BELLSOUTH

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: CC Docket No. 97-208, CC Docket No. 97-231, CC Docket No. 97-121, CC Docket No. 97-137, CC Docket No. 96-98, and RM-9101

Dear Ms. Salas:

This is to inform you that Randy New, Allan Price, Al Varner, Jim Llewellyn, and the undersigned, all of BellSouth Corporation, and Erwin Krasnow of Verner, Lipfert, Bernhard, McPherson & Hand, met with Commission staff on February 24, 2998. The following Common Carrier Bureau staff members attended this meeting: Carol Mattey; Michael Pryor; Melissa Newman; Jonathan Askin; Eric Bash; Greg Cooke; Erin Duffy; Jordan Goldstein; Jake E. Jennings; Katherine Schroder; Joe Welch, and Audrey Wright. Also present at the meeting was Michael Riordan, the Commission's Chief Economist.

During the meeting the participants discussed issues related to BellSouth's compliance with checklist items appearing in Section 271 of the Communications Act of 1934, as amended. The checklist items discussed related to BellSouth's provision of nondiscriminatory access to: (1) white page listings; (2) directory assistance; (3) numbering administration; (4) databases and signaling; and (5) dialing parity. Attachment 1 is the set of papers tendered at our meeting of February 19, 1998, which formed the basis for our discussion of these topics.[1]

[1] The document describing BellSouth's evidence of compliance with Checklist items 8, 9, 10, and 12 which was attached to our ex parte notice filed on February 17 was an earlier draft of document actually distributed at the February 17 meeting. By filing Attachment 1 to today's letter, I am also correcting that mistake by filing the document that was if fact distributed to Commission staff at that earlier meeting.

We also discussed the legal standards governing incumbent local exchange carriers' provision of unbundled network elements to their competitors. Attachment 2 is the legal memorandum distributed to the staff at the meeting, which formed the basis for our discussion of this topic. Attachment 3 is a document describing BellSouth's evidence of compliance with Section 271 checklist items 1, 3, 4, 5, 6, 7, 11, 13, and 14. This document was prepared in response to a Commission staff request. Representatives of BellSouth gave copies of this document to Commission staff at the meeting.

Because the Commission is considering one or more of the issues discussed at the meeting in each of the proceedings identified above, we are filing notice of this ex parte meeting in each of those proceedings.

As required by Section 1.1206(a)(2) of the Commission's rules, we are filing with the Commission two copies of this notice in each of the proceedings identified above. Please associate this notification with each of those proceedings.

Sincerely,

Kathleen B. Levitz

Kathleen B. Levitz
Vice-President
Federal Regulatory Affairs

Attachments

cc: Jonathan Askin
Erin Duffy
Carol Mattey
Michael Riordan
Eric Bash
Jordan Goldstein
Melissa Newman
Katherine Schroder
Audrey Wright
Greg Cooke
Jake E. Jennings
Michael Pryor
Joe Welch

BELLSOUTH'S EVIDENCE OF COMPLIANCE WITH CHECKLIST ITEM 8: WHITE PAGES DIRECTORY LISTINGS

- BellSouth's state-approved agreements with resellers and facilities-based carriers include arrangements for the provision of White Pages listings for customers of CLECs.

- In each state where the relevant state commission has approved BellSouth's Statement of Generally Available Terms and Conditions ("Statement"), or allowed it to take effect, CLECs also can obtain listings for their subscribers under the terms of the Statement.

- In its agreements and Statement, BellSouth makes available the following items:

  - BellSouth provides subscriber primary listing information in the White Pages in standard format at no charge to the CLEC or its customer.

  - CLEC subscribers are not separately classified or otherwise identified as such.

  - Additional and optional listings are available at rates set out in BellSouth's General Subscriber Services Tariff. If these services are being resold, the state-established wholesale discount applies.

  - BellSouth updates customers' listings based on information submitted by CLECs in standard format.

  - BellSouth omits subscribers that the CLEC indicates are to be unlisted and accords the directory listings of CLEC subscribers the same confidentiality as listings of BellSouth's own subscribers.

  - BellSouth includes and maintains CLEC subscriber listings in BellSouth's directory assistance database free of charge.

  - BellSouth delivers copies of the White Pages to CLEC subscribers free of charge.

- BellSouth's methods and procedures for listing the subscribers of other local service providers have been in place since March of 1996. As of February, 1998 BellSouth had provided more than 209,500 listings for CLEC customers in its nine-state region. These include: 16,500 in Alabama; 62,000 in Georgia; 52,000 in Florida; 8000 in Kentucky; 16,000 in Louisiana; 4000 in North Carolina; 16,500 in Mississippi; 15,500 in South Carolina; and 19,000 in Tennessee.

- BellSouth is aware of one incident in which a CLEC subscriber listing was excluded from BellSouth's white page listings because it had mistakenly been excluded from the information downloaded into the BellSouth directory assistance database. That incident

occurred in Georgia on or about May 21, 1997, and was corrected when the relevant CLEC notified BellSouth of the problem. Four other errors have been reported in CLEC customers' white pages listings. Further investigation of these incidents revealed that in each case the error arose because the CLEC erred in placing its order (e.g., erroneously stating that a customer's number should be unpublished) or else missed the deadline for placing orders. Liability for any errors or omissions in a directory listing is governed by BellSouth's tariff.

- Where any local service provider — whether a CLEC or an independent telco— expressly informs BellSouth not to provide its customers listings to other local service providers, BellSouth honors that request. Unless a local service provider has expressly informed BellSouth not to provide its listings, however, BellSouth makes the listings of that local service provider available to CLECs.

- Although it is not required to do so under the checklist or any other provision of the Act, BellSouth includes listings of CLECs' business subscribers in the appropriate Yellow Pages or classified directory.

BELLSOUTH'S EVIDENCE OF COMPLIANCE WITH CHECKLIST ITEM 9: ACCESS TO TELEPHONE NUMBERS

- BellSouth's state-approved agreements obligate BellSouth to provide nondiscriminatory access to number resources.

- In each state where the relevant state commission has approved BellSouth's Statement of Generally Available Terms and Conditions ("Statement"), or allowed it to take effect, CLECs also can obtain number resources via the Statement.

- As the Central Office Code Administrator for its territory, BellSouth has established procedures to provide nondiscriminatory NPA/NXX code assignments to CLECs in accordance with the code administration guidelines published by the Industry Numbering Council, a national industry body.

- As of January 5, 1998, BellSouth had assigned a total of 962 NPA/NXX codes for CLECs. BellSouth is not aware of ever having refused a CLEC request for an NPA/NXX code assignment.

- In 1997 BellSouth became aware of a very few instances where an NPA/NXX code assigned to a CLEC was not activated as scheduled in all affected BellSouth switches. To remedy the problem, in mid-1997 BellSouth modified its testing procedures for new NPA/NXX codes. BellSouth has since assigned scores of NPA/NXX codes without any recurrence of the problem.

- When BellSouth is no longer the Code Administrator, BellSouth will continue to offer services to assist CLECs in obtaining NPA/NXX codes.

BELLSOUTH'S EVIDENCE OF COMPLIANCE WITH CHECKLIST ITEM 10: SIGNALING AND CALL-RELATED DATABASES

- BellSouth's state-approved agreements provide for non-discriminatory access to BellSouth's signaling networks and call-related databases used for call routing and completion.

- In each state where the relevant state commission has approved BellSouth's Statement of Generally Available Terms and Conditions ("Statement"), or allowed it to take effect, CLECs also can obtain access to BellSouth's signaling networks and call-related databases via the Statement.

- Signaling. CLECs in the State of _____ and throughout BellSouth's region have access to BellSouth's signaling systems.

  - Signaling Links are dedicated transmission paths carrying signaling messages between switches and signaling networks. Signaling Link Transport is a set of two or four dedicated 56 kbps transmission paths between CLEC-designated Signaling Points of Interconnection and a BellSouth Signal Transfer Point ("STP") site. BellSouth offers 56 kbps connections between a switch or Service Switching Point and a home STP, or between STPs in different company networks (for example, between two STP pairs for two CLECs).

  - Signal Transfer Points are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. CLECs may use BellSouth's Signaling System 7 ("SS7") signaling network for signaling between their switches, between their switches and BellSouth's switches, and between their switches and the networks of other parties connected to the BellSouth SS7 network. STPs also provide access to other network elements connected to the BellSouth SS7 network including: 1) BellSouth-provided local switching or tandem switching; 2) BellSouth-provided Service Control Points/databases; 3) third-party provided local switching or tandem switching; and 4) third-party provided Service Control Points/databases.

  - As of January 1, 1998, sixteen facilities-based CLECs had interconnected through an interexchange carrier connected to BellSouth or by using a third-party signaling hub provider which in turn accesses BellSouth's signaling network. Additional facilities-based CLECs may obtain access to the database as described in BellSouth's tariff (FCC No. 1). Assuming the appropriate signaling links are in place, direct access to the database can be provided as determined through negotiations. Because BellSouth's switch or STP does not distinguish between BellSouth's end users and the end users of resellers, BellSouth does not know how many queries have been made to BellSouth's databases from the end-user

customers of resellers.

- The Signaling Link between the CLEC's switch and BellSouth's STP is a complex unbundled network element that CLECs can order by contacting their assigned account team representative at BellSouth. The representative then arranges the set-up for the CLEC.

- Databases. Service Control Points ("SCPs") are databases containing customer and/or carrier-specific routing, billing, or service instructions. These SCPs are the network elements that provide the functionality for storage of, access to, and manipulation of information required to offer a particular service and/or capability. CLECs can access SCPs remotely, by dialing-up BellSouth's Advanced Intelligent Network ("AIN") Service Management System. BellSouth's databases include:

  - Line Information Data Base ("LIDB"). LIDB is a transaction-oriented database accessible through the SS7 network that contains records associated with subscriber line numbers and special billing numbers. LIDB accepts and responds to queries from other BellSouth network elements or a CLEC's alternative network.

    - From January through December, 1997, CLECs and other service providers across BellSouth's nine-state region completed approximately 448 million queries to BellSouth's LIDB database. Access to the database was through a third party "signaling hub" provider that was directly connected to BellSouth's signaling network or through an interexchange carrier that was directly connected to BellSouth's signaling network. LIDB queries are billed to the third party "signaling hub" provider or interxchange carrier, not the CLEC. Accordingly, of the 448 million queries completed, BellSouth cannot separate out the number completed by facilities-based CLECs. Facilities-based CLECs can, however, obtain direct access to the database as described in BellSouth's tariff (FCC No.1). Assuming the appropriate signaling links are in place, direct access to the database can be provided as determined through negotiations.

  - Toll Free Number Database. The toll free number database provides functionality necessary for toll free (for example, 800 and 888) number services.

    - From January through November, 1997, CLECs and other service providers across BellSouth's nine-state region completed approximately 65 million queries to BellSouth's Toll Free Number database. Facilities-based CLECs alone completed 1.6 million queries. Additional facilities-based CLECs may obtain access to

the database as described in BellSouth's tariff (FCC No.1). Assuming the appropriate signaling links are in place, direct access to the database can be provided as determined through negotiations.

- Automatic Location Identification/Data Management System ("ALI/DMS"). The ALI/DMS database contains subscriber information used for determining to which Public Safety Answering Point ("PSAP") an emergency call should be routed.

- Advanced Intelligent Network. AIN is a vendor-independent network architecture deployed by BellSouth that provides capabilities for creation of custom telecommunications services that are invoked by SS7 messages (called switch "triggers") from a switch to an SCP. AIN access provides CLECs the ability to create service applications utilizing BellSouth AIN and deploy those applications via the BellSouth Service Management System ("SMS") to BellSouth's SCPs. A CLEC that wishes to access BellSouth's AIN for the first time can do so in a matter of seven days provided that the CLEC has the appropriate customer premises facilities installed, i.e., ISDN and PC software.

  - BellSouth has tested its AIN Toolkit 1.0, which provides a CLEC with the ability to create and offer AIN-service applications to their end users, as well as its AIN SMS Access 1.0, which provides a CLEC with access to the BellSouth-provided service creation environment. The completion of test calls and the generation of billing records were part of the testing process. The testing confirmed that service orders flowed through BellSouth's systems properly and that accurate bills were rendered.

  - BellSouth has made presentations to several CLECs interested in using AIN Toolkit 1.0 to develop AIN applications that would run via BellSouth's AIN, and thus on BellSouth's switches. No CLEC is currently using AIN Toolkit in this manner. Also, no CLEC has yet requested the ability to use AIN Toolkit 1.0 to develop AIN applications that would run via BellSouth's AIN in conjunction with the CLEC's own switches.

- BellSouth provides access to the SMS associated with each of the databases described above in accordance with 47 C.F.R. §51.319(e)(3). Requesting carriers are provided with the information necessary to format data and enter it into the various databases using the associated SMS. BellSouth also provides interested CLECs with technical service descriptions for each of the above items.

- BellSouth allows access between the CLEC's SCP and BellSouth's signaling network. Appropriate mediation devices will be used as required and as ordered by state commissions to safeguard network security.

- All data in the above databases are maintained in accordance with §222 of the Act.

- BellSouth's cost-based prices for databases have been submitted to or approved by the relevant state commission.

BELLSOUTH'S EVIDENCE OF COMPLIANCE WITH CHECKLIST ITEM 12: LOCAL DIALING PARITY

- CLEC customers do not have to dial any greater number of digits than BellSouth customers to complete the same call. Although the CLEC's switch determines how the CLEC's end users dial specific calls, BellSouth interconnects with CLECs such that identical 7- and 10-digit local dialing for CLEC customers and BellSouth customers is ensured.

- BellSouth's state-approved agreements with carriers including AT&T and MCI provide for local dialing parity.

- In each state where the relevant state commission has approved BellSouth's Statement of Generally Available Terms and Conditions ("Statement"), or allowed it to take effect, CLECs also are entitled to local dialing parity via the Statement.

LEGAL STANDARDS GOVERNING INCUMBENT LECS' PROVISION OF UNBUNDLED NETWORK ELEMENTS

Section 251(c)(3) of the Communications Act requires an incumbent LEC to provide unbundled network elements (or "UNEs") "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications services." 47 U.S.C. § 251(c)(3). In its Local Interconnection Order, and again in its review of Ameritech's section 271 application for Michigan, the Commission held that Bell companies must go further and provide UNEs on an already combined basis.[1] The Eighth Circuit overturned the Commission's position. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), cert. granted, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-286 et al.). The Act requires incumbent LECs to provide UNEs "'in a manner that allows requesting carriers to combine such elements,'" the Court of Appeals explained, which "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." Id. (quoting section 251(c)(3)).

As it is thus clear (pending Supreme Court review) that CLECs must do the combining themselves, and incumbent LECs are under no legal obligation to combine UNEs on behalf of CLECs, this paper addresses the contours of an incumbent LECs' statutory duty to provide UNEs in a manner that enables CLECs to combine them. Specifically, the paper answers five questions the Commission has asked BellSouth to address regarding the this legal obligation. This paper

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[1] 47 C.F.R. § 51.315 (vacated); see First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15647 (1996) ("Local Interconnection Order"), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), motion to enforce mandate granted, 1998 U.S. App. LEXIS 1043 (8th Cir. Jan. 22, 1998), cert. granted, 66 U.S.L.W. 3490, (U.S. Jan. 26, 1998) (Nos. 97-286 et al.); Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC No. 97-298, ¶¶ 160, 336 (rel. Aug. 19, 1997) ("Michigan Order").

does not discuss voluntary steps an incumbent LEC may take in excess of its obligations under sections 251, 252, and (in the case of a Bell company) the checklist requirements of section 271. It should be noted, however, that BellSouth has developed voluntary offerings that exceed its statutory obligations in this area, just as BellSouth has exceeded many of its duties toward CLECs under the Telecommunications Act of 1996.

DISCUSSION

Each of the questions that the Commission has posed relates to the methods of access that an incumbent LEC must afford CLECs in order to fulfill its obligations under section 251(c)(3). Specifically, the questions pertain to whether an incumbent LEC may comply with section 251(c)(3) by making access to UNEs available through collocation, or whether the LEC must afford CLECs direct physical access to the LEC's central office equipment.

In the Local Interconnection Order, the Commission left open the possibility that incumbent LECs might be required to provide methods of access and interconnection beyond collocation (and the meet-point arrangements used by adjacent LECs) if a state commission found such additional methods of access to be "technically feasible." See 47 C.F.R. § 51.321; Local Interconnection Order, 11 FCC Rcd at 15777-82, ¶¶ 544-554. CLECs have taken advantage of this perceived window of opportunity, arguing that physical collocation does not provide the requisite access under section 251(c)(3) and urging the Commission to guarantee them direct physical access to LECs' central office equipment. See Comments of AT&T Corp. in Opposition to BellSouth Section 271 Application for Louisiana, CC Docket No. 97-231, at 14-

23 (filed Nov. 25, 1997); AT&T's Falcone/Lesher (Louisiana) Aff. ¶¶ 38-96.[2] To date, however, the Commission has reserved judgment on the question of whether offering CLECs the ability to combine network elements using collocation would alone "be consistent with sections 251(c)(3) and 252(d)(2), or whether other methods of recombining must be offered."[3] The discussion below addresses part of this question, demonstrating that there is no legal basis for CLECs' demands for direct physical access. Whether or not the Commission has authority to require alternative methods of access beyond collocation, it certainly lacks authority to require direct physical access to the central office or other facilities of incumbent LECs.

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[2] In section 271 proceedings, some CLECs have gone even further, urging the Commission to ignore the core of the Eighth Circuit's decision and forbid Bell companies from "physically (manually) separating UNEs." Competitive Telecommunications Association ("CompTel") Ex Parte filing, Application by BellSouth Corporation , et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, at 5 (filed Nov. 12, 1997). Such a course is not available to the Commission in light of the Eighth Circuit's order enforcing is mandate. See Order on Motions for Enforcement of the Mandate, Iowa Utils. Bd. v. FCC, No. 96-3321, slip. op. at 6 (January 22, 1998) ("The FCC cannot do . . . in a ruling on a section 271 application that which we have expressly forbidden it from doing in its rule-making procedure."); Writ of Mandamus, Iowa Utils. Bd. v. FCC, No. 96-3321 (Jan. 22, 1998). As the Commission and CLECs themselves admitted in their petitions for certiorari, the Eighth Circuit's decision clearly permits incumbent LECs — including Bell companies — physically to separate UNEs before delivering them to CLECs. See AT&T, Petition for a Writ of Certiorari, AT&T Corp. v. Iowa Utils. Bd., No. 97-826, at 23 (Nov. 19, 1997) (challenging "Eighth Circuit's interpretation of 'unbundled'" to "mean 'physically separated'"); MCI, Petition for a Writ of Certiorari, MCI v. Iowa Utils. Bd., No. 97-829, at 17 (Nov. 18, 1997) (same); FCC, Petition for a Writ of Certiorari, FCC v. Iowa Utils. Bd., No. 97-831, at 27 (Nov. 19, 1997) ("under the court of appeals' decision" incumbent LECs will "physically disconnect combinations of elements").

[3] Memorandum Opinion and Order, Application by BellSouth Corporation , et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC No. 97-228, ¶ 199 (rel. Dec. 24, 1997) ("South Carolina Order").

1. The requirement that UNEs must be provided for combination by CLECs cannot support a mandate of direct physical access to the incumbent's equipment.

An incumbent LEC may rely on collocation arrangements to satisfy its obligation under section 251(c)(3) to provide UNEs in a manner that permits their recombination. Although the Eighth Circuit never directly addressed which methods of UNE access would satisfy section 251(c)(3), the Eighth Circuit did indicate that direct CLEC access to an incumbent's cental office equipment — on par with the incumbent's own access — was not required. To the contrary, the Court of Appeals explained: "the degree and ease of access that competing carriers may have to incumbent LECs' networks is . . . far less than the amount of control that a carrier would have over its own network." 120 F.3d at 816.

Having ruled out any requirement of direct physical access to central office equipment, the Eighth Circuit did not need to address specifically whether physical collocation was an acceptable method of access under section 251(c)(3) because the Act itself confirms that it is. Congress imposed upon Bell companies the "duty to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). Congress thus envisioned that CLECs would obtain access to UNEs under section 251(c)(3) — and the ability to combine those UNEs — through collocation.

The Commission, however, may not go beyond Congress's suggested method of access and require a Bell company to afford full physical access to Bell company equipment. Any requirement of direct physical access would constitute a taking of incumbent LECs' property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("a permanent

physical occupation authorized by government is a taking without regard to the public interests that it may serve"), and thus work an impermissible expansion of the Commission's statutory authority, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

In the Bell Atlantic case, the Commission had ordered incumbent LECs to provide collocation space within their central offices to competitors, so that the competitors could install their own circuit terminating equipment. 24 F.3d at 1444. The LECs would have recovered their "reasonable costs" of providing collocation. Id. at 1445 n.3. Yet at the time that the Commission issued this requirement, the Act did not contain express language authorizing such access to the facilities of incumbent LECs. Id. at 1446. The Court of Appeals therefore vacated the order as arbitrary and capricious on the basis that the Act did "not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." Id.

Congress was aware of this limitation in drafting the 1996 Act, and for that reason expressly provided for collocation. See 47 U.S.C. § 251(c)(6); H.R. Rep. No. 104-204, at 73 (1995) ("House Report"). This is the Act's only statutory authorization for CLEC entry into BellSouth's premises, however. Had Congress intended to grant CLECs a further right of physical access to the facilities and networks of incumbent LECs in connection with their responsibility for recombining UNEs, it would have included the necessary statutory language authorizing this access. Congress did not do so, thus putting any further encroachments on incumbent LECs' property rights beyond the Commission's power.

Nor, contrary to CLECs' arguments, would it make a difference if CLEC access to the incumbent's central office was intermittent rather than permanent. The Supreme Court has

directly rejected the claim that intermittent access to private property is not a permanent physical occupation. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court held that a permanent physical occupation occurs whenever "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[4]

2. The statutory requirement of access "at any technically feasible point" does not extend the Commission's authority with respect to methods of access.

The same provision of the 1996 Act that guarantees CLECs the ability to combine UNEs also guarantees them "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . . ." 47 U.S.C. § 251(c)(3). This statutory command of access "at any technically feasible point" does not expand (or even bear upon) the Commission's authority to mandate particular methods of access. When used in subsections 251(c)(2)(B) and (c)(3), the recurring phrase "any technically feasible point" refers to a distinct location "within the [incumbent] carrier's network" at which two networks are joined or a network element begins or ends. 47 U.S.C. § 251(c)(2)(B).

This is distinct from the means by which access is obtained, such as physical collocation, which enable CLECs to install the "equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). The provision requiring access "at any technically feasible point" thus "only

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[4] Id. at 832; see also Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (holding that a taking occurs when the government grants an easement allowing third parties to have intermittent access to property rights); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (holding that "a permanent physical occupation need not be continuous and uninterrupted.").

indicates where unbundled access may occur, not which elements must be unbundled," 120 F.3d at 810, or how network access will be afforded. Just as the Eighth Circuit struck down a Commission rule that confused the "where" and the "which" — by requiring unbundling of elements wherever technically feasible — so too would it be unlawful to confuse the "where" and the "how" — by requiring direct physical access to incumbent LECs' central office equipment if such access were found to be "technically feasible."[5]

Whether an incumbent chooses to provide network access through physical collocation or by making available direct physical access to the incumbent's equipment has nothing to do with the network "point" at which interconnection or access is provided. For example, if a CLEC wishes to combine unbundled local switching with other UNEs, and requests access at the line side of the switch toward that end, the incumbent LEC could fulfill its duty under section 251(c)(3) to provide access at the requested "point" by running a cross-connect from the switch to the CLEC's collocation cage, where the switching element could be utilized as the CLEC sees fit.

Beyond the plain language of the provision, reading section 251(c)(3)'s requirement of access "at any technically feasible point" as a license for CLECs to insist upon direct physical access to central office equipment would be inconsistent with the collocation provisions of section 251(c)(6). As the Commission has acknowledged, section 251(c)(6) was necessary to give the Commission authority "previously found lacking." Local Interconnection Order, 11

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[5] See 120 F.3d at 810, 818-19 nn.38& 39 (rejecting reasoning of Local Interconnection Order ¶¶ 278, 281 and vacating 47 C.F.R. § 51.317 "to the extent that the rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so").

FCC Rcd at 15779, ¶ 551. A specific authorization of collocation would not have been needed, however, if Congress had meant to authorize physical access to an incumbent LEC's facilities through section 251(c)(3).

The statutory command of access "at any technically feasible point" is no closer to an authorization of physical access to the incumbent's central office than was the statutory language found insufficient in Bell Atlantic. There, the D.C. Circuit held that the Commission's right under section 201(a) to order incumbent LECs "to establish physical connections with other carriers" did not provide the Commission with authority to order physical collocation because it did not specifically authorize a taking. 24 F.3d at 1445-47. If the duty "to establish physical connections" could not be read to authorize collocation arrangements, then the right to access "at any technically feasible point" surely does not empower the Commission to go even further and grant CLECs direct physical access to the incumbent's central office equipment.

3. CLECS' freedom to select a method of recombining UNEs does not expand incumbents' obligations regarding methods of access.

Upon receiving UNEs from the incumbent LEC, CLECs are free to decide for themselves how they will go about doing the actual combining of those UNEs. See 47 C.F.R. § 51.309(a) (prohibiting LEC restrictions on use of UNEs that would impair CLECs' ability to provide telecommunications services). This does not mean, however, that a CLEC is free to choose a method of recombination that requires direct physical access to the incumbent's equipment, and thereby create for itself an entitlement to such access. The Commission may not force an incumbent to afford direct physical access to its central office equipment absent "a clear warrant" in the governing statute, Bell Atlantic, 24 F.3d at 1446, which is not found in section 251(c)(3).

Moreover, so long as an incumbent LEC's chosen method of access affords CLECs at least one practicable way of recombining UNES — and thereby allows CLECs a "meaningful opportunity to compete" through the use of recombined UNEs — the LEC has fulfilled its statutory obligation, as interpreted by the Commission. When describing an incumbent LEC's obligations under section 251 (and the checklist if it is also a Bell company), the Commission generally has required the LEC to meet a standard of "equivalent access" — i.e., to demonstrate that the network access it provides to CLECs is on par with what it provides itself. See Michigan Order ¶ 140. But the Commission also has recognized that a CLEC may order items that do not have a retail analog. Id. ¶ 141. Where a CLEC requests such an item, — for example by ordering UNEs for the purpose of recombining them — meaningful retail comparisons are not available and a LEC instead "must demonstrate that the access it provides to competing carriers satisfies its duty of nondiscrimination because it offers an efficient competitor a meaningful opportunity to compete." Id.

Under this "meaningful opportunity to compete" standard, a LEC must afford a method of access to UNEs that provides CLECs with a feasible method for recombining those UNEs. But if the LEC's chosen method of access — typically collocation — provides that opportunity, there is nothing in the Act to support a CLEC's further demand for direct physical access to the LEC's central office equipment. See 120 F.3d at 813 ("The fact that . . . unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier."). Of

course, once the CLEC has received the requisite access through physical collocation, it is free to choose any compatible method of combining UNEs.

4. The Eighth Circuit's dicta regarding "network access" is consistent with the statutory reliance upon collocation as CLECs' method of access for purposes of combining UNEs in the central office.

The Eighth Circuit concluded from incumbent LECs' stated reluctance to combine UNEs for CLECs, that these incumbents "would rather allow [CLECs] access to their networks than have to rebundle the unbundled elements for them." 120 F.3d at 813. This observation is wholly consistent with a statutory scheme under which incumbent LECs must afford "access to their networks" within the central office only through collocation. Indeed, the Eighth Circuit simply stated the obvious: If the incumbent LEC does not combine UNEs for the CLEC and the CLEC itself must "do [some] of the work," id., then the CLEC of course must have some form of physical access to the necessary network pieces for this purpose.

While the Court of Appeals noted the Commission's concern that giving CLECs "access" for combining UNEs might in some way "interfer[e] with [incumbents'] networks," there is no basis for concluding that the court itself had in mind physical entry into the central office beyond collocation. Id. "Network access" is a term of art encompassing a variety of arrangements that range from utilization of a collocation cage, to accommodations that do not involve any form of entry into the incumbent's central office. For instance, the Commission's rules list meet point arrangements as a "metho[d] of obtaining . . . access to unbundled network elements," 47 C.F.R. § 51.322(b), yet such arrangements do not entail direct physical access to the incumbent's central office equipment.

5. The Eighth Circuit's holding regarding CLECs' ability to obtain end-to-end network elements on an unbundled basis also is consistent with the use of physical collocation to access UNEs.

The Eighth Circuit held that CLECs "may obtain the ability to provide finished telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3)." 120 F.3d at 815. The Court of Appeals thus rejected arguments that "a competing carrier should own or control some of its own local exchange facilities before it can purchase and use unbundled elements from an incumbent LEC to provide a telecommunications service." Id. at 814.

This endorsement of end-to-end UNEs, which will be reviewed by the Supreme Court next fall, is also consistent with a statutory scheme that relies upon physical collocation as the principal method of access to UNEs. While it is true that CLECs may need some materials to combine network elements delivered to a collocation cage, these same items would be needed regardless of whether the CLEC has "its own telephone exchange facilities" or buys from the incumbent the full set of unbundled elements that comprise a finished retail service. In other words, the Eighth Circuit's decision that CLECs must combine UNEs for themselves necessarily requires that the CLECs obtain the materials (which could range from a termination frame to electrical tape) necessary to perform the combinations. The incumbent is not required to provide these materials because they are not network elements used in its own network. See 120 F.3d at 813 ("subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network — not to a yet unbuilt superior one"). And the incumbent certainly is not required to provide physical access to its central office transmission equipment just because this might lessen (but not eliminate) the CLEC's need to obtain the materials used to accomplish

combinations of UNEs. See id. at 813 ("incumbent LECs" need not "cater to every desire of every requesting carrier").

This is confirmed by the Eighth Circuit's observation that "the degree and ease of access that competing carriers may have to incumbent LECs' networks is . . . far less than the amount of control that a carrier would have over its own network." Id. at 816. The Eighth Circuit knew that CLECs choosing to compete on a facilities basis without constructing even part of a network of their own would face different technical challenges than the incumbent or a network-based CLEC. Such challenges, however, are an inherent part of "the costs and risks associated with unbundled access as a method of entering the local telecommunications industry," id. at 815, and they are matched by unique benefits associated with this mode of entry.

CONCLUSION

The Commission may not require incumbent LECs to grant CLECs direct physical access to central office transmission equipment. Nothing in the 1996 Act expressly authorizes such physical entry, as would be required under the Bell Atlantic decision. Likewise, nothing in the Eighth Circuit's holdings suggests an expectation by the court that such direct physical access would occur.

BELLSOUTH'S EVIDENCE OF COMPLIANCE WITH CHECKLIST ITEM 1: INTERCONNECTION

- BellSouth's interconnection agreements and its Statements of Generally Available Terms and Conditions make available interconnection for the exchange of local traffic between BellSouth and a CLEC.

- Interconnection typically involves the following components in establishing complete and efficient interconnection of networks: 1) termination points; 2) trunk directionality; 3) trunk termination method: and, 4) interconnection billing.

  - Termination points. BellSouth allows interconnection at the line-side or trunk-side of the local switch, as well as at trunk interconnection points for a tandem switch, central office cross-connect points, and out-of-band signal transfer points. Pursuant to a "Bona Fide Request Process" that was developed jointly with AT&T and is available to all CLECs, BellSouth also will provide local interconnection at any other technically feasible point, including meet-point arrangements.

    - To date, four CLECs — MCImetro, NextLink, Hyperion, and ICG — have requested local tandem interconnection. The latter two requests have been completed (with nearly 250 trunks in use), while the details of the former two are still being worked out.

    - Although local tandem interconnection was formerly accomplished through the BFR process. BellSouth now offers local tandem interconnection as a standard arrangement.

  - Trunk directionality. BellSouth offers routing of local and intraLATA traffic over a single trunk group. Access traffic, as well as all other traffic utilizing BellSouth's intermediary tandem switching function, is routed via a separate trunk group.

    - The CLEC may choose to order two-way trunks for exchange of combined local and intraLATA toll traffic at BellSouth end offices or access tandems. Both companies will have to agree to the following two-way trunking principles.

      - The CLEC will initiate a request for two-way trunking, BellSouth will concur, and two-way trunking will be jointly provisioned.

      - The parties will agree upon a mutually acceptable Point of Interconnection. (If an agreement cannot be reached, each party will establish its own one-way trunk group.) BellSouth and the CLEC will each be responsible for installation and maintenance of

its own trunks and facilities.

- BellSouth and the CLEC will jointly review the trunk forecast on a periodic basis, as needed, but at least every 6 months.

- The CLEC will order trunks using the Access Service Request process in place for local interconnection.

- BellSouth and the CLEC must agree on standard traffic engineering parameters that will be used in the engineering of the trunk groups.

- Either the CLEC or BellSouth can request one-way trunk groups, even after two-way trunk groups are in place.

- For technical reasons, two-way trunk groups may not be used with a BellSouth DMS100 local tandem switch or a DMS100 end office switch. (Calls from cellular type 1 trunk groups and some PBXs would otherwise automatically fail.)

- To date, two-way trunking has been ordered by one CLEC, Continental Cable, in Jacksonville, Florida.

- In cases where the CLEC is also an IXC, the IXC's Feature Group trunking must remain separate from the local interconnection trunking.

- Trunk termination method. BellSouth offers interconnection of facilities and equipment through: 1) physical collocation; 2) virtual collocation, and 3) interconnection via purchase of facilities from either company by the other company.

  - Physical collocation is available from BellSouth as evidenced by the fact that, from late 1996 through November 30, 1997, 40 physical collocation arrangements were put in service in BellSouth's nine-state region.

    - Physically collocated equipment is placed in secured areas, separated from BellSouth's equipment area. The CLEC may elect to terminate its own fiber entrance cables on its collocated equipment. The CLEC is able to install, operate and maintain its equipment within that space and arrangements are made for the installation of cross-connections to BellSouth's unbundled network elements, transport services, and trunking to other BellSouth central offices.

- BellSouth places no restrictions on the type of telecommunications equipment which may be physically collocated within a BellSouth central office. However, in order to protect BellSouth facilities, equipment and personnel, and the equipment and personnel of collocators, all collocation arrangements must be engineered and installed by a BellSouth-certified supplier and must comply with the BellSouth Engineering and Installation Standards for Central Office Equipment (TR 73503). A CLEC may be approved to perform those tasks which must be performed by certified suppliers.

- BellSouth permits a CLEC to place interconnection facilities between its physical collocation spaces within a building in those cases when a single CLEC has more than one physical collocation arrangement in a given central office building.

- Where space is not available for physical collocation, or upon request of the CLEC, BellSouth will offer virtual collocation for local interconnection in accordance with the existing BellSouth Tariff FCC Number 1, Section 20, "Virtual Expanded Interconnection Service." Across BellSouth's nine-state region, there were 152 virtual collocation arrangements in service to CLECs with an additional 44 arrangements in progress as of November 30, 1997.

  - Under this option, the CLEC installs fiber optic transmission cable to the entrance manhole of the BellSouth tandem or end office and provides sufficient additional cable for BellSouth to pull the cable into a cable vault. BellSouth splices the CLEC's transmission cable to a CLEC-provided riser tail and cable termination shelf assembly. The CLEC directly contracts with a BellSouth-certified supplier for the engineering and installation of its collocation equipment arrangement.

  - The CLEC leases to BellSouth all equipment, facilities and support components required to provision and maintain/repair the arrangement on an ongoing basis for the nominal fee of one dollar ($1.00).

  - Performance monitoring, alarm monitoring and software cross-connect control of all collocator-owned/BellSouth-leased facilities and equipment are the responsibility of the CLEC. Once notified by the CLEC that work is necessary, BellSouth will, at a minimum,