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State of North Carolina Utilities Commission

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February 9, 1993

92-222

Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Ms. Searcy:

Enclosed please find a true copy of the North Carolina Utilities Commission's February 10, 1993, Order Promulgating Policy Favoring Choice pursuant to the Federal Communication Commission's Report and Order and Notice of Proposed Rulemaking entitled In the Matter of Expanded Interconnection With Local Telephone Company Facilities (CC Docket 91-141 and CC Docket No. 92-222).

Sincerely,

Geneva S. Thigpen

Geneva S. Thigpen
Chief Clerk

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List A B C D E

430 North Salisbury Street Raleigh, North Carolina 27611
Telephone No.: (919)733-4249
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the key details of virtual collocation arrangements, allowing the parties to tailor rates, terms, and conditions to the type of central office equipment an interconnector wishes to use. The same arrangements will be made available to any similarly situated entity within the same central office.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby promulgate a policy of LEC choice with respect to intrastate expanded interconnection by CAPs and other interconnectors with LEC facilities.

2. That a copy of this Order be sent to the Federal Communications Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of February 1993.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

(SEAL) Geneva S. Thigpen, Chief Clerk

allowing LECs to choose which form of interconnection to use for intrastate expanded interconnection. A copy of that Order was served on all LECs, all certificated interexchange carriers, (IXCs), the Attorney General, Public Staff, and Privacom. In addition, certain of the LECs were required to have a public notice of investigation published in newspapers of general circulation throughout North Carolina.

Comments were received from: ALLTEL Carolina, Inc., Heins Telephone Company and Sandhill Telephone Company (ALLTEL); Carolina Telephone and Telegraph Company (Carolina); Central Telephone Company (Centel); GTE South Incorporated and Contel of North Carolina, Inc., (GTE South); Citizens Telephone Company (adopting Comments of ALLTEL), Concord Telephone Company (Concord); Lexington Telephone Company (Lexington); North State Telephone Company (North State); BellSouth Telecommunications, Inc., d/b/a Southern Bell Telephone and Telegraph Company (Southern Bell); AT&T Communications of the Southern States, Inc. (AT&T); LDDS of Carolina, Inc. (LDDS); MCI Telecommunications Corporation (MCI); Sprint Communications Company L.P. (Sprint); The Public Staff; Carolina Utility Customers Association, Inc. (CUCA); and PrivaCom, Inc. (PrivaCom).

Initial Comments. All of the LECs with the exception of North State favored the Commission adopting a state policy of LEC choice as to the form of interconnection, with virtual collocation as an alternative. North State recommended virtual collocation.

Carolina argued that under GS 62-110 the Commission lacks the statutory authority to certify competitive access providers (CAPs) on an intrastate basis, and that, absent legislative action, CAPs must be restricted to operation on an interstate basis only. Carolina recommended that the Commission issue an order allowing the affected LECs to choose either virtual collocation or physical collocation to use at such time as intrastate expanded interconnection is allowed by law. In what Carolina viewed as a less satisfactory alternative, Carolina recommended that the Commission issue an order favoring virtual collocation. Carolina expressed concerns about FCC preemption and pressed the Commission to act to ensure that FCC preemption regarding mandatory physical collocation does not occur.

Centel also suggested that the Commission adopt a position in favor of LEC choice of providing physical or virtual collocation. Centel argued that the physical collocation position of the FCC is flawed in that there is no proof that physical collocation is necessary for the public interest to be served. Mandatory physical collocation is in conflict with the FCC's own earlier statement that virtual collocation is comparable. Furthermore the FCC action is an unwarranted taking of property, and may actually serve to undermine the FCC intent to promote competition. Centel states that the LECs can best manage interconnection arrangement to the benefit of end users and that, due to limited floor space availability and no requirement to construct facilities for collocation, the FCC action may deter new market entrants after the initial phase. Centel also argued that the Commission should take the position that tariffing of building space is not a proper function of the tariffing process and that physical collocation should not be required.

GTE asked the Commission to adopt a policy of LEC choice as between virtual

and physical collocation, or in the alternative, adopt a virtual collocation policy. GTE cited several reasons for its position: A physical collocation policy will raise costs and reduce efficiency; mandatory physical collocation poses serious network security and reliability risks; and finally, a LEC option rule will best preserve this Commission's power to direct telecommunications policy.

Southern Bell stated it favored a policy -- both interstate and intrastate -- that permits a Tier I LEC to choose either virtual or physical collocation on a central office by central office basis. Southern Bell submitted that the Commission cannot permit competition in the access market unless the General Assembly specifically authorizes that competition, as it did with long distance, coin telephone service, and shared tenant service. Even before considering such competition, the Commission should consider the issues to which that competition gives rise including pricing flexibility, loss of subsidy to the basic residence exchange service and regulatory reform. Given the complexity of all of the issues, the Commission should not be forced to act precipitously. Southern Bell recommended that the Commission consider supporting NARUC's petition for reconsideration now pending at the FCC.

Several non-Tier I companies filed comments. ALLTEL thought it would have been preferable to limit the scope of this inquiry to Tier 1 companies and urged the Commission to exempt all non-Tier 1 LECs from any Commission requirement of collocation or of filing of intrastate collocation tariffs. Concord expressed concerns that the small companies which are exempted from the FCC's order will, through regulatory or market forces, be required to provide expanded interconnection in the future. Concord also expressed concern with safety and employees, and security and recommended that the Commission make physical collocation optional, not mandatory, for Tier 1 LECs. Concord further stated it does not believe that any party in this FCC proceeding has offered a compelling reason to require physical collocation over virtual collocation for LECs, but there have been serious concerns raised regarding the additional costs, and security and legal issues presented by physical collocation. Lexington encouraged the Commission to adopt a policy which would allow LECs to choose the form of interconnection which best fits that LEC's circumstances. North State stated it believes that a state policy in favor of virtual interconnection arrangements is in the public interest, removes undue burdens from the LEC, and approaches interconnection in a manner which has less far-reaching impact on the ratepayer.

AT&T argued that the real objective of the LECs is to obtain a pronouncement by this Commission of a state policy favoring virtual collocation which would exempt them -- for purposes of interstate services -- from the physical collocation requirement. AT&T stated it favored expanding access alternatives and it supports Commission action authorizing access competition in connection with intrastate service. AT&T further favors a requirement, in the event competitive access is authorized, that physical collocation be required to be offered by the LECs. However, AT&T believes that the narrow "collocation" question which the LECs are now pressing cannot reasonably be resolved in isolation from broader issues of competition in general, and encouraged the Commission to proceed to a broader generic hearing addressing the authorization of competitive access (including collocation), expanded local calling plans, and intraLATA competition.

LDDS and MCI supported the Commission adopting a policy of physical collocation. Both companies expressed concerns about the possible competitive advantage AT&T would have over its smaller rivals. MCI stated it believes that expanded interconnection should be accompanied by the implementation of certain safeguards to avoid the risk that expanded interconnection could adversely affect competition in the interexchange marketplace.

Sprint stated it does not take a position as to which form of collocation, physical or virtual, the Commission should adopt as its policy, and it does not oppose LECs choosing physical or virtual collocation. Sprint also urged the Commission to take such actions as may be necessary to insure that the terms and conditions governing the Commission's collocation policy does not favor one interconnector over another or physical collocation over virtual collocation. Further, Sprint urged the Commission to consider the safeguards set out by the FCC in its order. In addition, Sprint stated that, to achieve the benefits of intrastate expanded interconnection, virtual collocation arrangements must be provided in a manner that is sufficiently comparable in quality to physical collocation.

The Public Staff argued that the Commission does not have the authority under existing statutes to authorize competition with the LECs in the provision of local exchange or intrastate access services and that enabling legislation would be required before the Commission could authorize provision of local exchange or intrastate special access by a competitive carrier. However, the Public Staff does not believe the Commission is precluded from reaching a policy conclusion at this time on the preferred means of intrastate expanded interconnection even though the Commission does not currently permit such interconnection. The Public Staff stated that based upon its review of the FCC docket, it believes that each LEC should be free to determine on an office-by-office basis the type of expanded interconnection which it will make available to interconnectors. This would enable LECs to offer virtual collocation to interconnectors where provision of physical interconnection would result in greater costs or inefficiency for the LEC. Since the increased costs and inefficiency would impact the interests of the basic local subscribers as well as the large telecommunications users, giving the LEC flexibility to choose which type of collocation it will provide would enable the LEC to better balance the interests of all of its subscribers.

CUCA believed that retention of the physical collocation requirement will not preclude the LECs from negotiating virtual collocation requirements with interested parties. Approval of any requested exemption from the physical collocation requirement could well preclude certain forms of competition which would be socially beneficial. CUCA further stated that in the event that the Commission authorizes reliance upon virtual collocation rather than physical, the competitive options to CUCA's member companies will be significantly reduced. The Commission should therefore not allow any "watering down" of the FCC's efforts in favor of competition in the absence of some overriding reason to do so. Since, to date, no overriding reason for abandoning the physical collocation requirement has been advanced by anyone, CUCA believes the Commission has no basis to permit any exemption from the physical collocation requirements at the present time.

PrivaCom, a competitive access provider (CAP), urged the Commission not to seek exemption from the FCC mandated physical collocation rules. PrivaCom further stated that it is not necessary for the Commission to establish virtual collocation as a viable service option because CAPs may find virtual collocation preferable to physical after exploring both options with LECs. The ability of CAPs to compete effectively for interstate access services is contingent upon their ability to gain expanded interconnection within the central offices owned and controlled by the LECs. Because LECs control these central offices, they occupy a bargaining position superior to the CAPs. PrivaCom argued that the considerable experience that has been gained with collocation in other states, and the voluminous record compiled in the FCC's collocation proceeding fully demonstrates that only a mandatory physical collocation standard can place interconnectors on competitively equal footing with the LECs. PrivaCom stated that inasmuch as North Carolina does not now permit competition for intrastate local access services, having a policy in place would conflict with existing North Carolina law and policy.

Reply Comments. Reply Comments were received from: Carolina, GTE, Southern Bell, AT&T, CUCA and Fibercom, Inc.

Carolina replied to PrivaCom's concerns about virtual collocation as being inferior to physical, and concerns regarding technological advances by indicating that these allegations are unsupported by the facts. Further, Carolina stated that PrivaCom's allegation that most states favor a physical collocation arrangement is simply untrue, a number of states support the policy of LEC choice, and NARUC has adopted a resolution favoring LEC choice. Carolina will provide collocation to all parties requesting it and on the same or similar terms and conditions. Furthermore, Carolina does not foresee a lessening of infrastructure development and technological advance if the Commission adopts a position of LEC choice.

In response to AT&T's comments, Carolina stated that AT&T's argument that collocation and intraLATA competition are inseparable is without basis as intraLATA competition is not directly related to collocation issues and should not be addressed in this docket.

Carolina concluded by reiterating its earlier recommendation that the Commission should issue an order allowing the affected LECs to choose either virtual or physical collocation on an office-by-office basis at such time as intrastate expanded interconnection is allowed by law, or in the alternative, but less acceptably to Carolina, an order requiring virtual collocation rather than physical collocation.

In its Reply Comments, GTE pointed out that PrivaCom's Comments made no attempt to justify a physical collocation rule in terms of the Commission's responsibility to safeguard ratepayers' interests. GTE also cautioned the Commission to avoid accepting claims that failure to act on collocation at the state level would not result in preemption of state special access interconnection policies and that it is a practical impossibility to limit the effects of interconnection implementation decisions to just the interstate or intrastate arena.

In response to Privacom's arguments that the actions of other state regulatory commissions and the FCC provide "incontrovertible evidence" to support adoption of a physical collocation requirement, GTE replied that these assertions were misleading and provide no basis for this Commission to forego issuance of its own policy. GTE also responded to PrivaCom's remarks that experience with virtual collocation in other jurisdictions has demonstrated its anticompetitive impact by indicating these statements are wholly unsupported by any facts and, to GTE's knowledge, no such problems have occurred. GTE further pointed out that the FCC Order was not unanimous, was introduced late in the FCC's rulemaking by three of the five FCC Commissioners and overrode the FCC's own staff recommendation.

GTE stated that most advocates of mandatory physical collocation did not adequately justify their preference for physical collocation. According to GTE, CUCA appeared to rely solely on the FCC's judgment that mandatory physical collocation is a competitive necessity, AT&T's concern seems to be with further introduction of competition in intrastate markets, rather than the specific issue of collocation, and MCI's filing appears to be motivated primarily by fear that AT&T will gain an undue competitive advantage in an environment of expanded special access competition. In response to PrivaCom's contentions that a virtual collocation option will result in less reliable CAP service, artificially inflate CAPs' cost, result in excessive litigation and stunt North Carolina's economic growth, GTE stated it believed such assertions to be untenable.

GTE also stated it believed there are no legal obstacles to adoption of a LEC option collocation policy and that nothing precludes the Commission from ruling on collocation at this time whereas the risks of inaction in this matter are simply too great. GTE concluded by urging the Commission to adopt a policy allowing LECs to choose between physical and virtual collocation in response to valid interconnection requests. The availability of a virtual collocation option is critical to assure the Commission's ability to guide the development of the intrastate special access market in accordance with state-specific conditions and social objectives.

Southern Bell recommended that the Commission adopt the Public Staff's recommendation and declare a policy allowing LECs to choose on an office-by-office basis between virtual and physical collocation in time to allow the LECs to seek an exemption from the FCC by February 16, 1993.

AT&T pointed out that it should be clarified that the FCC's proceeding does not entail preemption of any intrastate services and there is nothing in the FCC's decision that would prevent this Commission, at a later time, from adopting virtual collocation, or LEC choice, as a policy for intrastate special access. The FCC's deadline is designed to respond to existing state policies supporting competitive access for intrastate services. It is clear that a true competitive policy in this respect in North Carolina will not and cannot be put in place in the next two weeks and there is neither need or justification for immediate action by this Commission. AT&T recommended that the Commission proceed to address the North Carolina issues independently of the FCC's procedural schedule and at a pace which allows the relevant state issues to be aired and resolved reasonably and responsibly.

AT&T repeated that it is prepared to assist in pursuing a generic and broad-based docket on the full range of competitive issues facing the Commission but recommends that, for the present, the Commission refrain from any hasty policy pronouncements.

CUCA suggested that the Commission should abstain from making any decision to grant or deny any exemption from the physical collocation requirement or to adopt a policy of mandatory physical collocation for use in this jurisdiction.

Fibercom urged the Commission not to adopt either of the policies proposed in its December 22, 1992, Order for the following reasons: The FCC order does not preempt state action; the FCC's collocation rule will not affect the intrastate rate base; there is no legitimate basis for LECs' alleged concern over security and network integrity; the FCC's collocation order does not represent an unlawful taking of LECs' property; physical and virtual collocation do not confer the same benefits on interconnectors; and competition for intrastate local access services is not permitted under North Carolina law.

WHEREUPON, THE COMMISSION reaches the following

CONCLUSIONS

After careful consideration of the filings in this docket, the Commission believes that the LECs should be given the choice of virtual or physical collocation as to interconnection with CAPs and other interconnectors.

The posture of this matter as it appears before the Commission at this time is somewhat unusual. The Commission agrees with those parties who have noted that the North Carolina statutes do not currently allow the certification of CAPs. The Commission also agrees with the Public Staff that the Commission nevertheless is not precluded by this from reaching a policy conclusion at this time on the preferred mode of intrastate expanded interconnection. The policy would simply apply to the provision of access at some future time.

The fact of the matter is that the FCC's decision favoring interstate physical collocation necessarily has intrastate implications. First, if North Carolina were to allow intrastate CAPs, the physical collocation preference of the FCC would tend to determine the preferred mode of intrastate collocation. Second, even in the absence of intrastate CAP certification, the preference for interstate physical collocation has implications for intrastate services and the cost of these services. Fortunately, the FCC has chosen to allow the states a window of opportunity in which to exercise what some parties have characterized as a "reverse preemption" -- that is, if a state favors a policy of virtual collocation or of choice with respect to intrastate interconnections, this policy will be determinative of interstate interconnection as well.

We believe that the Pennsylvania Public Utility Commission was directly on point concerning the importance of the central office to the telecommunications infrastructure and to the maintenance of effective service when it issued its December 19, 1992 statement of Policy favoring choice in this matter. The Pennsylvania Commission wrote:

> LEC central offices are fundamental components of the core telecommunication's infrastructure used to provide telephone service to the ratepayers. . . Thus we have a vital interest in ensuring that the LECs continue to maintain their ability to utilize the capacity of their central offices in order to meet the obligations to provide reliable and economical intrastate telephone service. (Pennsylvania Bulletin, Vol. 22, No. 5, December 19, 1992, p. 6034)

In view of the limited time that the Commission has in which to act, we believe that the more prudent course is for us to exercise the right of reverse preemption and enunciate a policy of choice for LECs for the reasons as generally set forth by the proponents of choice. Such concerns regarding physical collocation include:

1. Higher costs and reduced efficiencies pursuant to the forced reconfiguration of LEC central offices. A mandatory physical collocation policy could affect the intrastate rate base. With central office space preemptively allocated to interstate interconnectors, LECs may well have to build or acquire new facilities to meet intrastate needs, thus increasing the cost of intrastate services.

2. Risks concerning network security and reliability.

3. Disruption of LECs' operations leading to a reduced ability to ensure reliable and affordable service.

4. Reduced ability by the LECs to meet long-term state needs and several objectives.

5. An erosion of the Commission's power to direct telecommunications policy.

Proponents of mandatory physical collocation, notably PrivaCom, have sought to deprecate these concerns. The Commission does not agree. Since the actual experience with collocation is minimal, the Commission believes it would be unwise to mandate one form of collocation at this time.

A flexible policy of permitting LECs to opt for either virtual or physical collocation for special access is the best way for the Commission to assure dependable and affordable telecommunications services in keeping with North Carolina consumers' needs. A LEC option policy will also allow this Commission to determine the contours of the access market in accordance with state-specific conditions.

This alternative will fit within any future Commission initiatives to foster development of the competitive special access market. This is true because the FCC's virtual collocation scheme affords technical interconnection arrangements equal to those associated with a physical collocation regime. Under virtual collocation, the LEC will designate an interconnection point near its central office that is physically accessible to both the LEC and the interconnector on nondiscriminatory terms. LECs and interconnectors would remain free to negotiate

the key details of virtual collocation arrangements, allowing the parties to tailor rates, terms, and conditions to the type of central office equipment an interconnector wishes to use. The same arrangements will be made available to any similarly situated entity within the same central office.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby promulgate a policy of LEC choice with respect to intrastate expanded interconnection by CAPs and other interconnectors with LEC facilities.

2. That a copy of this Order be sent to the Federal Communications Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of February 1993.

NORTH CAROLINA UTILITIES COMMISSION

(SEAL)

Geneva S. Thigpen, Chief Clerk