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March 20, 1998

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Ex Parte
CC DKT. 97-208 Application by BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provisioning of In-Region, interLATA Service in South Carolina.

Dear Ms. Roman Salas:

A copy of the attached document was provided to Ms. Carol Mattey of the Common Carrier Bureau's Policy Division on Friday, March 20, 1998.

Two copies of this Notice are being submitted to the secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

Robert W. Quinn Jr.

Attachments

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March 20, 1998

Ms. Carol Mattey
Chief, Policy & Program Planning Division
Federal Communications Commission
Common Carrier Bureau
1919 M Street, NW, Room 544
Washington, DC 20554

Dear Ms. Mattey:

Enclosed please find a copy of AT&T's paper titled "The Incumbent LEC's Duty to Permit New Entrants to Combine Unbundled Network Elements At Any Technically Feasible Point." This paper is submitted pursuant to the process set forth in the Public Notice dated January 27, 1998 announcing meetings on Section 271 of the Communications Act of 1934, as amended.

Please contact me if you have any questions regarding this matter.

Best Regards,

Robert W. Quinn Jr.

Attachments

cc: Melissa Newman
Michael Pryor
Jake Jennings
Katherine Schroder
Michelle Carey
Jordan Goldstein

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THE INCUMBENT LECS' DUTY TO PERMIT NEW ENTRANTS TO COMBINE UNBUNDLED NETWORK ELEMENTS AT ANY TECHNICALLY FEASIBLE POINT

The issues discussed in this memorandum arise out of AT&T's efforts to obtain access to incumbent LEC unbundled network elements in the aftermath of the Eighth Circuit's decision in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom. AT&T Corp. v. Iowa Utilities Bd., No. 97-826 (January 26, 1998). The Eighth Circuit held that competing LECs are not entitled to access to an incumbent LEC's network elements as already combined in the incumbent LEC's network. Instead, the court interpreted the Act to mean that carriers requesting unbundled network elements "will combine the unbundled elements themselves." Id. at 813.

Since that decision, AT&T has identified methods for recombining network elements that would not require AT&T to lease collocated space in an incumbent LEC's central office or install any network facilities or equipment in an incumbent LEC's central office. Although these methods impose significant costs and risks upon AT&T that resale or access to existing combinations of network elements would not, they are less costly and risky than methods that involve collocation.

The incumbent LECs, however, have refused to provide access to their unbundled network elements at points where it would be technically feasible for AT&T to combine elements using these methods. They insist that the Eighth Circuit's decision requires that new entrants not only combine elements themselves, but do so at only one particular point in the incumbent LEC's network: collocated facilities installed by the competing LEC in the incumbent LECs' central office. BellSouth has taken this position in its section 271 application for Louisiana and in a recent ex parte submission to the Commission;[1] other incumbent LECs have

[1] See In the Matter of Application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, BellSouth Brief at 47-48 (filed Nov. 6, 1997); In the Matter of Application by BellSouth Corporation, et al for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, BellSouth Reply Brief at 35-37 (filed Dec. 19, 1997); Ex Parte Letter from Kathleen B. Levitz to Magalie R. Salas, February 25, 1998, and attachments ("BellSouth Ex Parte")

made similar arguments in other venues.[2] In the BellSouth South Carolina Order, the Commission observed that it was "still evaluating" the impact of the Eighth Circuit's ruling on the question whether it may require "methods other than or in addition to collocation for combining network elements" pursuant to the statute. BellSouth South Carolina Order ¶ 199. In the subsequent BellSouth Louisiana Order, the Commission did not address the issue at all.

The incumbent LECs' insistence upon requiring the competing LECs to collocate facilities before competing LECs can combine network elements lacks merit. It conflicts with the plain language of section 251(c)(3) -- which requires non-discriminatory access to unbundled network elements -- and with numerous Commission rules that the Eighth Circuit expressly upheld, and that BellSouth and other incumbent LECs inexplicably and improperly ignore. A collocation requirement would also conflict with the Eighth Circuit's decision that competing LECs may combine elements without owning or controlling "some portion of a telecommunications network," and with the court's acknowledgement that granting competitors access to incumbent LECs' networks is an inevitable consequence of the incumbents' decision to disassemble their networks. 120 F.3d at 813-14.

More fundamentally, a collocation requirement would prevent the achievement of one of the Act's basic goals. As the Eighth Circuit recognized, "the Act itself calls for the rapid introduction of competition into local phone markets by requiring incumbent LECs to make their network elements available to their competing carriers." 120 F.3d at 816-17. If the incumbent LECs succeeded in imposing a collocation requirement, "rapid introduction" of UNE-based local competition could not occur. As AT&T has elsewhere explained in detail, although collocation

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Ex Parte Letter from Susanne Guyer to Magalie R. Salas, March 13, 1998 and attachments ("Bell Atlantic Ex Parte".

2 Bell Atlantic, for example, argued at length in its Ex Parte and in its reply comments before the New York Public Service Commission that collocation is the sole point of access for combining network elements that it is required to provide under section 251; in response, AT&T submitted detailed comments rebutting the specific arguments that Bell Atlantic raised. See Rebuttal Comments of AT&T Communications of New York (Dec. 22, 1997) and Reply Comments of Bell Atlantic New York, (Dec. 16, 1997), submitted in Ordinary Tariff Filing of New York Telephone Company to Effect the Withdrawal of Certain Combinations of Unbundled Network Elements, Case No. 97-C-1963 (NY PSC). As of this date, the NY PSC has not ruled on the matter.

may be appropriate for competitors that seek access only to a single network element, the costs and risks of using collocation to combine unbundled network elements are so high as to foreclose meaningful competitive entry using such combinations.[3]

This memorandum therefore addresses various arguments that the incumbent LECs and BellSouth have raised in favor of a collocation requirement. Part I describes two points of access to an incumbent LEC's network, other than collocated facilities in an incumbent LEC central office, at which it is technically feasible to provide competing LECs with access to an incumbent LEC's unbundled network elements for the purpose of combining them.

Part II explains why the Act and the Eighth Circuit's decision give competing LECs the right, if they choose, to utilize a recombination process that the ILECs use today. Part III demonstrates more broadly that the plain language of section 251 authorizes any alternatives to collocation for combining unbundled network elements that are technically feasible, and that the Eighth Circuit's decision forecloses the incumbent LECs' claim that competing LECs can be limited to access at only one point in the network, collocated facilities.

Part IV demonstrates that the "takings" concerns that the incumbent LECs have raised provide no basis for ignoring the plain meaning of section 251(c)(3). Finally, Part V refutes BellSouth's contention that an incumbent LEC can satisfy its obligations under section 251(c)(3) by providing only one practicable method of combining unbundled network elements.

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[3] See, e.g., Aff. of Robert V. Falcone and Michael Lesher, submitted by AT&T in Opp. to BellSouth Louisiana section 271 application, CC Docket No. 97-231 ("Falcone/Lesher Aff.").

I. THERE ARE MULTIPLE POINTS IN AN INCUMBENT LEC'S NETWORK AT WHICH IT IS TECHNICALLY FEASIBLE FOR A COMPETING LEC TO GAIN ACCESS FOR PURPOSES OF COMBINING UNBUNDLED NETWORK ELEMENTS

Section 251(c)(3) requires incumbent LECs to provide other carriers with nondiscriminatory access "at any technically feasible point" to unbundled "network elements," and to do so "in a manner that allows requesting carriers to combine such elements." § 251(c)(3) (emphasis added). This plain statutory language comports fully with engineering reality. There are, as a practical matter, multiple points of access to an incumbent LEC's network elements at which it is technically feasible for a competing LEC to gain access to network elements for the purpose of combining them. This memorandum will discuss three such points of access -- collocated space; the main distribution frame ("MDF"); and operations support systems (OSS).

A. Collocated Space

Facilities installed in collocated space are one point where it is technically feasible for a competing LEC to gain access to an incumbent LEC's network elements. As described in detail in the affidavit of Messrs. Falcone and Lesher, collocated space is an area within an incumbent LEC's central office that the incumbent LEC leases to the competing LEC in which the competing LEC permanently installs network facilities and equipment. See Falcone/Lesher Aff. ¶¶ 30-34 and Att. 7. That space is then dedicated exclusively to the competing LEC's use: The area is separated from the rest of the central office by walls or wire mesh and a locked door, and the competing LEC, not the incumbent LEC, is responsible for maintaining the collocated facilities.

Collocation was developed as a means of providing certain facilities-based carriers -- those that had their own switches and transport -- with access to the loops that terminated at an incumbent LEC's central office. Rather than replicate the last mile of the incumbent LEC's network, those carriers could install remote switching and/or transmission

facilities in the incumbent LEC's central office and thereby gain access to the incumbent LECs' loops. To gain such access, the incumbent LEC would need to disconnect the customer's loop from the cross-connect at the MDF, and reconnect it to the competing LEC's cable.

BellSouth and other incumbent LECs now seek to require competing LECs to use collocated space to combine the incumbent LEC's loop and switching elements. Under this approach, the incumbent LEC would disconnect the customer's loop and port at the MDF, and then run cables from both the loop and port to the competing LEC's collocated space, where the two would be reconnected by the competing LEC. The approach is ill-conceived, to say the least. It makes no more sense than running a series of extension cords from a living-room lamp around the entire living room to ultimately plug the daisy chain of extension cords into the electrical socket adjacent to the lamp, rather than simply plugging the lamp directly into the socket. See Falcone/Lesher Aff. ¶ 35 & Att. 9.

B. OSS

One alternative to collocation -- combining elements through use of the "recent change" process -- involves accessing the network elements at a point within the incumbent LECs' OSS. The recent change process is the automated process that incumbent LECs routinely use today to separate, recombine, and modify elements such as the loop, switching, and transport, to serve their customers. As used by the incumbent LECs, the process involves sending software messages to the switch to determine, for example, whether and how network elements are to be made available to a particular customer.

Competing LECs could combine network elements just as the incumbent LECs do by gaining access to the incumbent LEC's OSS for this purpose. Such access is technically feasible. Indeed, each of the large incumbent LECs today provides comparable access to their Centrex customers so that they can offer those customers the ability to make changes on their lines. That service permits large incumbent LEC customers to use a remote terminal, connected to a data base within the OSS, to connect and disconnect lines, and to add, delete or alter

features, and make other changes to a block of lines dedicated to their use. With modifications that are modest and technically feasible, these systems could be used to provide LECs with comparable access to combine, for example, the loop and the switch.

C. The MDF

A second alternative to collocation is simply to dispense with the collocated space and associated tie-cables, cross-connects, and terminal frame (or "mini-MDF") that the incumbent LEC-approach imposes. The same functional result of disconnecting the customer's service (and thereby separating the loop and port) and reconnecting that service (and thereby combining the loop and port) can be achieved simply by allowing the incumbent LEC to disconnect the cross-connect at the MDF (which it would also do in the collocation approach) but then permitting the competing LEC to perform the physical work needed to reconnect the cross-connect right at the MDF itself. See Falcone/Lesher Aff. at ¶ 99. This could be done either by having an incumbent LEC and competing LEC technician standing "shoulder-to-shoulder" at the MDF or, more efficiently, by having the incumbent LEC and interested competing LECs jointly retain a single, incumbent LEC-certified vendor who would deploy a single technician to perform both tasks. See id. at ¶¶ 100-107.

II. REQUIRING INCUMBENTS TO PERMIT COMPETITORS TO USE THE RECENT CHANGE PROCESS TO COMBINE ELEMENTS SATISFIES THE NONDISCRIMINATION PROVISIONS OF THE ACT AND THE 8TH CIRCUIT'S DECISION

The most promising alternative to collocation -- indeed, the only alternative that, if properly implemented, could satisfy both the Eighth Circuit's mandate that competing LECs combine unbundled network elements and the Act's command (and the Commission's rules) requiring nondiscriminatory access to network elements -- is combination of elements using the recent change process. Although the incumbent LECs presumably will object to this alternative on the grounds discussed in Parts III-V, infra, they object expressly to this method as a threshold

matter on the ground that it does not involve "physical separation" of unbundled network elements and therefore conflicts with the Eighth Circuit's decision. See BellSouth Ex Parte, Att. 2 at 3 n.2; Bell Atlantic Ex Parte at pp. 4-5.

This argument lacks merit. Although the Eighth Circuit did hold that that CLECs rather than ILECs must do the combining, it did not enshrine a new right for incumbent LECs to insist upon unbundling network elements by physically separating them, rather than by logically separating them. To the contrary, the court specifically upheld the Commission's rules that implement the statute's guarantee of nondiscriminatory access to network elements. Because the incumbent LECs themselves routinely use logical means to separate and combine the elements of their network, those rules -- and the Eighth Circuit's decision upholding them -- require incumbent LECs to provide competitors the ability to combine network elements just as the incumbent LECs do.

A. The Eighth Circuit's Decision

The Eighth Circuit addressed all of the Commission's unbundling rules; it vacated some, but it upheld all of the rest. Notably, in vacating Rule 51.315(b), the court held that "the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves," explaining that section 251(c)(3) imposes a duty to provide access "only on an unbundled (as opposed to a combined) basis." Iowa Utils. Bd., 124 F.3d at 813. Accordingly, the Eighth Circuit vacated Rule 51.315(b), holding that section 251(c)(3) could not reasonably be construed to forbid incumbent LECs "from separating network elements that it may currently combine." 120 F.3d at 813.[4]

Nowhere in its opinion, however, did the Eighth Circuit provide an express definition of the statutory terms "combine" or "unbundle" as used in section 251(c)(3). The Eighth Circuit concluded only that the terms "combine" and "unbundle/separate" are antonyms:

[4] The Supreme Court, of course, has granted certiorari, inter alia, on the validity of this statutory interpretation. For purposes of this memorandum, however, we assume that this holding and the Eighth Circuit's construction of the relevant statutory language are binding on the Commission.

It found a duty to provide access to network elements on "only on an unbundled (as opposed to a combined) basis." 120 F.3d at 813. It simply did not address whether its concept of unbundling or combining elements requires physical as opposed to logical methods of separating and combining.

In this regard, BellSouth's claim (Ex Parte Att. 2, at 3 n.2) that the Commission "admitted" in its cert. petition that "the Eighth Circuit's decision clearly permits incumbent LECs -- including Bell companies -- physically to separate UNEs before delivering them to CLECs" is simply incorrect. What the Commission in fact stated was that the incumbent LECs have put that interpretation on the decision: "Incumbent LECs have unambiguously declared that, under the court of appeals' decision, they will physically disconnect combinations of elements (such as loops and switches), evidently to subject new entrants to the expense of reassembling them." FCC, Pet. for Cert., FCC v. Iowa Utils. Bd., No. 97-831, at 27 (Nov. 19, 1997). In so stating, the Commission plainly did not concede that the incumbent LECs' interpretation was correct. See id.

It is also important to note that the Eighth Circuit did not disturb the Commission's definition of the term "combine" to mean "connect" in the Local Competition Order.[5] Specifically, the Court defined the statutory term "combine" to mean "connecting two or more unbundled network elements in a manner that would allow a requesting carrier to offer the telecommunications service it seeks to offer." Local Competition Order ¶ 294 n.620 (emphasis added). The Eighth Circuit's opinion thus requires competing LECs to do the connecting ("combining") for any elements that the incumbent LEC disconnects ("separates") -- but does not expressly reach the question whether that connecting and disconnecting is to be done physically or logically.

Other aspects of the Eighth Circuit's decision, however, effectively foreclose the Bell Atlantic/BellSouth argument that "physical" separation and combination are required by

[5] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) ("Local Competition Order").

section 251(c)(3). Apart from Rule 51.315(b) and several other specific rules, the Eighth Circuit expressly upheld all of the Commission's other rules related to unbundled network elements. 120 F.3d at 818-19 nn. 38-39. Rejecting the claims of some LECs that the unbundling rules, viewed in their entirety, conflicted with the Act's purposes, the court stated that, by vacating the pricing rules and certain unbundling rules and upholding the remaining unbundling rules, it had struck an appropriate balance. 120 F.3d at 815-16. Having "conclude[d] that the Commission's unbundling rules do not subvert the Act's purposes," the court decided to "uphold all of the Commission's unbundling regulations except [for certain specific provisions]." Id. at 817, 818 n.38.

In particular, the court upheld the rules that mandate that a competing LEC must be given access to network elements that is equal to the incumbent LEC's access. Most notably, Rule 51.313(b) provides that "the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements . . . shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself." 47 C.F.R. § 51.313(b); see also id. § 311(b) ("the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself"). As explained below, because the incumbent LECs themselves use means other than collocation to disconnect and reconnect the elements of their network, they must permit competing LECs to use those means as well.

B. Incumbent LECs Connect And Disconnect Elements Logically Rather Than Physically

Network elements are combined when they are connected and can be used together to provide telecommunications services. Local Competition Order ¶ 294 n.620. Incumbent LECs routinely connect and disconnect network elements, but only rarely do so by physically pulling apart cables, wires and hardware connections and then reassembling them. Instead, the incumbent LECs employ the recent change capability that is built in to every switch

to connect or disconnect these elements "logically" -- that is, by making software changes. These logical connections give the network its connectivity and functionality. Without them, the wires, cables, switches, and other elements of the network -- even if physically connected -- would be inoperable.

A few examples of how incumbent LECs use the recent change capability illustrate the point. When a customer terminates local phone service, the incumbent LEC does not send personnel into the central office to disconnect the former customer's loop from the switch by manually lifting the cross-connect at the MDF. Such a step, although effective, would be tremendously costly and wasteful. Instead, the incumbent LEC utilizes the recent change process to send an electronic message to a database associated with the former customer's switch instructing it to terminate service for that loop, effectively disconnecting the loop from the switch. From that moment forward, that loop is not functional and cannot be used to send make or receive calls. The loop remains disconnected until the ILEC sends an appropriate subsequent message that effectively reconnects the loop with the switch in order to begin service for the new customer.[6] The incumbent LECs thus handle most loop and switch disconnections and reconnections electronically, not physically. See, e.g., Examination of Thomas M. Aulisio of Bell-Atlantic N.Y., Mass. DPU/DTE 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E, Hearing Vol. 22, Dec. 4, 1997, pp. 27-30.

Incumbent LECs also use the recent change process to combine other elements. For example, if an incumbent LEC decides to relieve an over-burdened tandem switch that

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[6] See, e.g., Examination of Neil Cox of Ameritech, Public Utilities Commission of Ohio Case No. 96-752 TP-ARB, Hearing Tr. Vol. IV, p. 44:

> Q: But with respect to the unbundled network elements, what I believe I heard your testimony to be is that – and correct me if I misheard you please – [Ameritech] will not provide elements to its customers in parity with how Ameritech Ohio is provisioning those same elements to its end user customers; is that correct?
>
> A: That's correct because you're comparing apples and oranges. You're comparing two different – you're comparing resale, which is the systems all integrated in with our network – and in the last twenty years we have mechanized this very much so we can push a button and turn service on – versus unbundled network elements, which are a coordination where every order has to be dispatched on.

serves end office switch A and end office switch B, physically installing new transport between those switches is not sufficient to accomplish the task. To effect a functioning connection between the new transport and these switches, each switch's recent change memory must be reprogrammed to connect and thereby route traffic over the new transport. The recent change capability also works dynamically. Building upon the above example, assume that the incumbent LEC wishes to use the tandem now only for overflow traffic between end office switches A and B. It would use the recent change process to program the switches to use the tandem trunk group for such overflow.

C. Logical Separation and Combination Is The Only Means That Fully Satisfies The Eighth Circuit's Requirements And The Commission's Rules

Because the incumbent LECs themselves use the recent change process to separate and recombine elements, section 251(c)(3) and the Commission's rules mandate that competing LECs be provided the same means. Although the Eighth Circuit vacated the Commission's rules that would have required incumbent LECs to provide competing LECs with "superior quality access to network elements," the Court expressly upheld those rules that require that the quality of access "be equal -- not superior." 120 F.3d at 812. The Commission's rules also require incumbent LECs to provide access to network elements on terms and conditions "no less favorable. . .than the terms and conditions under which the incumbent LEC provides such elements to itself." § 51.313(b); see § 51.311(b) (access must be "equal in quality" to incumbent LEC's). In short, competing LECs that are not permitted to connect and disconnect loops and switches logically, as incumbent LECs do, are not receiving equal access to those elements.

Indeed, logical separation and recombination is the only method of accessing unbundled network elements that fully satisfies the standards of section 251(c)(3). Section 251(c)(3) requires that access to network elements be made available on an unbundled basis "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." It would certainly be "discriminatory" and "unreasonable" for an incumbent LEC to refuse to make available a method of combining elements that it routinely uses.

Moreover, only logical methods of recombination hold out any promise of permitting competing LECs the opportunity to compete using combinations of unbundled network elements -- and therefore to meet the Act's goal of "rapid introduction" of UNE-based competition. See 120 F.3d at 816-17. Physical combination is simply too cumbersome to handle the volume of transactions that a truly competitive market would produce. And physical combination would not permit competing LECs to compete for those incumbent LEC customers served by integrated digital loop carrier (IDLC) and whose service cannot be rolled over to a spare copper pair. See Falcone/Lesher Aff. ¶¶ 70-74.

D. The Recent Change Method of Recombination Imposes Costs And Risks Not Imposed By Resale

The foregoing demonstrates that logical methods of connecting network elements are the only methods of combining unbundled network elements that fully satisfy both the Act and the Eighth Circuit's decision. In this regard, one other aspect of the Eighth Circuit's opinion is worth noting. Although the Eighth Circuit's decision to vacate Rule 51.315(b) rested on the court's reading of the plain language of section 251(c)(3), the Eighth Circuit noted that, as a consequence of its statutory interpretation, the costs and risks of using unbundled network elements would increase: "[R]equiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access" beyond the costs and risks associated with resale. Id. at 815. The recent change method of recombination imposes costs and risks that resale does not.

In the incumbent LEC's collocation approach, a technician manually separates the loop from the port by disconnecting cross-connects at the MDF. At the moment of disconnection, the customer entirely loses service: Any on-going call is interrupted, no new calls can be made or received, and the phone line is "dead." Service is not restored until the technician completes new cross-connections to the tie cables leading to and from the competing LEC's collocated space. This procedure imposes both costs (manual labor, delayed and gated market entry) and risks (customer dissatisfaction due to service outages, delayed provisioning,

degraded quality, etc.) that would not be incurred if competing LECs were to resell incumbent LEC service. See Falcone/Lesher Aff. ¶¶ 38-96.

The recent change method of recombination likewise imposes risks that resale does not. In this method of connecting network elements, the incumbent LEC separates the loop from the port by sending, electronically, a message that tells the switch to disconnect that line. By taking this step, the incumbent LEC separates the customer's loop and port just as effectively as if the incumbent LEC had physically disconnected the loop/port connection at the MDF. Once that disconnect message is processed, the customer can no longer make or receive calls; as with manual separation, the line is dead.[7] Service will not be restored unless and until the competing LEC takes an additional discrete step -- to send, electronically, a reconnect message to the same database in the switch. This recombination step is every bit as important as recombining by manually laying in a cross-connect. If the competing LEC's operators or systems fail to send such a reconnect message, the competing LEC's new customer will have no telephone service.

Use of the recent change approach imposes a risk of significant customer outages that is entirely absent with resale. In the latter, customers are transferred from the incumbent LEC to the competing LEC without any interruption in service and without any risk of interruption. The competing LEC never needs to send a message to the switch's recent change memory to restore service, because service is never interrupted to begin with. With recent change, however, there will always be some period of customer outage (between the processing of the suspend and restore messages), and there is a significant risk of prolonged customer outage, which will occur if the competing LEC's reconnect messages are either not sent or not properly processed by either the competing or the incumbent LEC.

The recent change method also imposes costs that resale would not. With resale, competing LECs would not incur the costs of developing and integrating the OSS systems

[7] The recent change is more flexible than physical separation, however, in that the disconnect message can be tailored to preserve the customer's ability to call 911, or the incumbent LEC's business office, to comply with state "warm dial tone" requirements. Physical separation does not have this ability.

necessary to send reconnect messages to the relevant switch's recent change memory. To develop this capability will require (1) the incumbent LECs and competing LECs to agree on standards for formatting these messages; (2) the competing LECs and incumbent LECs to incur the costs of having vendors develop the necessary software to send and receive such messages; (3) the competing LECs to incur the costs of deploying and integrating such software into their existing ordering systems; and (4) the competing LECs to incur the costs of training personnel to use and maintain this software. None of this development work or expense would be required of a competing LEC seeking to enter via resale.

* * * *

In summary, use by competing LECs of the recent change process to access and recombine unbundled network elements is comparable to the processes used by the incumbent LECs themselves to combine network elements for the purpose of providing service to end users. In addition, the recent change process permits the incumbent LEC to separate the loop and switch in a manner that -- absent additional work by the competing LEC -- will completely and indefinitely prohibit the competitor from providing telephone service to its customer. It requires the competing LEC to take a concrete step to combine elements for every new customer the competing LEC signs up -- and to incur the costs of taking those steps -- in order to provide service to the new customers. Finally, it imposes substantial costs upon competing LECs and creates risks of customer outage that simply would not be incurred if competing LECs were able to gain access to network elements in existing combinations.

Further, logical combination is able to satisfy the statutory reasonableness and nondiscrimination requirements in ways that physical combination cannot. Logical combination is the only method that will permit competing LECs to recombine network elements for all of the incumbent LECs' customers, rather than just those served by analog loops. It is the only method to do so for large volumes of customers without gating entry, thus permitting the "rapid introduction" of local UNE-based competition that the Act requires. 120 F.3d at 813-14. Finally, it is the only method that allows CLECs to combine elements as the incumbent LECs do.

In short, logical recombination not only meets the Eighth Circuit's requirement that competing LECs recombine elements themselves, it is the only method that satisfies the criteria of section 251(c)(3).

III. UNDER SECTION 251 AND THE EIGHTH CIRCUIT'S DECISION IN IOWA UTILITIES BOARD, INCUMBENT LECS MAY NOT FORCE COMPETING LECS TO COMBINE ELEMENTS ONLY IN COLLOCATED SPACE

In response to AT&T's requests to pursue alternatives to collocation, the incumbent LECs have uniformly argued that the only point of access at which competing carriers may access network elements is through use of their own facilities installed in collocated space. The incumbent LECs' insistence on collocation conflicts with both the plain language of section 251 and with the Eighth Circuit's decision.

A. Section 251(c)(3) Clearly Authorizes Access To Network Elements At Points Other Than Collocated Space

Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements . . . at any technically feasible point." § 251(c)(3) (emphasis added). Providing competing LECs with access to an incumbent LECs' OSS or to its MDF falls squarely within this plain language.

1. Recent Change

The incumbent LECs have not argued that OSS systems are an impermissible point of access for network elements, and no such argument could be legitimate. The Commission has squarely held that an incumbent LEC's OSS is a network element. OSS also provides a point within an incumbent LEC's network that a competing LEC may access for purposes of combining elements. And as the Centrex experience demonstrates, access at this point for the purpose of modifying the recent change memory in the switch is technically feasible. See 47 C.F.R. § 51.311(d) ("Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point . . .").

2. The MDF

The MDF is also a unique point of access. The MDF is piece of equipment common to incumbent LEC central offices where the incumbent LEC physically joins two

"network elements" -- analog loops and switching. It is also a point where it is technically feasible to gain "access" to those network elements. Incumbent LECs routinely certify and retain third-party vendors to provide technicians to do work on their MDFs as well as on other network facilities within the central office. No incumbent LEC has tried to suggest that combining the analog loop and the port at the MDF is not "technically feasible."

BellSouth does argue, however, that the "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." BellSouth Ex Parte, Att. 2 at 6. See also Bell Atlantic Ex Parte, Att. At pp. 6-7. From this premise, BellSouth then asserts that accessing network elements "direct[ly]" at the MDF is merely one "method" of access at the MDF, while collocation is another such method. Id. at 6-7. By offering collocation, then, BellSouth claims to have offered carriers access to the MDF. Id.

Both the premise of BellSouth's argument and its characterization of collocation as solely a "method" are incorrect. BellSouth's premise conflicts with the Commission's unbundling rules, upheld by the Eighth Circuit, which expressly give competing LECs the right to choose which "method" of access they wish to employ, subject only to considerations of technical feasibility. See 47 C.F.R. §§ 51.321(b), 51.5 and discussion in Part V, infra. These rules follow directly from the competing LECs' statutory right to gain access at "any" technically feasible point, because the point of access will, as a practical matter, dictate the method of combination that is feasible to use.[8] Thus, by authorizing competing LEC access at any technically feasible point, the statute necessarily authorized competing LECs to use whichever method of combining elements was appropriate for access at that point, so long as that method could be carried out via access at a "technically feasible point."

[8] For example, the method of combining the loop and the port at the MDF -- manually disconnecting and reconnecting the cross-connect, using no new equipment or materials -- is practical only at the MDF and no other point. Similarly, the method of combining the loop and port that the ILECs' propose -- involving new CLEC frames, tie-cables, and cross-connects -- would be impractical at the MDF because of the congestion and obstruction it would create. And logical combination must be done through access to the ILECs' operations support systems; that element cannot be effectively accessed at the MDF or in collocated space.

Even assuming, moreover, that the incumbent LECs' untenable position that the Act's mandate extends only to points but not methods of access were correct, BellSouth is simply wrong to characterize collocation as nothing more than a "method" of accessing the MDF. BellSouth errs for three reasons.

First, under BellSouth's own reading of the statutory phrase "any technically feasible point," the word "point" must be understood, at a minimum, to connote a "distinct location" within the incumbent LEC's network. See BellSouth Ex Parte, Att. 2 at 6 (conceding that the phrase "at any technically feasible point" in section 251(c)(3) authorizes access at "a distinct location 'within the [incumbent] carriers network' at which . . . a network element begins or ends") (quoting § 251(c)(2)(B)). It is indisputable that collocated space is located in a place within the central office that is different -- and sometimes several floors away -- from the MDF. See Falcone/Lesher Aff. ¶ 30. For this reason alone, access at collocated space is access at a location "distinct" from the MDF.

Second, to equate the two is inconsistent with established incumbent LEC practice in collocation arrangements. It has been the incumbent LECs that have insisted upon a point of demarcation to segregate the incumbent LEC's network from the competing LEC's network for testing and maintenance purposes. This demarcation, sometimes called a point-of-termination bay or "POT bay," is typically situated immediately outside the competing LECs' collocated space, and is well-removed from the MDF, which remains squarely on the incumbent LEC's side, and to which the competing LECs emphatically have no access. See Falcone/Lesher Aff. ¶ 31 n.5. BellSouth is thus arguing here, non-sensically, that by giving access to collocated space, it is giving carriers access to the very facilities that BellSouth and other incumbent LECs have gone to great lengths to ensure are entirely off-limits to competing carriers.

Finally, the incumbent LEC's approach robs the words "access" at a particular "point" of intelligible meaning in one other respect. For once the point at which the competing LEC is deemed to have access is not the point at which access is actually granted (i.e. collocated space) but some other point in the network, there is no principled basis for saying that the other

point is the "MDF" as opposed to any other part of the network. Once you look beyond the point of demarcation, the incumbent LEC's network is all interconnected. The tie cables that, on BellSouth's theory, give a competing LEC access to the MDF would also give the competing LEC access, on that theory, to the switch, the loop, the signaling and transport networks, and beyond -- an absurd result that illustrates why BellSouth's approach strips section 251(c)(3)'s "any point" requirement of its meaning. For this reason as well, competing LECs should be understood to have "access" only at points to which they in fact are granted access.

Apart from its flawed "method" argument, BellSouth argues only that, in authorizing access at "any" technically feasible point, section 251(c)(3) cannot mean what it says because that would render the obligation (in section 251(c)(6)) to provide collocation "superfluous."[9] BellSouth Louisiana Reply Br. at 37. This argument lacks any merit, for reasons well-known both to this Commission and to the incumbent LECs.

Section 251(c)(6) is not superfluous because it was drafted to serve one specific and important purpose: to ensure that the incumbent LECs could not argue that the duty in section 251(c)(3), no matter how broadly worded, was nevertheless not specific enough to authorize physical collocation. Less than two years before the passage of the Act, the D.C. Circuit held that the Commission's express statutory grant of broad "authority to order carriers 'to establish physical connections with other carriers'" did not provide the Commission with authority to mandate physical collocation. Bell Atlantic Tel. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (quoting 47 U.S.C. § 201(a)). In particular, the court held that although "the Commission's power to order 'physical connections' [is] undoubtedly of broad scope, [it] does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." Id. at 1446 (emphasis added).

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[9] Section 251(c)(6) imposes a duty upon ILECs to provide CLECs with "physical [or virtual] collocation of equipment necessary for interconnection or access to unbundled network elements at the [ILEC's] premises." § 251(c)(6).

Because Congress anticipated that the incumbent LECs would again attack any broad statement of their duties that did not expressly refer to physical collocation, it added an express provision imposing a duty to provide collocation. See H.R. No. 204, 104th Cong., 1st Sess. 73 (July 24, 1995) ("this provision is necessary to promote local competition because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. v. Federal Communications Commission, [24 F.3d 1441] No. 92-1619 (D.C. Cir. June 10, 1994)).");[10] see Local Competition Order ¶ 551. Thus, far from being "superfluous," section 251(c)(6) was essential to ensuring that the incumbent LECs would not succeed in narrowing the scope of the Commission's authority under section 251(c)(3) as they had done with section 201(a).

At bottom, the incumbent LECs cannot escape two core facts about the plain language of the Act. First, section 251(c)(3) explicitly requires the incumbent LECs to provide competing LECs with such access at any technically feasible point. Second, nothing in the language of section 251(c)(6) cuts back on that broad duty; instead, that section clarifies that the duty extends so far as to encompass physical collocation. Collocated space is thus but one of many points of access (and physical collocation but one of many methods) authorized by the statute.

B. The Eighth Circuit's Decision Does Not Require Competing LECs To Combine Network Elements Only By Using Competing LECs' Own Facilities Installed in Collocated Space

Given the plain language of section 251, it would be surprising if the Eighth Circuit had chosen to impose a collocation requirement where Congress and the Commission had not. The Eighth Circuit did not do so, either directly or by implication. To the contrary, it upheld the Commission's rules that expressly permit competing LECs to request methods of access other than collocation.

[10] The provision referred to in the House Report was section 242(b)(4)(B) of H.R. 1555, which was later adopted by the conferees, with modifications, as section 251(c)(6).

Prior to the Eighth Circuit's decision in Iowa Utilities Bd., the Commission had already considered the incumbent LECs' claim that collocation was the only permissible point at which competing LECs could access unbundled network elements -- and had rejected that claim as inconsistent with the plain language of the statute. The Commission expressly concluded -- in both the Local Competition Order and in Rule 51.321(b) -- that incumbent LECs were not permitted to limit competing LECs to collocation as the sole method of gaining access to unbundled network elements: "The Commission concluded in the Local Competition Order that new entrants have a choice of method for access to unbundled network elements, and that this choice must include (though is not limited to) either physical or virtual collocation." BellSouth South Carolina Order ¶ 207 (emphasis added); see, e.g., id. at ¶ 184 ("'any requesting carrier may choose any particular method of technically feasible . . . access to unbundled network elements'") (quoting 47 C.F.R. 51.321(b)); Local Competition Order, ¶¶ 549-54 (same).

The Eighth Circuit, in turn, reached three separate holdings that each foreclose, either explicitly or by necessary implication, the extraordinary result the incumbent LECs seek here. Specifically, the Eighth Circuit (1) upheld "all" of the Commission's unbundling regulations (except for specified exceptions), including those that require other methods of access besides physical collocation, and did so precisely against the claim that they provided competing LECs with unduly "extensive access" to incumbent LEC networks; (2) construed the "plain meaning" of section 251(c)(3) to require "requesting carriers" to combine network elements, and specifically acknowledged that one consequence of that decision was that such carriers would now require "access to [incumbent LECs'] networks" to combine elements; and (3) expressly held that competing LECs were entitled to use methods of combining network elements that did not require them to "own or control some portion of a telecommunications network" -- a criterion that can be met, as a practical matter, only by methods using points of access other than collocated space. 120 F.3d at 813, 814, 815-17, & 818-19 nn. 38-39.

1. The Eighth Circuit Upheld Most Of The Commission's Unbundling Rules, Including Rules 51.321(b) and 51.5

As discussed above (see Part II.B, supra), the Eighth Circuit, with only a few exceptions, expressly upheld all of the Commission's rules related to unbundled network elements. In so holding, the court noted that several petitioners had challenged the unbundling rules in their entirety, arguing generally that the "FCC's unbundling rules in combination provide competing carriers with such extensive access to the incumbent LECs' networks that they will thwart the Act's principal purpose." 120 F.3d at 815-16 (emphasis added).[11] That claim -- a more general version of the claim advanced here -- was rejected. The court explained that, by vacating the pricing rules and certain unbundling rules and upholding the remaining unbundling rules, it had struck an appropriate balance, and "thus conclude[d] that the Commission's unbundling rules do not subvert the Act's purposes." Id. at 817; see id. at 818 n.38 ("In sum, we uphold all of the Commission's unbundling regulations except [certain specific provisions]") (emphasis added).

In pursuing claims here for collocation, the incumbent LECs and BellSouth in particular have simply ignored their defeat in the Eighth Circuit and the existence and continuing vitality of the Commission's unbundling rules. Rule 321(b), for example, which is upheld by the Eighth Circuit, mandates that incumbent LECs provide methods of access other than collocation -- precisely the result that the ILECs continue to resist. The incumbent LECs' position on collocation thus flatly conflicts with the Eighth Circuit's decision to uphold Rule 321(b), Rule 51.5, and other unbundling rules against the same general charge -- that they authorize far too "extensive access to the incumbent LEC's network" -- that BellSouth and others continue to raise here.

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[11] See, e.g., Iowa Utils. Bd. v. FCC, Nos. 96-3321 et al., Brief for Petitioners Regional Bell Companies and GTE, at 48-49 (FCC's unbundling rules "largely ignore[]" the "explicit limitations on the scope of these unbundling and resale duties" that were "set forth in the Act"); id. at 73 ("the Court should reject the FCC's construction of the 1996 Act's unbundling and resale provisions as contrary to the language and design of the Act"); see generally id. at 48-73, 81-82.

2. The Eighth Circuit Emphasized The "Plain Meaning" Of Section 251(c)(3) And Acknowledged That Its Ruling Would Compel Competing LECs To Seek Access To Incumbent LEC Networks

The incumbent LECs' argument also conflicts with both the statutory analysis underlying the Eighth Circuit's decision to vacate Rule 51.315(b) and the court's explanation of the consequences of that holding. The holding rests on the Eighth Circuit's analysis that the "plain meaning" of section 251(c)(3) requires "requesting carriers" to combine unbundled network elements themselves. 120 F.3d at 813. Under that analysis, it is even more plain that, because the statute obligates incumbent LECs to provide (and entitles competing LECs to request) access at "any" technically feasible point, it is the CLEC that gets to specify at which of the technically feasible "points" in the network it will obtain access to unbundled network elements. 47 U.S.C. § 251(c)(3).

The Eighth Circuit's explanation of its holding that competing LECs must do the combining also conflicts with any collocation requirement. The court made clear that it understood that the Act grants new entrants "extensive access" to incumbent LEC networks beyond the collocation that the Commission unbundling rules prescribe. Id. at 813. In vacating Rule 51.315(b), the court stated that "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." 120 F.3d at 813. The only response that BellSouth has offered to this statement from the court is that there is "no basis for concluding that the court itself had in mind physical entry into the central office beyond collocation." See BellSouth Ex Parte, Att. 2 at 10 (speculating, without any foundation in the court's opinion, that perhaps the court had in mind "meet point arrangements").

In fact, there is direct evidence in the opinion itself that the court was referring precisely to the kind of direct access that the incumbent LECs are now belatedly protesting against. The court expressly made the above statement in response to the arguments of the "FCC and supporting intervenors." Id. These parties, in turn, had argued that Rule 51.315(b) was essential because incumbent LECs would never allow competing LECs the direct access to