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April 8, 1998

EX PARTE OR LATE FILED

EX PARTE PRESENTATION

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

RECEIVED

APR - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *CC Docket Nos. 97-121, 97-137, 97-208, 97-231*

Dear Ms. Salas:

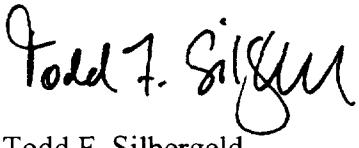
On April 9, 1998, representatives of SBC Communications Inc. are scheduled to meet and discuss with Commission staff several issues concerning compliance with Section 271's competitive checklist. Specifically, we will discuss SBC's policies concerning non-discriminatory access to network elements and Section 251(c)(3)'s requirement that unbundled network elements be provided "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (1996).

Recently, BellSouth Corporation and AT&T respectively provided the Commission with legal analyses addressing these complex issues.* SBC concurs generally with BellSouth's analysis. In response to the flawed analysis offered by AT&T, attached is a white paper entitled "The Obligation of Incumbent LECs to Provision Unbundled Network Elements: A Response to AT&T's Demand for Electronic Access to Combined Network Elements", which contains SBC's views on these issues.

* *In the Matter of Application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 97-231, *Ex Parte* Letter from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth Corp., to Magalie Roman Salas, Secretary, FCC (dated Feb. 25, 1998); *In the Matter of Application of SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Oklahoma,* CC Docket No. 97-121, *Ex Parte* Letter from Robert W. Quinn, Jr., Director-Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC (dated March 20, 1998).

Should you have any questions concerning the foregoing, please give me a call.

Respectfully submitted,



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Director-Federal Regulatory

Attachment

cc: Carol E. Mattey, Esq.
Michael H. Pryor, Esq.
Jordan Goldstein, Esq.
Mr. Jake Jennings
Katherine Schroder, Esq.
Jeannie Su, Esq.

THE OBLIGATION OF INCUMBENT LECS TO PROVISION UNBUNDLED NETWORK ELEMENTS: A RESPONSE TO AT&T'S DEMAND FOR ELECTRONIC ACCESS TO COMBINED NETWORK ELEMENTS

The Eighth Circuit has held that section 251(c)(3) of the 1996 Act "unambiguously indicates that requesting carriers will combine . . . unbundled elements themselves." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). While CLECs are entitled to unbundled network elements ("UNEs"), section 251(c)(3) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services." Id.

Obtaining the "platform" of pre-combined network elements has nevertheless remained the Holy Grail for a handful of CLECs that have held back from building local networks, most notably AT&T. The reason for this quest to obtain pre-combined network elements was expressed with unusual candor by AT&T's President, John Zeglis, in a speech to the investment community: the platform gives AT&T "another way to resell" incumbent LECs' existing services — a way that avoids the resale rates envisioned by Congress.[1] In explaining AT&T's scheme to investors, Mr. Zeglis crowed that in Pennsylvania, for example, the state-wide resale discount set in accordance with the 1996 Act's avoided-cost methodology is 25.9 percent, while purchasing the platform would allow AT&T to achieve a discount of "52 percent" off the incumbent LEC's retail rate for a mid-volume customer and even higher discounts for a customer with large monthly bills. Id. This hope of at least doubling the statutory discount rate explains why AT&T has refused to accept the Eighth Circuit's unequivocal holding that CLECs are not

[1] Transcript, AT&T Investment Community Meeting, at 4 (Mar. 3, 1997) (comments of John Zeglis).

entitled to obtain use of a pre-assembled local network at the prices Congress established for those competitors who legitimately "do [some] of the work" of building a network. Iowa Utils. Bd., 120 F.3d at 813.

The Supreme Court has granted AT&T's Petition for Certiorari on the "platform" issue, and will decide whether the Eighth Circuit was correct in its interpretation of the Act. See 118 S. Ct. 879. Nevertheless, in recent ex parte filings, AT&T has conjured up yet another argument for disregarding the Eighth Circuit's ruling, despite its legal effectiveness.[2] According to AT&T, CLECs should be permitted to obtain access to network elements used to serve existing customers of the incumbent LEC solely through incumbent LECs' OSSs, without having to lease collocated space or use any of their own facilities or equipment to combine the UNEs.[3] AT&T Ex Parte at 1. Under AT&T's plan, incumbent LECs would keep an existing loop and switch physically connected upon a CLEC's request, and only send an "electronic message" that disables this UNE combination from carrying traffic.[4] The CLEC would then send a second

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[2] E.g., Ex Parte Letter from Robert W. Quinn to Carol Mattey, March 20, 1998, with attachment ("The Incumbent LEC's Duty to Permit New Entrants to Combine Unbundled Network Elements at Any Technically Feasible Point") ("AT&T Ex Parte").

[3] AT&T also half-heartedly offers another alternative to physical collocation — to "dispense with the collocated space . . . and . . . simply allow[] the incumbent LEC to disconnect the cross-connect . . . then permit[] the competing LEC to perform the physical work needed to reconnect the cross-connect." AT&T Ex Parte at 6. But as AT&T concedes, this approach would require regular physical access into incumbent LECs' central offices — a situation that would violate the Eighth Circuit's order and work a taking. See Part II, infra.

[4] Affidavit of Robert V. Falcone and Michael E. Lesher, ¶ 119, attached to Comments of AT&T In Opposition to Application by BellSouth Corporation, et al Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231,(FCC filed Nov. 25, 1997) ("AT&T's Falcone/Lesher (Louisiana) Aff.").

electronic signal, putting the already-combined elements back into service. Id.

This arrangement would be usable solely to convert incumbents' existing facilities to CLECs; CLECs still would need to utilize other arrangements to serve new lines and customers. Moreover, AT&T concedes that incumbent LECs' networks do not have the capabilities to allow this arrangement. AT&T Ex Parte at 6. AT&T compares its proposal to the "recent change" process used in incumbent LECs' retail operations. Recent change capacities assign a telephone number to the line port, assign features to the line port, and provide other instructions to the switch concerning how call requests are to be processed when they originate or are directed to a line port. In no way does the switch separate the loop from the line port; contrary to AT&T's suggestion, the loop must be connected to the switch before the switch's recent change instructions can have any effect.

AT&T's proposal for electronic re-activation runs afoul of the Act, the Eighth Circuit's recent holdings, and network technical capabilities. It would also work an unauthorized taking and endanger the security and reliability of the network. The Commission should see AT&T's "logical" access proposal for what it is — an illogical attempt by AT&T to obtain what it has repeatedly been told it cannot have — end-to-end, pre-combined network elements at cost-based rates.

I. MANDATORY ELECTRONIC ACCESS WOULD VIOLATE THE 1996 ACT

When seeking to persuade the Supreme Court to review the Eighth Circuit's determination that CLECs are not entitled to pre-combined network elements, AT&T argued that the Eighth Circuit's conclusion that "unbundled" means "physically separated" is "a matter of the

utmost national importance" that should be reviewed and reversed by the Supreme Court.[5] Yet having achieved its goal of obtaining Supreme Court review of the Eighth Circuit's decision, AT&T, in a stunning display of cynicism, now disavows its own representations to the Supreme Court. AT&T now contends that far from defining "unbundled" to mean "physically separated," the Eighth Circuit's opinion did not "expressly reach" the question of whether incumbent LECs may physically separate network elements.[6] AT&T Ex Parte at 8.

Why has AT&T repudiated its representations to the Supreme Court? Because they flatly preclude AT&T's latest pitch to obtain pre-combined network elements. AT&T's new approach is frivolous — and not just because it is directly refuted by AT&T's own representations to the Supreme Court.

A. Electronic Access Would Require Incumbent LECs to Provide Network Elements on a Pre-Combined Basis

As the Eighth Circuit concluded, the Act ensures that "requesting carriers will in fact be receiving the elements on an unbundled basis," Iowa Utils. Bd., 120 F.3d at 815, but guarantees them access "in a manner that allows requesting carriers to combine such elements." Id. (quoting 47 U.S.C. § 251(c)(3)). This rule reflects Congress's judgment about how best to promote vigorous local competition and network investment. While it is true that "requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry," id.,

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[5] AT&T Corp.'s Petition for a Writ of Certiorari at 23, 26 (No. 97-826, Nov. 17, 1997).

[6] AT&T goes so far as to contend that the Eighth Circuit "simply did not address whether its concept of unbundling or combining elements requires physical as opposed to logical methods of separating and combining." Id. at 8. At no point in its ex parte submission does AT&T attempt to square this position with the one AT&T took before the Supreme Court.

Congress thereby encouraged CLECs to undertake other entry strategies, particularly construction of their own competitive networks, that may benefit consumers more greatly.[7] The unbundling requirement also protects Congress's resale regime, by ensuring that parties who want simply to market the incumbent LEC's services will not be able to arbitrage retail pricing distortions caused by state regulation to undercut the incumbent's prices — all without making any network investment. See Iowa Utils. Bd., 120 F.3d at 815; Local Interconnection Order, 11 FCC Rcd at 15509, ¶ 12.

Incumbent LECs may fulfill their statutory obligations by delivering physically separated network elements to a CLEC's collocation cage, and allowing the CLEC there to recombine those elements however it wishes. Indeed, while section 251(c)(3) generally requires incumbent LECs to provide "access to network elements on an unbundled basis" in a manner that permits their combination, section 251(c)(6) specifically instructs those same LECs to provide "for physical collocation of equipment necessary for . . . access to unbundled network elements." 47 U.S.C. § 251(c)(3), (6). Collocation is the only method of access for recombining network elements set out in the Act.[8]

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[7] See id.; see also First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15509, ¶ 12 (1996) ("Local Interconnection Order") ("The Act contemplates three paths of entry into the local market — the construction of new networks, the use of unbundled elements of the incumbent's network, and resale."), modified on reconsideration, 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), motion to enforce mandate granted, 135 F.3d 535 (8th Cir. 1998), cert. granted, 118 S. Ct. 879.

[8] To date, the Commission has reserved judgment on the question of whether offering CLECs the ability to combine network elements using collocation would alone "be consistent with sections 251(c)(3) and 252(d)(2)," or whether other methods of recombining must be offered. Memorandum Opinion and Order, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended to Provide In-Region,

Regardless of whether an incumbent LEC chooses to make available access arrangements beyond collocation, however, it is indisputable that the incumbent may not be required to turn over to CLECs UNEs that have already been physically assembled — even if the assembled elements are rendered temporarily unuseable. Indeed, AT&T would have this Commission ignore its own representations to the Supreme Court that a "[c]entral" aspect of the Eighth Circuit's "holding is the premise that elements are 'unbundled' for purposes of Section 251(c)(3) only if they are *physically* separated."[9] Absent a reversal of the Eighth Circuit's holding on this point, the Commission has no authority to order incumbent LECs to provide UNEs on the physically pre-combined basis that AT&T demands, a point the Commission itself has acknowledged.

InterLATA Services in South Carolina, 13 FCC Rcd 539, 648, ¶ 199 (1998) ("South Carolina Order"). While SBC agrees with other parties that only collocation is required, see Ex Parte Letter from Bell Atlantic to FCC, March 13, 1988, and attachment, at 6, SBC voluntarily offers three methods of access that do not require collocation. Subject to the availability of space and equipment, SBC will extend UNEs that require cross connection to: (1) a CLEC UNE frame located in a common area room space, other than collocation space, within the central office or tandem office building; (2) an external point of presence, such as a cabinet located on SBC property but outside the central office or tandem office building; or (3) a building not controlled by SBC, via a cable from the central office to a manhole outside the central office building. AT&T's sweeping contention that incumbent LECs require CLECs to combine UNEs only at collocated space within the incumbent LEC's central office is therefore incorrect. AT&T Ex Parte at 1.

[9] United States' Petition for a Writ of Certiorari at 25 (No. 97-831, Nov. 1997). AT&T's insistence that it is "simply incorrect" that the FCC conceded that the Eighth Circuit's holding equated "unbundled" with "physically separated," AT&T Ex Parte at 8, is refuted by the express language of the Government's petition for certiorari.

B. Mandatory Electronic Access Is Not Supported by any Provisions of the Act

Grasping at statutory straws, AT&T suggests that an incumbent LEC's duty under section 251(c)(3) to provide UNEs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" somehow supports AT&T's demand for electronic access to combined elements. AT&T Ex Parte at 11. AT&T contends that section 251(c)(3) and the Commission's rules "mandate that competing LECs be provided the same means" of access as incumbent LECs. Id. However, "nondiscriminatory" access does not mean identical access. See Iowa Utils. Bd., 120 F.3d at 816 ("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."). In fact, CLEC access to UNEs cannot be identical to the access that an incumbent LEC provides itself or its retail customers, since UNEs are not used in retail operations.[10]

AT&T goes so far as to contend that its electronic access "is the only method of accessing unbundled network elements that fully satisfies the standards of section 251(c)(3)" — overlooking that Congress expressly provided for collocation, but no other form of access to UNEs. AT&T Ex Parte at 11. It defies reason to contend that Congress specified collocation alone as a method of access to UNEs, while also believing that physical collocation violated section 251(c)(3). See In re Nofziger, 925 F.2d 428, 434 (D.C. Cir. 1991) ("Legislatures are presumed to act reasonably and statutes will be construed to avoid unreasonable and absurd results"), cert. denied, 493 U.S. 1003 (1991). While AT&T contends that electronic access is

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[10] See Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, 20619, ¶ 141 (1997) ("Michigan Order") (finding that ordering and provisioning of UNEs has "no retail analogue").

preferable because it avoids the costs of physical collocation, AT&T Ex Parte at 24, the Eighth Circuit directly rejected the argument that section 251(c)(3) entitles CLECs to whatever method of access is cheapest for them. See Iowa Utils. Bd., 120 F.3d at 815 ("our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks" to CLECs). Moreover, AT&T's claim that it is entitled to the least expensive form of access to UNEs boils down to AT&T's core fallacy: CLECs should be allowed to obtain what is in effect resale service at cost-based prices lower than the resale rate.

Finally, AT&T argues that physical collocation impermissibly requires CLECs to "own or control a portion of a telecommunications network" in violation of the Eighth Circuit's opinion. AT&T Ex Parte at 25. AT&T misunderstands the nature and function of collocation. Collocation space is not a "portion" of a network, any more than the lobby of an incumbent LEC's central office, or a manhole, are portions of a network. Nor is collocation a "point within the [incumbent] carrier's network" at which CLECs may interconnect to UNEs. 47 U.S.C. § 251(c)(2), (3); see AT&T Ex Parte at 16-17. Rather, physical collocation is an arrangement under which an incumbent LEC makes UNEs available to CLECs at a location on the incumbent LEC's property. Indeed, the Act defines physical collocation as the placement of "equipment necessary for interconnection or access to unbundled network elements" at "the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

C. Electronic Access Would Jeopardize the Security of the Network

In order to implement its direct electronic access, AT&T would need control of shared switching capacity. AT&T Ex Parte at 13 (As part of recent change method, "[s]ervice 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."). However, the Commission has explained that under its implementing rules "the incumbent LEC is not required to relinquish control over operations of the switch." Local Interconnection Order, 11 FCC Rcd at 15708, ¶ 415. More specifically, the incumbent LEC — not the CLEC — is responsible for "activat[ing] (or deactivat[ing]) the particular features on the customer line designated by the competing provider." Id.

This arrangement is necessary to address concerns that "shared use of the unbundled switching element would jeopardize network security and reliability by permitting competitors independently to activate and deactivate various switching features." Id. Central office equipment, and the internal workings of the switch in particular, are the heart of the public switched network. Not only do the communication lines for thousands of people and businesses depend upon central office switches, but critical circuits for national security, public safety and emergencies — i.e., National Security and Emergency Preparedness, Department of Defense, Federal Aviation Administration, 911, fire and burglar alarms — are concentrated in the central offices. If these critical communications paths are not maintained or are disturbed, major economic and social harm can result. Each CLEC that requests unbundled local switching under Commission rules therefore "obtains all switching features in a single element on a per-line basis." Id. at 15706, ¶ 412. If a CLEC were permitted not only to use the features that the

incumbent makes available for that CLEC's lines, but to manipulate the shared switching functions upon which all CLECs and their end user customers, as well as the incumbent LEC and its end user customers, rely, the security of the network would be at risk.

II. AT&T'S PROPOSED ACCESS WOULD WORK AN IMPERMISSIBLE TAKING

A. Electronic Access Impermissibly Interferes with Incumbent LEC Property Rights

While AT&T concedes that its plan would raise a takings issue, it contends the taking will not be "serious." AT&T Ex Parte at 27. In the case of electronic access, AT&T assures the Commission that because it "involves no physical invasion," there cannot be a taking. Id. at 27. But AT&T itself has conceded that electronic manipulation of UNEs can be "every bit as effectiv[e]" as traditional physical manipulation. AT&T's Falcone/Lesher (Lousisiana) Aff. ¶ 120. AT&T explains that when incumbent LECs or CLECs send an electronic signal to deactivate or activate the loop-switch combination, it is just "as if" they had "assigned . . . a technician in the central office" to perform the function manually. AT&T Ex Parte at 27. The electronic access that CLECs seek thus interferes with LECs' property rights just as much as a requirement that incumbent LECs open the doors of their central offices and allow CLECs to come and go as they please. Cf. United States v. Morris, 928 F.2d 504, 511 (2d Cir.) (characterizing computer "hacking" as a form of trespass), cert. denied, 502 U.S. 817 (1991).

AT&T's second proposed alternative to collocation, which allows CLECs to "perform the physical work needed to reconnect the cross-connect," would work the most obvious of takings by granting CLECs unfettered physical access to incumbent LECs' central offices. AT&T admits this, but insists that the unfettered physical access enjoyed by CLECs will be "both

transitory and very controlled in nature." AT&T Ex Parte at 30. AT&T seems to believe that as long as a constitutional violation is small, it is unobjectionable. But "one of the most essential sticks in the bundle of rights that are commonly characterized as property" is the right to exclude others. See Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). Indeed, "the right to exclude others is perhaps the quintessential property right." Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992); see Kaiser Aetna, 444 U.S. at 180 ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within the category of interests that the Government cannot take without compensation").[11]

AT&T is simply whistling in the dark when it states there is "no case" that holds that "transitory, controlled access . . . implicates the Takings Clause." AT&T Ex Parte at 32. The Supreme Court has expressly rejected AT&T's position. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court held that a permanent occupation occurs whenever "individuals are given a permanent and continuous right to pass to and fro . . . even though no particular individual is permitted to station himself permanently upon the premises." Id. at 832; see also Kaiser Aetna, 444 U.S. at 180 (holding that a taking occurs when the government grants an easement allowing third parties to have intermittent access to property rights); Skip

[11] AT&T's proposal that incumbent LECs supervise intrusions onto their property does not solve the takings problem. AT&T Ex Parte at 6. As the Supreme Court has emphasized, "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982). Allowing an incumbent LEC to observe the physical occupation of its property by a CLEC does not alter the fact that this occupation is a taking.

Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (holding that "a permanent physical occupation need not be continuous and uninterrupted"); National Wildlife Fed. v. ICC, 850 F.2d 694, 705 (D.C. Cir. 1988) (instructing ICC to consider whether its rules on rights-of-way for hiking trails will effect a taking under Nollan).

AT&T's attempt to distinguish Nollan is unpersuasive. According to AT&T, "the homeowners in Nollan had no choice but to grant the state the easement or forgo increasing the size of their home. AT&T Ex Parte at 32. By contrast, AT&T says, "the incumbent LECs could avoid any physical intrusion on their premises by agreeing to provide elements in combination." Id. But, as AT&T itself observes, the Nollans could also have avoided the "physical intrusion" by declining to build a larger house. The point of Nollan is not, as AT&T suggests, that a property owner "manufacture[s]" a taking by refusing to acquiesce in a government requirement to which the property owner could otherwise object. Rather, the case stands for the proposition that "a continuous right to pass to and fro" works a taking — regardless of whether the property owner can avoid the taking by surrendering another legal right. Nollan, 483 U.S. at 832.

It also does not matter that incumbent LECs have voluntarily allowed some customers a degree of access to the network. The "distinction between regulation affecting one's relationship to those voluntarily admitted to property versus government action compelling an owner to allow continuous access to third parties" lies at the core of takings law. Nixon, 978 F.2d at 1286 (emphasis added). Thus, even if an incumbent LEC were to contract with a retail customer for electronic or human access similar to that which AT&T demands, this would not empower the Commission to compel that incumbent LEC to afford comparable access to all CLECs.

B. The Commission's Taking Authority is Limited to Physical Collocation

The Commission's limited takings authority under the Act cannot support the intrusion upon incumbent LECs' property rights that AT&T demands. See Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). In the Bell Atlantic case, the Commission had ordered incumbent LECs to provide collocation space within their central offices to competitors, so that the competitors could install their own transmission equipment. Bell Atlantic, 24 F.3d at 1444. The incumbent LECs would have recovered their "reasonable costs" of providing collocation. Id. at 1445 n.3. Yet at the time that the Commission issued this requirement, the Act did not contain express language authorizing such access to the facilities of incumbent LECs. Id. at 1446. The Court of Appeals therefore vacated the order as arbitrary and capricious on the basis that the Act did "not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." Id.

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

Unable to avoid the holding of Bell Atlantic, AT&T is reduced to arguing that while Congress recognized that it needed express language for physical collocation to avoid the takings problem raised by the Bell Atlantic case, it somehow concluded that it did not need express language for any other physical intrusion. AT&T Ex Parte at 20. According to AT&T, the Bell Atlantic case stands only for the proposition that physical collocation — and only physical collocation — requires an express grant of authority, but this simply ignores the Court of Appeals' broad holding that "the Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of the LECs' central offices." Bell Atlantic, 24 F.3d at 1446. The only "clear warrant" that the Act has supplied is collocation. Nor are AT&T's assertions that any damages suffered by incumbent LECs as a result of any taking are minimal, or that these claims may be raised in the Court of Claims. AT&T Ex Parte at 27-28. These same arguments were rejected in the Bell Atlantic case. Bell Atlantic, 24 F.3d at 1444-45.

CONCLUSION

If AT&T wants effortless access to pre-combined network elements, without having any equipment to accomplish combinations and without undertaking any work, it can have such access — provided that it is willing to (1) pay resale rates or (2) accept a UNE combination service voluntarily offered by the incumbent LEC. But, as the Eighth Circuit has held, AT&T cannot have resale service at cost-based rates. AT&T's proposal for mandatory electronic access to UNE combinations is nothing more than a fiction, designed to obtain finished, end-to-end telecommunications service without paying the rate required by Congress.