incumbent LEC networks that would otherwise be required to combine network elements. See Iowa Utils. Bd. v. FCC, Joint Brief Of Intervenors In Support Of FCC at 91 ("the LEC would not allow its competitors to show up at its facilities with screwdrivers and begin working on the LEC's network as they see fit"). Thus, the court's decision on section 315(b), like its resolution of the broader challenge to the network access mandated by the unbundling rules as a whole, further confirms that the court viewed such access as a necessary quid pro quo for denying competing LECs the ability to use existing combinations.

3. The Incumbent LECs' Collocation Requirement Conflicts With The Eighth Circuit's Holding That Competing LECs Need Not Own Or Control A Portion Of The Network To Access Unbundled Network Elements

Finally, a collocation requirement would conflict with the Eighth Circuit's flat rejection of the incumbent LECs' argument that competing LECs must be required "to own or control some portion of a telecommunications network before being able to purchase unbundled [network] elements." 120 F.3d at 814. In so holding, the Eighth Circuit made clear "that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network." Id. (emphasis added); see id. ("FCC's determination that a competing carrier may obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled network elements is reasonable") (emphasis added); Local Competition Order at ¶¶ 320-341.[12]

For two reasons, any requirement that all competing LECs gain access to unbundled network elements through collocation arrangements would render this holding a nullity. First, collocation imposes such enormous costs and risks as to make it infeasible as a method of combining all network elements. See Falcone/Lesher Aff. ¶¶ 38-96. As a practical

[12] The Supreme Court has granted cert. on the ILEC's challenge to this holding. For the reasons set forth by the Commission in the Local Competition Order and in opposition to the ILECs' cert. petitions, and for the reasons set forth by AT&T and others in their oppositions, the ILECs' challenge lacks merit. See, e.g., AT&T's Response to Cross-Petition of Regional Bell Cos. at 12-20 (Dec. 30, 1997).

matter, a collocation requirement would deny competitors "the capability to provide telecommunications services completely through access" to unbundled network elements. 120 F.3d at 814.

Second, to insist on collocation is to insist -- in flat contravention of the Eighth Circuit's decision -- that a competing LEC "own or control some portion of a telecommunications network" and "some of its own local exchange facilities." 120 F.3d at 814. For example, to combine elements in collocated space, the competing LEC must obtain space within a central office to which it alone has access; it must equip that space with facilities to transmit calls between the unbundled loop and the unbundled port; and it must test, maintain, and repair these facilities, because any problem with these facilities will not be repaired by the incumbent LEC, and because every call the competing LEC handles will necessarily flow over these facilities. Collocation thus requires a CLEC to own or control a portion of a telecommunications network -- viz, that portion of the central office and those facilities through which the competing LEC's calls flow and for which the competing LEC alone is responsible. See Consolidated Petitions of New England Telephone and Telegraph, et al. Pursuant to Section 252(b) of the Telecommunications Act of 1996, D.P.U./D.T.E. 96-73/74 et al., Order at 13 (Mass. D.P.U. March 13, 1998) ("it is clear that collocation requires a competing carrier to own a portion of a telecommunications network, so making collocation a precondition for obtaining UNEs appears to be at odds with the Eighth Circuit's Findings").

By contrast, the methods of combining network elements that AT&T has proposed do not require competing LECs to own or control any portion of a telecommunications network. For example, to combine the loop and the switch at the MDF, the competing LEC need deploy only a vendor to perform the necessary connection; no new equipment or facilities of any kind are required. Similarly, the recent change method, like resale, only requires a competing LEC to connect with an incumbent LEC's OSS. In addition, with such access, the competing LEC's traffic will not flow over a portion of the network that the competing LEC controls or is

required to maintain. Thus, recent change and MDF-access, but not collocation, are examples of the kind of access that is "indicate[d]" by the "plain language of section 251(c)(3)." Id. at 814.

BellSouth's only response here is to suggest that the 8th Circuit could not have meant what it said. BellSouth opines that "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." BellSouth Ex Parte, Att. 2 at 11. It then claims that collocation merely requires the use of such "materials," and that it is therefore no different from any method of combining elements. BellSouth Ex Parte at 11.

BellSouth is able to make such an argument, of course, only by studiously avoiding any description of what collocation necessarily involves. As the above description (and the Falcone/Lesher affidavit) make clear, collocation does not involve adding "electrical tape" to a frame, but carving out a portion of the network to be controlled, engineered, and maintained by a competing LEC. Conversely, by combining elements at the MDF, the competing LEC is able to provide finished service "entirely through" the use of the incumbent LECs' network elements, without adding other materials. Thus, yet again, the incumbent LEC's insistence on a collocation requirement conflicts with a holding of the Eighth Circuit.

Indeed, BellSouth has sought support not from any holding of the Eighth Circuit, but only from a single sentence of the opinion, twice repeated in its memorandum, 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." BellSouth Ex Parte, Att. 2 at 4, 12. This statement, of course, does not begin to mandate a collocation requirement. It simply reflects the reality that, under the Eighth Circuit's decision, competing LECs, unlike incumbent LECs, have far less control over the network because they are not able to use elements in their existing combinations or to order improvements in the configuration and

deployment of elements.[13] For all these reasons, the Eighth Circuit's decision forecloses the incumbent LECs' claim that section 251 limits competing LECs to only one technically feasible point of access to unbundled network elements.

IV. PERMITTING COMPETING LECS TO COMBINE NETWORK ELEMENTS LOGICALLY AND AT THE MDF PURSUANT TO SECTION 251(c)(3) RAISES NO CREDIBLE "TAKINGS" ISSUE

Interpreting section 251(c)(3) to authorize competing LECs to combine network elements at a particular point other than collocated space raises no serious takings issue. The recent change process, for example, involves no physical invasion of the incumbent LECs' network whatsoever, and is authorized not only by section 251(c)(3)'s command of access at any technically feasible point" but by the competing LECs' right to obtain and use fully the features, functions, and capabilities of the switching and the OSS elements.

Similarly, with respect to access at the MDF, Section 251(c)(3) authorizes access "at any technically feasible point," and section 251(c)(6) makes it crystal clear that this access includes the most intrusive method for gaining access from a takings perspective -- physical collocation. Given these facts, there is no coherent way to read sections 251(c)(3) and 251(c)(6) and come to any conclusion other than that Congress fully authorized <u>any</u> means of accessing the incumbent LECs' network elements -- including letting competing LECs control portions of the central office and permanently install their own facilities there -- and thereby eliminated any basis for the kind of narrowing construction that the court of appeals found necessary in <u>Bell Atlantic</u>.

Accordingly, the proper venue for the incumbent LECs' takings argument lies not with this Commission (or the courts of appeals), but with the Court of Claims, which has

[13] When combining elements directly at the MDF, the CLEC would not enjoy the same unfettered access to the MDF that the ILEC enjoys: Unlike a CLEC, the ILEC can dispatch any number of technicians at any time to do any work it wishes to have done at the MDF without ever needing to notify, let alone obtain approval from, a CLEC. Similarly, the limited recent change capability that a CLEC would need to connect a customer's loop and switch does not begin to approach the control over the switch's recent change functionality that the ILEC enjoys.

exclusive jurisdiction under the Tucker Act for takings claims alleged to exceed $10,000. If the incumbent LECs ever bring their claims in that forum, they will be quickly disposed of, both because it is obvious that neither electronic access to OSS nor controlled and limited physical access to the MDF would amount to a taking, and because in any case the statute authorizes just compensation.

A. The Recent Change Process Involves No Physical Invasion And Is Authorized As Part Of the Features, Functions, And Capabilities Of The Switch

Combining elements through use of the recent change process involves no physical occupation or invasion of the LEC network of any kind. It simply requires the incumbent LEC to provide competing LECs with electronic access to its OSS. Such access has never been found to raise a takings problem, and no incumbent LEC has seriously argued to the contrary.

Even if such an argument were raised, however, it is clear that the Act plainly authorizes such access. As discussed below, competing LECs are entitled to access "at any technically feasible point," and this broad language plainly permits access at the OSS. In addition, however, such access is independently authorized by the incumbent LECs obligation to provide competing LECs with access to the "features, functions, and capabilities" of the switching element. 47 U.S.C. § 3(29); see, e.g., 47 C.F.R. § 51.307(c) (incumbent LEC must provide "all of the unbundled network element's features, functions, and capabilities"); Local Competition Order ¶ 292 ("section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element"). Because recent change capability is one of the capabilities of the switch, the Act fully authorizes purchasers of the unbundled switch to use that capability to combine elements and provide telecommunications services.

B. The Bell Atlantic Decision Provides No Basis For Declining To Authorize Access To The MDF

Bell Atlantic does not require the Commission to walk away from the plain meaning of section 251(c)(3). In that case, the Court chose to give a "narrowing construction" to the broad language of section 201(a) because construing that section to authorize physical collocation would have created a "'class of cases'" seeking compensation that Congress did not foresee. Bell Atlantic, 24 F.3d at 1445.

In contrast to section 201(a), Congress made it abundantly clear not only that the form of access to the incumbent LECs' network elements most likely to be deemed a taking -- physical collocation of equipment on incumbent LEC premises -- was authorized, but that access at "any technically feasible point" was authorized. See §§ 251(c)(3); 251(c)(6). Methods such as combining elements at the MDF are far less intrusive, from a takings perspective, than permanently locating facilities upon a competitor's premises (and the recent change process involves no intrusion at all). To argue, as the incumbent LECs do, that Congress meant to authorize only the most intrusive means of access and that the statute must be read narrowly to avoid authorizing less intrusive means conflicts not only with the statute but with common sense.

BellSouth claims nevertheless that because section 251(c)(6) is the only provision that mentions access to an incumbent LECs' "premises," the only way that Congress intended competing LECs to get access on an incumbent LEC premises was via collocation. BellSouth Ex Parte at 5. It would read Bell Atlantic to require express statutory authorization for every specific form of "physical access to the facilities and networks" of the incumbent LECs. Id. Thus, BellSouth argues, to combine network elements at the MDF is "to go even further" beyond physical collocation to a type of access to an incumbent LEC's premises not authorized by the statute. BellSouth Ex Parte, Att. 2 at 8.

This argument has no merit. First, while BellSouth claims that the statute lacks suitably specific language, it offers no plausible account of how the "any technically feasible point" language could have any meaning whatsoever if it was construed, as BellSouth claims in this argument, to exclude access to the incumbent LECs' "facilities and networks." Id. at 5.

BellSouth's statutory interpretation simply takes a provision (section 251(c)(6)) that was meant to remove any doubt about the broad scope of authorized access, and tries to use it to limit access. It is plain, however, that Congress did not intend in section 251(c) to narrow the scope of authorized access, for the FCC has rejected incumbent LECs' arguments that section 251(c)(6) only provides for virtual collocation when physical collocation is impractical, see Local Competition Order, ¶¶ 547, 552, and the Eighth Circuit has left this ruling undistributed, see Iowa Utils. Bd., 120 F.3d at 818-819 & nn. 38-39.

Second, the concern in Bell Atlantic was not with "physical access" of any kind, but only with the kind of access -- permanent physical occupation -- that constitutes a per se taking. The core fallacy in BellSouth's argument is that access to the MDF is far less intrusive than physical collocation. To combine network elements most efficiently at the MDF, a single technician, from a vendor certified by the incumbent LEC and jointly retained by the incumbent LEC and competing LECs, enters the incumbent LEC's central office pursuant to established procedures to work solely on the lines of the new competing LEC customers. Thus, to the extent physical intrusion onto incumbent LEC property occurs, it is both transitory and very controlled in nature. In short, unlike physical collocation, access to the MDF entirely lacks the attributes of a permanent, physical occupation that are the hallmark of a "per se" taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

Furthermore, the fact that no incumbent LEC has attempted, before either the Eighth Circuit or this Commission, to argue that such access would be technically infeasible strongly undercuts any notion that their opposition to permitting competing LECs to combine elements at the MDF is anything other than tactical. The reality is that incumbent LEC-certified third-party vendors regularly dispatch technicians to work on the incumbent LEC's equipment within the central office. The limited task of separating the loop and port connections of new competing LEC customers and then reattaching them is well within the vendors' range of expertise. There is, accordingly, no basis for reading sections 251(c)(3) and 251(c)(6) to mean anything other than what they plainly say, i.e., that competing LECs can choose to access

incumbent LEC unbundled network elements at any technically feasible point, and that the MDF is one such point.

C. BellSouth's Substantive Takings Claim Lacks Merit

Once the Commission concludes, as it must here, that there is no ambiguity about the scope of congressionally authorized access to network elements that would require a "narrowing construction" of section 251(c)(3) under Bell Atlantic, the Commission's course is clear. It must apply the law as written, and enforce the duties Congress authorized. It then becomes the job of the Court of Claims to determine whether those duties, so enforced, have effected a taking and, if so, whether the aggrieved party received just compensation. Bell Atlantic, 24 F.3d at 1444 n.1.

Nevertheless, it is worth noting how wholly unsupported the incumbent LECs' purported takings concerns are. As noted above, unlike Bell Atlantic, this is not a case where the conduct at issue would amount to a per se taking. Combining elements at the MDF involves no permanent, physical occupation of any incumbent LEC property.

Recognizing this fact, BellSouth argues that the Takings Clause is implicated even when "'individuals are given a permanent and continuous right to pass to and fro, so that the real property may be continuously traversed, even though no particular individual is permitted to station himself permanently upon the premises.'" BellSouth Ex Parte, Att. 2 at 6 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987). Even out of context, however, this snippet from Nollan is inadequate to support BellSouth's position; when considered with the holding in that case, it is clear that Nollan is wholly inapposite.

First, as the quoted sentence implies, Nollan involved a demand by the state for a permanent easement that would have permitted any individual, at any time, to pass or repass upon the Nollan's property (specifically, the sand in front of the Nollan's beachfront home). See 483 U.S. at 828. There was no real dispute in Nollan that such an easement, if imposed outright on a private party, would constitute a taking. Id. at 831. Nollan is inapposite here because

competing LECs are not seeking a "permanent and continuous right" for anyone at anytime "to pass to and fro" through an incumbent LEC's central office. The MDF alternative would permit only a highly limited, pre-approved set of individuals, whose competence is certified by the incumbent LEC itself, to perform a single type of procedure at one point in the central office. The incumbent LECs have cited no case that suggests that this sort of transitory, controlled access (comparable, for example, to government regulatory inspections of private facilities) implicates the Takings Clause, and it is well-settled that it does not. See, e.g., Loretto, 458 U.S. at 426-28 (1982) (carefully and repeatedly distinguishing between a "permanent physical occupation" and a "temporary invasion," and noting that "[a] taking has always been found only in the former situation.")[14]; Hilton Washington Corp. v. District of Columbia, 777 F.2d 47, 49 (D.C. Cir. 1985) (finding no "permanent physical occupation" under Loretto for "temporary transient occupation" by taxis at hotel taxi stand); Southview Assocs. Ltd. v. Bongartz, 980 F.2d 84, 95 (2d Cir. 1992) (where "no absolute, exclusive physical occupation exists" and no "dispossession" of property rights, then "[u]nder Loretto, there has been no physical taking").

Second, the homeowners in Nollan had no choice but to grant the state the easement or forgo increasing the size of their home. That is not true here. The incumbent LECs could avoid any physical intrusion on their premises by agreeing to provide elements in combination. No competing LEC would ever insist on actual access that it thought the CLEC would use, in lieu of having the ILEC leave existing combinations in place, because the physical work of separating and recombining accomplishes no functional purpose but simply further increases the costs and risks of entry. A party may not manufacture a takings claim by insisting

[14] See also id. at 430 (distinguishing a "permanent physical occupation" from "a physical invasion short of an occupation"); id. at 434 ("underscor[ing] the constitutional distinction between a permanent occupation and a temporary physical invasion"); id. at 435 n.12 ("[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking"); id. at 436 (physical occupation is distinguishable because "the owner may have no control over the timing, extent, or nature of the invasion"). Indeed, given the broad range of federal law that mandates some transitory occupation of private premises, any judgment that such requirements created a right to just compensation would eviscerate the regulatory power of the federal government.

on an option that involves some physical invasion, however limited and transitory, when other even less intrusive options are available.[15]

Finally, Nollan is unhelpful to BellSouth because it did not involve a per se taking. There, as here, the state did not impose the easement outright, but sought it as a condition of granting the Nollans a permit to increase the size of their beachfront home. The court found a taking because of the lack of any reasonable relationship between the easement and the permit. Nollan, 483 U.S. at 838-39. Here, by contrast, providing competitors with nondiscriminatory access to the elements of incumbent LEC networks is not only rationally related but essential to achieving the Act's purpose of opening local markets to competition. The irrational relationship between the easement and the permit that Nollan condemned has no analogue in this case.[16]

It is thus plain that transitory and highly controlled access to the MDF is not equivalent to either a permanent physical occupation or to the granting of a permanent easement. The incumbent LECs' substantive claims would therefore be evaluated under the standard for a "regulatory" rather than a "per se" taking. That "ad hoc, factual" inquiry examines several factors, including "[t]he economic impact of the regulation," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

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15 See, e.g., Loretto, 458 U.S. at 440 n.19 (where property owner is able to "exercise[] control" and "own the installation," thus retaining the rights to "placement, manner [and] use," taking will not likely occur); Cape Ann Citizens Ass'n v. City of Gloucester, 121 F.3d 695 (1st Cir. 1997) (where city required homeowners either to purchase and install a special septic tank or to grant city an easement to enter and install tank, no taking occurred under Loretto because "the option . . . of homeowner ownership" grants "full authority over the installation" to the owner).

16 The other cases that BellSouth has cited are also inapposite because the government actions at issue there were more severely invasive, either allowing unrestricted access to any person or causing a physical break-in and loss of control of access. See BellSouth Louisiana Reply Br. at 36 n.21 (citing Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (government's imposition of a "navigational servitude" allowed any member of the public to use private marina as a "continuous highway" at any time and without payment of $72 annual fee) and Skip Kirchdorfer Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (government's seizure and occupation of warehouse was a taking, where it entered via "broken locks at early morning hours and "assumed control" of warehouse such that the owner "no longer controlled access").

Here, the economic impact of these alternatives upon the LEC would be minimal, would not disrupt its own use of the property, would not interfere with investment-backed expectations, and thus plainly would not amount to a taking.

Finally, even if access to the MDF were, improbably, to be deemed a "taking," there would still be no constitutional violation. Congress expressly provided for full and just compensation under the pricing standards of Sections 251(c)(3) and 252(d)(1),[17] thus mooting any valid constitutional claim. At the very least, any takings claim "is not ripe," and therefore provides "no justification" for a court not to defer to the Commission's reasonable construction of its authority under section 251(c)(3). Iowa Utilities Bd., 120 F.3d at 818.

In summary, section 251(c)(3) plainly imposes on incumbent LECs the duty to offer competing LECs methods of accessing network elements other than collocation. Section 251(c)(6) supplements that obligation by making clear that incumbent LECs also have a specific obligation to provide collocation, thereby responding directly to the holding in Bell Atlantic. The incumbent LECs' attempt to recast that explicit expansion of their duties as a limitation is nonsensical and wholly contrary to the language and purpose of the Act. The MDF alternative to collocation is substantially less intrusive from a takings perspective than collocation, and does not raise any serious takings issue.

V. INCUMBENT LECS CANNOT FULFILL THEIR OBLIGATIONS UNDER SECTION 251(c)(3) BY AFFORDING COMPETING LECS ONLY "ONE PRACTICABLE MEANS OF ACCESS" TO UNBUNDLED NETWORK ELEMENTS

BellSouth's final argument for limiting competing LECs to collocation is that "so long as an incumbent LEC's chosen method of access affords competing LECs at least one practicable way of recombining UNEs -- and therefore allows competing LECs a meaningful

[17] See, e.g., Iowa Utils. Bd., 120 F.3d at 810 ("the costs of. . .interconnection or unbundled access will be taken into account when determining the just and reasonable rates, terms, and conditions for these services [under] §§ 251(c)(2),(3)" and so "an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests.").

opportunity to compete through the use of recombined UNEs -- the LEC has fulfilled its statutory obligation, as interpreted by the Commission." BellSouth Ex Parte Att. 2, at 9. For this proposition, BellSouth ignores the language of section 251(c)(3) and the Commission's rules. It relies instead on a snippet from the Eighth Circuit's discussion of the superior-quality rules, and on excerpts from two paragraphs of the Ameritech Michigan Order. Id.

BellSouth's argument begins with a factual assertion -- that collocation could provide competing LECs with a "practicable" and "meaningful" opportunity to compete using combinations of network elements -- that AT&T has elsewhere demonstrated is false. See Falcone/Lesher Aff.[18] But even putting that to one side, it is clear that the slim authorities cited by BellSouth do not suffice to establish that providing one method, even if competitively meaningful, is enough to meet the duties imposed by section 251(c)(3). The plain language of section 251(c)(3), the Commission's Rules and Orders, and a long line of Commission precedent in analogous rulings under sections 201 and 202, all establish the right of competing LECs to choose among technically feasible methods of access.

A. Section 251(c)(3) and the Commission's Rules And Orders

As the Commission previously concluded, the language of section 251(c)(3) makes clear that a competing LEC has the right to select the method of access to network elements for combining network elements so long as that method is technically feasible. First, the competing LEC's right to select a particular method of recombination flows directly from the unequivocal mandate in Section 251(c)(3) that competing LECs be able to obtain nondiscriminatory access to network "elements" "at any technically feasible point." § 251(c)(3)

[18] See also Evaluation of the United States Department of Justice, BellSouth 271 Application for South Carolina, CC Docket No.97-208, Nov. 4, 1997, at 25 (BellSouth's collocation requirement for combining UNEs "would entail substantial cost and delay for CLECs wishing to use combinations of elements"); id. at 22 (denying CLECs direct access to incumbent's network and requiring use of collocation arrangement instead may preclude a finding that BellSouth is offering nondiscriminatory access to unbundled elements"); Petition for Arbitration of Interconnection Agreement Between AT&T and GTE, Docket No. UT-960307, Order, March 16, 1998 (rejecting GTE proposal that CLECs combine elements through collocation arrangement, based on finding that collocation is neither technically nor economically feasible).

(emphasis added). This obligation to provide access at "any" technically feasible point clearly indicates that the competing LEC may select the technically feasible point it prefers. The use of the word "any" presupposes that there is more than one point at which it is technically feasible for a competing LEC to obtain access to multiple "elements." Because section 251(c)(3) imposes an affirmative "duty to provide" access at any such point, the incumbent LECs are foreclosed from arguing that an offer of access at only one such point is adequate.

Second, as discussed above, incumbent LECs are independently obligated under section 251(c)(3), section 3(29), and Rule 51.307(c), to provide competing LECs with the ability to use the recent change process because that process is one of the capabilities of the switch. See Part IV.A., supra. The fact that the incumbent LEC may concurrently offer some other practicable method of combining elements provides no justification for refusing to provide a competing LEC with the ability to use one of the capabilities of the switch. See 47 U.S.C. 3(29), 251(c)(3); 47 C.F.R. § 51.307(c).

Third, an incumbent LEC's refusal to permit a competing LEC to use its preferred, technically feasible method of access would be irreconcilable with section 251(c)(3)'s further command that such access be granted "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). It is simple common sense -- abundantly borne out by AT&T's experience with every incumbent LEC to date -- that an incumbent monopolist, if given the option to choose which "method" of access or interconnection to make available to a competitor, will choose the method least likely to permit new entrants to compete effectively. Such conduct, though predictable, is nevertheless manifestly unjust and unreasonable.

Indeed, even though, under the Eighth Circuit's decision, competing LECs must combine the elements themselves, the Act's requirement of "nondiscriminatory access to network elements" requires incumbent LECs to provide competing LECs with the same flexibility the incumbent LEC would have to choose among technically feasible methods of combining those

elements.[19] There can be no dispute that when an incumbent LEC seeks to modify or introduce a new service, it is free to examine all of the alternative methods for combining the elements of its network to accomplish its goal, and then to select the method that the incumbent LEC concludes is the most efficient and effective. There is also no question that an incumbent LEC is free, if it so chooses, to disconnect and reconnect its own customers at the MDF.

By providing competing LECs with "nondiscriminatory access" to the incumbent LECs unbundled network elements, Congress plainly gave competing LECs the same right to evaluate alternative methods of combining them and to select the method that best suits the competitor's needs. It is inherently discriminatory for an incumbent LEC (whose access to, and ability to manipulate, network elements is unlimited) to deny competing LECs economically and technologically feasible methods of access that the incumbent uses itself.

That the statute grants to competing LECs, and not incumbent LECs, the right to choose among technically feasible methods of recombination is clear also from the rules that the Commission adopted prior to the Eighth Circuit's decision, and that the court's decision did not overturn. As the Commission made clear in the Local Competition Order, "under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point." Local Competition Order, ¶ 549 (emphasis added). Notably, Rule 51.321(a) states that incumbent LECs shall provide "any technically feasible method of obtaining . . . access to unbundled network elements at a particular point." 47 C.F.R. § 51.321(a). Rule 51.5 reinforces the incumbent LECs' obligation to provide "collocation, and other methods of achieving interconnection or access to unbundled network elements."

Although BellSouth simply ignores these Commission rules, the Eighth Circuit's decision upheld them, and nothing in the court's dicta undercuts them. Indeed, all that BellSouth

[19] Rules 51.311(b) and 51.313(b), which the Eighth Circuit upheld, confirm that a CLEC's access to network elements must be "equal to" and "no less favorable" than the ILEC's own access -- confirming that ILECs may not deny CLECs the same flexibility that ILECs possess in choosing how to combine elements to serve customers.

can point to in that opinion is the Eighth Circuit's observation that the Act's requirement of nondiscriminatory access "'does not mandate that incumbent LECs cater to every desire of every requesting carrier.'" BellSouth Ex Parte at 9 (quoting 120 F.3d at 813). But that sentence does not support BellSouth's point, because the Eighth Circuit intended it to serve a wholly different purpose. BellSouth neglects to remind the Commission that the Eighth Circuit made this statement solely to explain its decision to vacate the Commission's superior-quality rules, and that the Eighth Circuit expressly upheld the Commission's rules that require that access "be equal" to the incumbent LEC's access. Id.

Similarly, the Commission's section 271 orders, which BellSouth also quotes out of context, only further reinforce the Commission's rules. BellSouth cites only to paragraphs 140 and 141 of the Ameritech Michigan Order, which address the unrelated issue of performance standards for ordering existing combinations of unbundled network elements. More to the point, in the Ameritech Michigan Order the Commission acknowledged that incumbent LECs could not meet their obligations by providing only one method of access to the OSS network element, even assuming that the one method offered provided "equivalent electronic access for competing carriers." Ameritech Michigan Order ¶ 137 (requiring manual as well as electronic access to OSS); see id. ¶ 220 (Commission "agree[s]" with the Department of Justice that a BOC will be required to offer more than one interface where there is evidence that an interface that is suitable for one competing LEC will not be "economically efficient" for another). And the BellSouth South Carolina Order further underscores the broader point that a fully competitive market will evolve only if entrants of different sizes, with different strategies, and targeting different markets, are able to use the elements of the incumbent's network in the manner that best suits their needs. E.g., BellSouth South Carolina Order at ¶ 17 (Commission has "sought to ensure that a new entrant's decision to enter the local exchange market in a particular state is based on the new entrant's business considerations, rather than the availability or unavailability of particular OSS functions to support each of the modes of entry."). The Commission's Orders are thus consistent with the plain language of the rules.

B. Commission Precedent Under Sections 201 and 202

Finally, the obligation of an incumbent LEC to accommodate the competing LEC's choice of access method is fully consistent with the Commission's precedent in other analogous contexts. The Commission's rulings implementing the general directives of sections 201(b) and 202 of the Act, which require common carriers to furnish communication services and to establish physical connections with other carriers upon reasonable request and without discrimination, are particularly relevant here.[20] In enforcing sections 201 and 202 of the Act, the Commission has consistently refused to allow incumbent wireline carriers to dictate the terms of interconnection to non-wireline carriers. Given this clear precedent, it would be anomalous, to say the least, for the Commission to construe the strong language of section 251(c)(3) any differently.

For example, in Capital Telephone Co. v. FCC, 777 F.2d 868 (2d Cir. 1985), petitioner Capital, a radio common carrier, sought access to New York Telephone's ("NYT's") direct distance dialing ("DDD") network. NYT did not grant Capital's request, but instead "urged Capital to use foreign exchange ("FX") lines, an alternative system." Id. at 869. The Commission found that, by denying Capital access to the system of its choice, NYT had violated its decision in Allocation of Frequencies in 150.8-162 Mc/s Band, 12 FCC2d 841, recon. denied, 14 FCC 2d. 269 (1968), aff'd sub nom. Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969) (hereafter "Guardband"). In Guardband, the Commission had announced that it would prevent telephone companies from discriminating against radio common carriers and in favor of their own mobile services in violation of section 201 of the Act. In an opinion directly relevant here, the Second Circuit in Capital Telephone Co. affirmed the Commission's decision, explaining that the competitor "had a right to decide for itself which system was preferable":

> Despite the petitioner's protestations of innocence, the [Common Carrier] Bureau had support in the record for its finding that [NYT]'s conduct violated Guardband.

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[20] Specifically, 47 U.S.C. § 201(b) requires that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable," and section 202(a) forbids carriers "to make any unjust or unreasonable discrimination" in providing communications services.

> In its attempts to induce Capital to use FX lines, [NYT] admittedly couched its responses in terms of what was best for Capital. The radio carrier, however, had a right to decide for itself which system was preferable. Because [NYT] used the DDD network for its own radio system, Capital could not be compelled to adopt the alternate network. [777 F.2d at 870-71 (emphasis supplied).]

The Second Circuit further noted that "[a]lthough Guardband dealt with a one-way paging service, its principle has since been extended to include two-way services, such as car or boat phones." Id. at 869 n.2 (citing Mobile Marine Radio, 63 FCC 2d 266, 269 (1977)). In all of these contexts, the Commission has placed the choice of the manner of interconnection in the hands of the requesting carrier in order to prevent wireline carriers from discrimination in favor of their own mobile services.

The Commission more recently articulated the same conclusion in proceedings addressing interconnection issues related to the licensing and operation of commercial cellular systems. See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to the Cellular Communications Systems, 86 FCC 2d 469 (1981) ("Report and Order"), 89 FCC 2d 58 (1982) ("Memorandum Opinion and Order on Reconsideration"), 90 FCC 2d 571 (1982) ("Memorandum Opinion and Order on Further Reconsideration"). There the Commission specifically rejected the notion that a cellular carrier can be required to connect to the wireline system on terms specified by the wireline carrier, stating that "the wireline carrier remains under the duty to provide interconnection to a non-wireline carrier that is reasonable and technically suitable for the non-wireline's system." 90 FCC 2d at 577 (emphasis supplied).

Subsequently, in In re Need to Promote Competition and Efficient Use of Spectrum for Radio and Common Carrier Services, 59 RR 2d 1275, 1283 (1986), the Commission again explained that cellular carriers had "the right to request interconnection that may not be the same as that used by the wireline cellular carrier, and may not be 'locked into the specific interconnection arrangements requested by a wireline carrier'" (quoting 89 FCC 2d at 82) (emphasis supplied). See also id., 66 RR 2d 105, 114 (1989) (stating that the Commission's

rulings with respect to cellular carrier interconnection "followed [its] well-established interconnection policies in stating that the reasonable interconnection standard gives a cellular carrier the option of choosing Type 1 or Type 2, 'whichever form is reasonably appropriate to system design'").

In the cellular proceedings, the Commission further stated that the policies and guidelines articulated there were equally applicable to non-cellular radio common carriers. 63 RR 2d 7, 17 (1987). See also 66 RR 2d at 115 ("we emphasize that, like a cellular system, a paging carrier is entitled to choose the most efficient form of interconnection for its network and the BOCs may not dictate an RCC's type of interconnection"); cf. Matter of William G. Bowles D/B/A Mid Missouri Mobilfone, 12 F.C.C.R. 9840 (C.C.B. 1997) ("a LEC is obligated to provide a CMRS provider with the interconnection of its choice upon its request [unless that interconnection is not technically feasible or economically reasonable]").[21]

Thus, for many years, the Commission has interpreted the reasonableness and nondiscrimination requirements of sections 201(b) and 202 to require a local exchange carrier to interconnect with other carriers in the manner selected by the requesting carrier so long as that manner is technologically feasible and economically reasonable. Like sections 201(b) and 202, section 251(c)(3) is intended to support interconnection and the competition that flows therefrom. Section 251(c)(3), like sections 201(b) and 202, also protects a requesting carrier from the unreasonable and potentially anticompetitive rigidity of the local exchange carrier and allows the requesting carrier to make its own business judgments.

Indeed, full enforcement of the nondiscriminatory access duty imposed by Section 251(c)(3) is essential if the basic goals of the Telecommunications Act are to be achieved. Permitting incumbent LECs to limit competing LECs to the incumbent LEC's chosen method of recombination would permit the incumbent LEC to select the method that is least efficient, least

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[21] Cf. Matter of Atlantic Richfield Company, 3 F.C.C.R. 3089 (1988) ("A telephone subscriber has a federal right, established by this Commission, and confirmed by the courts, to interconnect to the public telephone network in ways that are privately beneficial if they are not publicly detrimental") (citing Hush-A-Phone Corp., 20 FCC 391 (1955), aff'd Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956); Carterfone, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968)).

effective, and least likely to promote competition.[22] Such a result not only would conflict with the language of the Act, but would seriously undermine its purpose.

[22] As AT&T has elsewhere demonstrated, collocation would impose wholly unnecessary costs and delay on CLECs, would degrade customer service for CLEC customers, and would preclude CLECs from serving a significant and growing portion of the ILEC market altogether. See Falcone/Lesher Aff. ¶¶ 38-96. It is not surprising that this is the access "method" of choice for all ILECs, for it is the one method that they can confidently offer knowing that no CLEC will be able to take advantage of it and compete effectively on any meaningful scale.