflect the substantial differences in loop lengths, and hence loop costs, exhibited by the loops in that office (MCIm/AT&T Ex. 20 [Starkey Direct], 9). By separating the loops provisioned from the West 7th central office from the loops contained in the rest of rate band 1, the loops in each rate band would display much more similar loop characteristics and more accurately reflect the costs associated with the loops in each band (*Id.*,10). Mr. Starkey explained that CBT's proposed use of the same three rate bands used for retail pricing purposes served to inappropriately average the loop lengths and would mask the actual loop costs in the less densely populated areas.

In response to Mr. Mette's proposed revision of the *** weighting of the loops, Mr. Starkey testified in his supplemental testimony that CBT's change of heart should not be permitted unless his recommended establishment of a West 7th central office rate band is also adopted (MCIm/AT&T Ex. 21 [Starkey Supplemental], 71). He pointed out that the *** weighting of business to residential loops very accurately represented the proportion of business to residential loops in the West 7th central office, and if the purpose of CBT's change was to more accurately mimic the universe of loops, then logic would dictate that the West 7th central office be split out as a separate rate band (*Id.*). By changing the *** weighting and not creating the West

7th rate band, CBT's inaccurate averaging of the loop characteristics would be exacerbated and the costs of the loops inappropriately increased. Mr. Francis agreed with Mr. Starkey's analysis and recommended that the Commission either adopt separate the West 7th central office as a rate band and adjust the other two bands, or create four rate bands with West 7th being rate band one. (Staff Ex. 4 [Francis Direct], 45). He went on to note that CBT's change in the *** weighting "fits very well" with his rate band proposals (*Id.*, 46).

The Commission very accurately identified the relationship between CBT's original *** weighting and the development of a separate rate band for loops provisioned from the West 7th central office. The Commission's statement that the change in loop mix would drive up the cost of the loops was not based on an unsupported "result-driven" attempt to drive the price down, as claimed by CBT at page 28 of its Application for Rehearing, but rather a recognition that the change in the weighting would drive the cost study results away from the actual costs of providing a loop provisioned from the West 7th office. Since the Commission declined to adopt the recommendations of Staff and interveners that a West 7th band be created, logic then dictated that the original *** weighting be adopted. There is no reason for the Commission to revisit that ruling here.

VII. PRICING FOR ACCESS TO THE DA DATABASE.

A. The Commission Correctly Determined That CBT's Directory Listing Cost Study was Unreasonable.

CBT has asked the Commission to grant rehearing on the pricing of access to the DA database. Specifically, CBT has called into question the Commission's conclusion that the FCC's

proxy rates of $0.04 for the initial load of listings and $0.06 for the updates, established in *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273* (Third Report), should be adopted as the prices for the purposes of this TELRIC proceeding. However, the Commission made a reasonable determination based on the record of this proceeding, and CBT has presented no grounds for reconsideration which were not already a part of the Commission's initial determination. Rehearing should not be granted for the reasons set forth below.

MCIm witness Michael Starkey presented a very detailed analysis of the CBT directory listing cost study, and testified specifically as to the flaws contained therein. He found that CBT incorrectly performed the cost study by 1) including costs in the initial load which are not incremental to the copying and formatting of the database; 2) incorrectly forecasting its production expenses and over-allocating cost to the DA update function; and 3) incorrectly forecasting demand for the database (See AT&T/MCIm Initial Brief, 129-138). The Commission correctly noted the concerns expressed by Mr. Starkey at page 65 of the Order, and the Commission's agreement with Mr. Starkey's analysis was amply supported by the record of the case. Indeed, CBT witness Mr. Mette supported the admission of the cost study and provided a brief explanation of how the study had been done in his September 23, 1998 Supplemental Testimony (Exhibit 2 to CBT Ex. 7, testimony pages 12-14). Mr. Starkey presented 21 pages of analysis criticizing the study and making alternative recommendations in his December 23, 1998 Supplemental Testimony, MCIm Ex. 21 (pages 12-33), yet CBT did not bother to present rebuttal testimony in response to any portions of Mr. Starkey's recommendations except for the demand

forecast. That testimony consisted of a seemingly irrelevant statement by Mr. Mette on page 43 that no NEC had ordered its DA database "dip" service (CBT Ex.22 [Mette Rebuttal]). Having waived its opportunity to present responses to Mr. Starkey's position in the rebuttal phase of this case, CBT cannot now request the Commission to "identify errors in the study and state what parameters CBT should use" (CBT Application for Rehearing, 35). The Commission has already done so by agreeing with Mr. Starkey's identification of the errors in the study. If CBT had wanted to re-run its cost study to take into account and correct the serious flaws identified by Mr. Starkey, it could have done so during the proceeding. It would be inappropriate for the Commission to grant rehearing for this purpose, and there is nothing that could be accomplished on rehearing that could not have been accomplished during direct and rebuttal phases of the case.

CBT also cannot rely on the Staff's testimony for assistance on this matter, and its incorrect references to the Staff's position regarding the cost study should be disregarded. Indeed, the Joint Interveners find it highly objectionable that CBT would ascribe to Staff witness Doris McCarter statements which she clearly did not make. In her direct testimony, Ms. McCarter recommended one adjustment to the CBT cost study, and that was an increase of the demand assumption from three carriers to four (Staff Ex. 6, [McCarter Direct], 22). She never stated, either in direct or cross-examination testimony, that "MCI's proposal was results-oriented, as it manipulated CBT's cost study until it resulted in a rate closer to what MCI was willing to pay, rather than a rate that reflected CBT's real costs" (CBT Application for Rehearing, 31).[21] Similarly, the statement that "Ms. McCarter recognized that MCI was simply trying to avoid

[21] Not surprisingly, there is absolutely no record citation in CBT's application for rehearing for this statement, or the other two sentences which precede it which also claim to be testimony provided by Ms. McCarter.

sharing in the cost recovery for the labor needed to create and edit the raw data" (CBT Application for Rehearing, 33) is absolutely false; Ms. McCarter never said anything of the sort on the record of this case.

Even if CBT had correctly restated the Staff testimony, the fact that the Staff simply accepted the methodology used by CBT in its cost study cannot give rise to a finding that the Commission's agreement with Mr. Starkey's analysis should be reconsidered on rehearing. Similar to CBT, the Staff did not conduct its own evaluation or present any response whatsoever to the issues raised by Mr. Starkey other than Ms. McCarter's responses on cross-examination that she had reviewed his testimony and was aware of his concerns (Tr. XIV, 99-100). Ms. McCarter's testimony on CBT's directory listing cost study certainly did not give the Commission any additional grounds upon which to find that the study was reasonable, and her recommendation that CBT's demand forecast should be increased to four carriers was consistent with Mr. Starkey's evaluation of the demand forecast, as the Commission so noted (Order, 66).

As with the case of the errors identified by Mr. Starkey in the cost study, CBT similarly declined to produce any credible evidence as to why its costs to provide the initial load and updates to the DA database would be so much higher than those charged by other ILECs for the some services. Mr. Starkey not only presented the level of rates charged by Southwestern Bell (SBC) but he also included supporting information as to the development of those rates (MCIm Ex. 21 [Starkey Supplemental], 22-24, Ex. 5). Nonetheless, CBT presented no responsive testimony as to why it was reasonable for Mr. Mette's cost study to produce rates which were 16,636% higher than the SBC study for the initial load, or 763% higher than Ameritech Ohio's for the initial load (AT&T/MCIm Initial Brief, 135). Indeed, despite CBT's utter failure to

address the rate comparison issue in the rebuttal phase of the case, MCIm even attempted to anticipate the one argument that CBT might have advanced- that its small size makes its cost structure different- and addressed that issue in Mr. Starkey's rebuttal testimony (MCIm Ex. 23 [Starkey Rebuttal], 18-19). Sure enough, CBT has now stated on rehearing that the Commission should have considered "whether the significant size differences between CBT and those companies impacted the cost studies" (CBT Application for Rehearing, 32). The Commission did have evidence to consider on that issue, and its analysis was correct. Once again, CBT has raised nothing new for the purposes of rehearing.

The Commission understood that the rate comparison analysis offered by Mr. Starkey and discussed in the MCIm initial brief supported the testimony presented by Mr. Starkey that CBT's forecasted cost levels were too high (Order, 65). The Commission did not accept Mr. Starkey's testimony because his recommendations were "result-driven" and geared towards achieving a rate that MCIm would be "willing to pay". Rather, the Commission correctly recognized that rate comparisons are an "important indicator" of the reasonableness of CBT's proposed rates, and that based on such comparisons, as well as the concerns raised by Mr. Starkey, CBT had not presented a sufficient basis in support of its rates (Order, 66). On rehearing CBT has presented no new evidence or support for such rates, nor has CBT been able to point to any other ILECs with rates which are in the range of its proposed $0.18 per listing.

B. The Use of the FCC Proxy Rates Was Appropriate for the Purposes of This Proceeding.

After holding that CBT had not sufficiently supported the reasonableness of its proposed rates, the Commission then determined that the proxy rates established by the FCC for directory

listings in the Third Report are reasonable and should be adopted. While these rates are somewhat higher than the ones which would result from the methodology recommended by Mr. Starkey, the Joint Interveners support the Commission's decision. $0.04 for the initial load listings and $0.06 for the daily update listings is within the range of rates being charged by ILECs around the country, as noted by the FCC in its decision.

CBT has first argued that the FCC's proxy rates should not be used because the Third Report came out months after the conclusion of briefing in this case and CBT "did not have any opportunity to address the propriety of applying those rates" (CBT Application for Rehearing, 30). This, of course, is not true. On September 1, counsel for MCIm first submitted the news release which summarized the yet-to-be issued FCC decision adopting the proxy rates but did not contain detail as to how the rates were determined. Counsel for CBT submitted a letter on September 17, 1999, stating that the presumptively reasonable rates established in the case were applicable to listing prices for directory publishing only (see Order, page 65, footnote 1). On October 1, 1999, counsel for MCIm submitted the portions of the Third Report pertaining to the calculation of the proxy rates, and also a cover letter which explained why the Third Report and the proxy rates were relevant for the purposes of establishing rates in this case. The Order in this proceeding was not issued until November 4, 1999; CBT had plenty of opportunity to respond to that letter and clarify why costs associated with directory listings sold to publishers would not be similar to those provided to directory assistance providers. CBT did not submit any such response at the appropriate time; there is no reason for such an opportunity to now be provided on rehearing.

The Commission correctly evaluated the Third Report and found it instructive as to the

issue of determining ILEC costs associated with providing the directory assistance information (Order, 66, Third Report, ¶12). Indeed, the Commission recognized that the FCC came to basically the same conclusions reached by Mr. Starkey which it concluded that carriers obtain directory listing information "quite easily" during the order taking process (*Id.*), and that the *incremental costs* of responding to subscriber list requests include such items as downloading the information and the magnetic tape (Third Report, ¶77). CBT did not submit any information which could have led the Commission to believe that the FCC was incorrect on this point. Indeed, CBT's assertions that the Commission's decision will cause it to under-recover its total joint costs of providing the DA and directory listings (CBT Application for Rehearing, 34) have a very hollow ring. CBT told the FCC that the price it charges commercial list providers for directory information is $0.055 to $0.065 for residential listings, and $0.06 to $0.075 for business listings, without telephone numbers, which are an additional $0.015 to $0.02 (Third Report, footnote 230). Because the FCC could not determine whether these rates were cost-based, the FCC used the somewhat lower proxy rates. Obviously CBT is either charging rates to its commercial listing customers which are substantially below the costs of providing the service, or the TELRIC costs of providing DA listings to carriers are approximately the same as the FCC proxy rates. It is CBT who cannot have it "both ways"- either the rates for its directory listings for publishers should be greater than $0.18 per listing, or the proposed "TELRIC" rates were wildly out of line with costs. Based on the Third Report, which CBT made no effort to refute in a timely fashion, the Commission made the correct decision that prices charged in a competitive marketplace would be more likely to be cost-based. Rehearing is not necessary and should not be granted.

VIII. CONCLUSION

CBT has presented the Commission with no valid reasons for granting rehearing on any of the issues discussed above. The Commission should affirm its Order and decline to reconsider the matters raised by CBT in its application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Redacted Memorandum Contra Application for Rehearing has been served upon the following by electronic mail, Federal Express or first class U. S. Mail, postage prepaid, this 3rd day of January, 2000.

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