EX PARTE OR LATE FILED

ORIGINAL

AT&T

Robert W. Quinn, Jr.
Director - Federal Government Affairs

Suite 1000
1120 20th St., NW
Washington, DC 20036
202 457-3851
FAX 202 457-2545

September 8, 1998

RECEIVED

SEP 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communication Commission
1919 M Street, NW-Room 222
Washington, DC 20554

Re: Written Ex Parte
Second Application by BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provisioning of In-Region, interLATA Service in Louisiana, CC Docket No. 98-121

Dear Ms. Salas:

At the request of the Staff of the Policy and Program Planning Division, AT&T provided to Jake Jennings on Friday September 4, 1998 the attached state decisions which address collocation requirements and the accompanying matrix that identifies the pertinent pages in the following documents:

1. Initial Staff Report, California Public Utilities Commission, Telecommunications Division, Pacific Bell and Pacific Bell Communications Notice of Intent to file Section 271 Application for InterLATA Authority in California, Case No. U 1001 C (July 10, 1998).

2. The Investigation and Suspension of Tariff Sheet filed by US WEST Communications, Inc. with Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling, and Resale of Services, Colorado PUC Docket No. 96S-331T, Decision Regarding Commission Authority to Require Combination of Network Elements, Decision No. C98-267 (Feb. 18, 1998).

3. Investigation into Rebundling of Telephone Company Network Elements, Conn. DPUC, Docket No. 98-02-01 (July 8, 1998).

4. Florida Public Service Commission, In re Motion of AT&T Communications et al. to Compel BellSouth Telecommunications, Inc., . . . To Set Non-Recurring Charges for Combinations of Network Elements, Docket No. 971140-T.P., Order No. PSC 98-08100-FOF-T.P. (June 12, 1998).

No. of Copies rec'd 0+1

5. Idaho Public Service Commission, In the Matter of AT&T Communication of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms, and Conditions of Interconnection with USE WEST, Case No. USW-T-9615 (Dec.1, 1997).

6. Iowa Public Utilities Bd., Docket Nos. AUA-96-1; AIA-96-2, Final Arbitration Decision on Remand (May 15, 1998).

7. Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. with Section 251 and Section 252(d) of the Telecommunications Act of 1996, Kentucky PSC, Case No. 98-348 (Aug. 21, 1998).

8. Comments of the Telecommunications Division of the Public Service Commission Staff, In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996, Case No. 8731 - Phase II(c) ("Md. UNE Combinations Case"), (Dec. 22, 1997).

9. Proposed Order of Hearing Examiner, Md. UNE Combinations Case (Jan. 16, 1998).

10. Consolidated Petitions Pursuant to Section 252(b) of the Telecommunications Act of 1996, Mass.D.P.U./D.T.E. 96-73/74 et al., (March 13, 1998).

11. Opinion and Order, Michigan Public Service Commission, In the Matter of the Application and Complaint of MCIMetro Access Transmission Services Against Ameritech Michigan Requesting Non-Discriminatory, Efficient, and Reasonable Loops Using GR303 Capability, Case No. U-11583 (June 3, 1998).

12. Public Service Commission of the State of Montana, Dept. of Public Service Regulation, In the Matter of The Petition of AT&T Communications of the Mountain States, Inc., Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms and Conditions of Interconnection With US WEST Communications, Inc., Docket No. D96.11.200, Order No. 5961d (April 30, 1998).

13. Proposed Findings of Administrative Law Judge Eleanor Stein, Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements, NY PSC, Case 98-C-0690 (Aug. 4, 1998).

14. Recommended Decision, Petition of Bell Atlantic - Pennsylvania, Inc. For a Determination Whether the Provision of Business Telecommunications Services is Competitive Under Chapter 30 of the Public Utility Code, Penn. PUC, Docket No. P-00971307 (July 24, 1998).

15. Commission Recommendation, Public Utility Co. of Texas, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, PUC Project No. 16251, (adopted May 21, 1998).

16. In the Matter of the Interconnection Contract Negotiations Between AT&T of the Mountain States, Inc., and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252 et al., Utah PSC, Order on Reconsideration, Dockets No. 96-087-03 et al, (June 9, 1998).

17. Hearing Officer, Proposal for Decision, Investigation into New England Tel. & Tel. Co. (NET's) tariff filing re: Open Network Architecture, including the unbundling of NET's network, expanded interconnection, and intelligent networks in re: Phase II, Module Two, Vt. PSB, Docket No. 5713 (May 12, 1998).

18. In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Inc., Washington UTC Order Partially Granting Reconsideration, Docket No. UT-960307 (March 16, 1998).

In compliance with Section 1.1206(a)(1) of the Commission's rules, I have filed with the Secretary of the Commission two copies of this written ex parte presentation and requested that it be associated with the record of CC Docket 98-121.

Sincerely,

Robert W. [illegible] Jr.

Attachments

cc: Jake Jennings

EX PARTE OR LATE FILED

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION REGARDING COMPLIANCE OF THE STATEMENT OF GENERALLY AVAILABLE TERMS OF BELLSOUTH TELECOMMUNICATIONS, INC. WITH SECTION 251 AND SECTION 252(D) OF THE TELECOMMUNICATIONS ACT OF 1996	)	CASE NO. 98-348

O R D E R

On June 22, 1998, BellSouth Telecommunications, Inc. ("BellSouth") filed its updated Statement of Generally Available Terms ("SGAT"), with supporting documents, together with a request that the SGAT be approved by this Commission. By Order dated July 6, 1998, the Commission established this case to determine, pursuant to the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the "Act"), at 47 U.S.C., § 252(f), whether the SGAT meets the requirements of 47 U.S.C., § 251 and 252(d) and relevant requirements of state law. The parties to Case No. 96-608[1] were also made parties to this proceeding and were invited to submit comments on the SGAT. Comments have been filed by e.spire Communications, Inc. ("e.spire"), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI"), Sprint Communications Company, L.P. ("Sprint"), AT&T

[1] Case No. 96-608, Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Communications of the South Central States, Inc. ("AT&T"), and the Competitive Telecommunications Association ("CompTel"). BellSouth has filed a response to those comments. The issue of whether BellSouth's SGAT complies fully with applicable law is ripe for Commission decision.

As an introductory matter, the Commission reiterates that matters relevant to Case No. 96-608, including BellSouth's actual dealings with its competitors and its technical ability to furnish nondiscriminatory access to necessary operating systems, are not at issue here. Accordingly, comments filed by the parties which discuss these issues will not be addressed herein. The sole focus of this proceeding is to determine the legal sufficiency of the SGAT as an adequate vehicle for competitive entry.

The SGAT purports to furnish legally sufficient terms regarding, inter alia, number portability, reciprocal compensation, unbundled access, collocation, rates for interconnection, transport and termination of traffic, unbundled network elements ("UNEs"), and resale of BellSouth services by competitive local exchange carriers ("CLECs"). Commenters dispute the legal sufficiency of several of these provisions. The Commission's findings regarding the relevant issues are as follows.

Operations Support Systems

Section 251(c)(2) requires BellSouth to provide interconnection and access that is at least equal in quality to that provided by BellSouth to itself. Commenters argue that the lack of clearly defined performance measurements in the SGAT render the SGAT provisions in this area inadequate. They also raise a number of issues relating to whether BellSouth can, in practice, provide nondiscriminatory access. However, performance measurements are not, in themselves, required by Section 251.

Moreover, the actual ability of BellSouth to deliver what it promises in its SGAT is not at issue. The SGAT offers electronic interfaces for pre-service ordering, service ordering and provisioning, trouble reporting, and customer usage data, as well as the option of placing orders manually.[2] Current systems will be updated as needed to improve operations, and CLECs choosing the SGAT will be kept informed of updates and given the option to migrate with BellSouth.[3] The provision for updating these systems ensures that CLECs electing to provide service pursuant to the SGAT will be able to receive the benefits of improvements as they are made. The Commission finds no legal infirmity in the terms offered in the SGAT, and finds that performance issues pursuant to those terms are not ripe for decision. Performance measurements may very well be necessary to determine whether BellSouth's performance in actually providing nondiscriminatory access is sufficient to enable it to enter the interLATA market. However, that issue will be addressed in Case No. 96-608.

Resale

The Act prohibits BellSouth from imposing "unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." Once again, several commenters discuss performance issues rather than contract terms offered in the SGAT. These issues are irrelevant here. AT&T points out that the joint marketing restriction in the SGAT, at Section XIV(E) does not contain a sunset provision stating that the restrictions no longer apply when BellSouth is authorized to provide in-region, interLATA services or on February 8, 1999, whichever is earlier. Such a sunset

[2] SGAT at II.B.5 and 6.

[3] SGAT at II B 6(f).

provision should be included pursuant to applicable law. Otherwise, except as specified elsewhere in this Order, SGAT terms regarding resale appear to be legally sufficient.

Customer Migration Issues

MCI complains that BellSouth inappropriately may require of the CLEC, at BellSouth's discretion, "proof" of authorization to migrate a customer. MCI accurately characterizes the section that contains this provision, XIV.G, as inappropriately vague. Accordingly, BellSouth shall clarify its SGAT to make it clear that BellSouth will not take upon itself the responsibility of determining whether one of its customers has, indeed, elected another local exchange carrier. Fraudulent carrier change orders will be handled by this Commission pursuant to HB 582 (eff. July 15, 1998), to be codified at KRS Chapter 278. The Commission notes that this statute requires the carrier that initiated the change, and not the customer's previous local exchange carrier, to retain proof that the change was actually requested.

MCI also points out that the SGAT charge to a local service provider for initiating an unauthorized carrier change is $19.41, see Section XIV.H, plus the appropriate nonrecurring charge to reestablish the customer's service with his preferred provider. The SGAT does not explain how BellSouth determines whether "slamming" actually has occurred. Moreover, such a finding should be made, in any event, by this Commission rather than by BellSouth. Reestablishing a customer's service with his preferred carrier will involve a cost, and the SGAT's provision passing that cost on to the carrier initiating the change is appropriate. However, there is no reason why BellSouth should collect an additional $19.41 in the absence of adequate cost justification. Alleged slamming violations should be reported to this Commission for resolution.

MCI correctly states that BellSouth should include in its SGAT a provision that a new CLEC customer may choose to migrate his directory listing as-is from BellSouth to his new carrier. BellSouth contends that the CLEC should provide the listing to BellSouth. However, ease of customer migration is crucial to development of local exchange competition, and BellSouth offers no reason why it should not provide "as-is" listings. BellSouth shall reform its SGAT to include such a provision.

Termination of Service and Notification of Network Changes

MCI contends that SGAT Section XIV.R is one-sided in that it contains no dispute resolution clause and only vaguely explains the reasons BellSouth may terminate service to a CLEC. As BellSouth notes, the Commission's complaint process is available pursuant to KRS 278.260. MCI also fears the section is so vague that a CLEC could have its service cut off at any time, even if it believes in good faith it is complying with the parties' agreement and with applicable rules. MCI demands that BellSouth clarify reasons for which it will terminate service and provide timely notification of termination or network changes. BellSouth says that it will provide "reasonable" notice, that the SGAT is sufficiently specific, and that the law requires nothing more. The Commission finds that prior notice of pending termination and network changes, together with available Commission complaint procedures, are sufficient protection for CLECs.

Reciprocal Compensation

Section 252(d)(2) of the Act defines just and reasonable reciprocal compensation to mean a reasonable approximation of the costs of terminating calls that originate on the network of the other carrier. Recovery of these costs must be mutual and

reciprocal. Id. Numerous commenters argue that internet service provider traffic must be explicitly defined in the SGAT as "local" traffic for which reciprocal compensation must be paid. However, the terms of the SGAT, at I(A), adequately define "local traffic" to include telephone calls that originate in one exchange and terminate in the same exchange or in a corresponding extended area service exchange. The issue of whether internet service provider traffic is local is before the Commission in Case No. 98-212[4] and will be decided therein. The terms of the SGAT are silent on this specific issue and, regardless of the Commission's eventual decision in Case No. 98-212, those terms are adequate.

Switched Access and Billing Issues

Commenters argue that terminating access should be at the CLEC's tariffed rate rather than BellSouth's rate if termination is to a CLEC customer; and commenters contend the SGAT must include a provision that CLECs will be provided with access daily usage files to enable them to bill access charges. BellSouth states it will clarify the SGAT to provide that the access daily usage files will be provided. The Commission finds that the proposed clarification should be made. The Commission also finds that terminating access charges should be at the CLEC rate if the call terminates to a CLEC customer. BellSouth shall revise its SGAT accordingly.

[4] Case No. 98-212, American Communications Services of Louisville, Inc., d/b/a e.spire Communications, Inc. and American Communications Services of Lexington, Inc., d/b/a e.spire Communications, Inc. and ALEC, Inc., Complainants v. BellSouth Telecommunications, Inc., Defendant.

Audits

Commenters contend that BellSouth's provision enabling it to perform resale audits of CLECs at its discretion is intrusive. However, BellSouth should be authorized to audit annually the services provided to CLECs to test conformity to the SGAT or its tariff. Other audit provisions are also included in the SGAT. Commenters contend these provisions are discriminatory since no reciprocal provision exists. The Commission agrees. The SGAT shall include reciprocal provisions for audit. Parties may bring disputes to the Commission's attention.

Access to Unbundled Network Elements

The SGAT, at Section II(G)(1), specifies that UNEs may be combined by means of collocation only. Numerous commenters discuss this provision of the SGAT, and correctly point out that the Act, at Section 251(c)(3) requires ILECs to provide nondiscriminatory access to UNEs "at any technically feasible point" and "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services," and they object to BellSouth's unwarranted limitation of methods of combination to collocation alone, particularly since the Eighth Circuit Court of Appeals, Iowa Utilities, held that a CLEC is not required to own a portion of a telecommunications network before it may provide service by means of unbundled elements. In addition, the Federal Communications Commission has determined that "nondiscriminatory access " requires an ILEC to provide access that is "at least equal in quality to that which the incumbent LEC provides to itself."[5] The Commission finds that the requirement that a CLEC may combine UNEs only by means of collocation is both discriminatory and unwarranted. The provision violates the Act and must be reformed.

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[5] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15658, ¶ 312, vacated in part on other grounds, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, ____ S. Ct. ____ (199__).

The commenters also point out that BellSouth's refusal to provide other CLECs with UNE combinations through the SGAT, while allowing AT&T and MCI to obtain them through their negotiated and arbitrated interconnection agreements, is discriminatory and therefore violates the Act. The Commission agrees. BellSouth must provide service to CLECs without discriminating among them.

Commenters also contend that the SGAT method of providing multiple UNEs to competitors violates the Act in that it is anticompetitive and discriminatory, resulting in a failure of BellSouth to provide service to CLECs at parity with service provided to itself. BellSouth, they claim, uses the "recent change" capability in its system to electronically separate and reconfigure UNEs. BellSouth states the "recent change" capability does not reconfigure UNEs, but can only disable and then re-start service. However, when no "reconfiguration" has been requested by a CLEC, there appears to be no reason the "recent change" capability cannot be used to provide UNEs to CLECs. Appropriate, one-time, cost-based compensation may be required by BellSouth for performing this procedure.

The SGAT provides that physical separation of UNEs that were previously combined by BellSouth will occur when they are ordered by a CLEC, even though those elements are currently combined. This provision is unacceptable. Such separation and subsequent recombination would serve no public purpose and would increase costs that ultimately would be passed on to the consumer. Simply put, it is an unnecessary disruption and as several commenters point out, would necessarily result in provision of inferior service to the CLEC's customers. For such an operation to take place, the customer's line must unnecessarily be taken out of service. In addition, the CLEC

would incur entirely unnecessary expense and loss of customer goodwill. While BellSouth may charge a reasonable, non-recurring, cost-based "glue charge" for its expertise in having combined the UNEs, thus receiving some increment above the total cost of the unbundled elements bought by the CLEC, the Commission finds that neither BellSouth nor any other ILEC shall indulge in the wasteful habit of physically separating UNEs for no other apparent reason than to disrupt migration of a customer to the services of another carrier.

BellSouth contends that the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom AT&T Corp. v. _____, ___ S. Ct. ___ (199___) determined that ILECs are not required by the Act to "combine" UNEs for CLECs. It also states that this Commission has never ordered it to "do the combining of UNEs" [BellSouth Response at 40]. Technically, BellSouth is correct. As the Eighth Circuit Court of Appeals noted, "the Act does not require the incumbent LECs to do all of the work." Id. at 813 (emphasis supplied). But failure to order BellSouth to "combine" UNEs at a CLEC's demand is a far cry from stating that BellSouth may deliberately *disconnect* UNEs that are already combined. To clarify: this Commission has not, and does not, order BellSouth affirmatively to combine UNEs for a CLEC. It does, however, order BellSouth to refrain from unnecessarily dismantling its network when elements of that network that are already combined have been ordered in that same combination by a CLEC. Even if the Act permits such anticompetitive conduct, this Commission has the authority, indeed the duty, pursuant to state law to forbid it See, e.g., KRS 278.280 (enabling the Commission to determine the "just" and "reasonable . . . practices . . . to be observed, furnished, constructed, enforced or

employed" by a utility and to "fix the same by its order, rule or regulation"); KRS 278.512 (enabling the Commission to regulate telecommunications competition in Kentucky in the public interest) 47 U.S.C., § 252(f)(2)(a state commission in reviewing the SGAT may establish or enforce state law, including service quality standards).

UNE Prices

Commenters argue that UNE rates in the SGAT are not properly set and do not comply with the Act. However, as this Commission previously has stated, the rates it has set comply with the Act, and UNE ratesetting is clearly jurisdictional to state commissions. 47 U.S.C. 252; Iowa Utilities. Accordingly, since the SGAT rates are based upon Commission determinations and upon other standards deemed appropriate by this Commission, they are in compliance with law.

Conclusion

The Commission finds that, absent the amendments prescribed in this Order, the SGAT does not conform to applicable law. However, BellSouth may submit a reformed SGAT in accordance with this Order. If such a reformed SGAT is submitted, it shall be reviewed for compliance with the requirements stated herein and, if found to be in compliance, it shall be approved.

The Commission having considered BellSouth's SGAT and comments thereto, and having been otherwise sufficiently advised, HEREBY ORDERS that, absent the amendments prescribed herein, the SGAT shall not be approved. However, if BellSouth submits a revised SGAT which is in accordance with this Order, it shall be approved.

Done at Frankfort, Kentucky, this 21st day of August, 1998.

By the Commission

ATTEST:

Executive Director

State Commission Decisions Regarding Collocation Requirements for Combining UNEs

State	Staff Recommendation	Commission Action
California	The Staff of the California Public Utilities Commission, in finding that Pacific Bell had not met 11 of 14 Section 271 checklist items, stated that it "is concerned that Pacific's [collocation-based] options for combining UNEs are costly, slow, and may not have equivalent reliability as Pacific's retail operations. . . [As a result, in a collaborative process,] Staff will explore various options, including the use of recent change capability, that do not require competitors to own their own facilities." *See* Initial Staff Report, California Public Utilities Commission, Telecommunications Division, Pacific Bell and Pacific Bell Communications Notice of Intent to File Section 271 Application For InterLATA Authority in California, Case No. U 1001 C, at 46-47, (July 10, 1998).	
Colorado		The Colorado PUC determined that it had authority under state law to order US WEST to provide existing combinations of network elements, and rejected arguments by US WEST that the Eighth Circuit Order pre-empted state law. *See* In re The Investigation and Suspension of Tariff Sheets filed By US WEST Communications, Inc. With Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling, and Resale Services, Colorado PUC Docket No. 96S-331T, Decision Regarding Commission Authority to Require Combination of Network Elements, Decision No. C98-267 (Feb. 18, 1998), at 10. The PUC stated that "requiring USWC to do the combining of elements . . . may very well be consistent with the Act to promote competition." Id. at 8. The PUC noted CLECs' arguments against US WEST's SPOT frame proposal, but did not rule on those objections and is now conducting a factual investigation concerning the manual propriety of recombination of network elements.
Connecticut		The Connecticut Department of Public Utility Control required ILECs there to offer recombined UNEs for a period of five years, from the date of effectiveness, to CLECs for service to residential and small business customers. *See* Investigation into Rebundling of Telephone Company Network Elements, Conn. DPUC, Docket No. 98-02-01 (July 8, 1998). The DPUC found that the "limited use of a recombined service [i]s critical to the development of effective competition in rural and residential markets." Id. at 33.
Florida		Th Florida Public Service Commission rejected BellSouth's collocation requirement and concluded that BellSouth's proposal: "would impose on an ALEC seeking unbundled access the very obligation the [Eighth Circuit in Iowa Utilities Bd.] held to be inappropriate under the Act, i.e., to own or control some portion of the network. Nowhere in the Act or the FCC's rules and interconnection orders or the Eighth Circuit's opinions is there support for BellSouth's position that each network element ordered . . . in combination . . . by an ALEC must be physically disconnected from an ILEC's network, be connected to an ALEC's collocation facility, and then be re-connected to the ILEC's network. We believe that . . . collocation is only a choice for the ALEC, not a mandate." *See* Florida Public Service Commission, In re Motions of AT&T Communications et al. to Compel BellSouth Telecommunications, Inc, . . . To Set Non-Recurring Charges For Combinations of Network Elements, Docket No. 971140-T.P., Order No. PSC 98-08100-FOF-T.P. (June 12, 1998) at 52-53. *See* id. at 62-63 ("Based on the evidence in the record, we conclude that BellSouth's collocation proposal is unnecessary for the migration of an existing BellSouth customer. We conclude further that BellSouth's proposal to break apart loop and port combinations that are currently connected, requiring AT&T or MCI to establish a collocation facility where the unbundled loop and the unbundled port would be recombined, is in conflict with the terms of the parties' agreements and the Act as interpreted by the Eighth Circuit.")

State	Staff Recommendation	Commission Action
Idaho		The Idaho PUC held that AT&T's interconnection agreement required US WEST to provide existing UNE combinations to AT&T. *See* Idaho Public Service Commission, In the Matter of AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms, and Conditions of Interconnection with US WEST, Case No. USW-T-9615 at 4-5 (Dec. 1, 1997). It rejected the view that Iowa Utilities Bd. decision mandated complete physical separation of all parts of US WEST's network, recognizing that such a holding would result in unbundling of "countless physical components" and would cause "tremendous financial and technical burdens to both companies." Id. at 5. The PUC, therefore did not consider a collocation requirement.
Iowa		The Iowa Board of Public Utilities rejected a proposal by US WEST to collocate elements using an approach US WEST called a "SPOT frame" which is an area outside the central office dedicated to the equipment of several CLECs. *See* Iowa Utilities Bd., Dockets Nos. AIA-96-1; AIA-96-2, Final Arbitration Decision on Remand at pp. 22-23 (May 15, 1998). The Board found "ample evidence" that "the SPOT frame approach is inefficient, expensive, inconsistent with network security, and provides discriminatory access to UNEs." Id. Because of these limitations, the Board concluded that "the SPOT frame was likely to seriously limit the practical availability of the UNE method of entry." Id. at 23. The Board listed five options for combining UNEs: leaving existing combinations intact, recent change, glue charge for recombination by US WEST technicians, recombination by 3rd party vendor, and direct access. Id. at 22. However, the details of each option are vague, and, more importantly, US WEST, not CLECs, chooses which method will be implemented.
Kentucky		The Kentucky PSC squarely held that "the requirement that a CLEC may combine UNEs only by means of collocation is both discriminatory and unwarranted." *See* Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. with Section 251 and Section 252(D) of the Telecommunications Act of 1996, Kentucky PSC, Case No. 98-348 (Aug. 21, 1998). The PSC found that: [S]eparation and subsequent recombinations [of UNEs] would serve no public purpose and would increase costs that ultimately would be passed on the consumer. Simply put, it is an unnecessary disruption and as several commenters point out, would necessarily result in provision of inferior service to the CLEC's customers. For such an operation to take place, the customer's line must unnecessarily be taken out of service. In addition, the CLEC would incur entirely unnecessary expense and loss of customer goodwill. . . [T]he Commission finds that neither BellSouth nor any other ILEC shall indulge in the wasteful habit of physically separating UNEs for no other apparent reason than to disrupt migration of a customer to the services of another carrier." Id. at 8-9. The PSC also found that BellSouth must provide access to the recent change process for CLECs to recombine network elements.
Maryland	The Staff of the Maryland Public Service Commission "supports the UNE platform and combined UNEs as a competitive entry option." It found it "uneconomical to require CLECs to establish collocation, and install the extra cross-connects that a collocation space would require." *See* Comments of the Telecommunications Division of the Public Service Commission Staff, In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996, Case No. 8731 – Phase II(c) ("Md. UNE Combinations Case") at 1 (Dec.22, 1997).	In its Proposed Order, the Hearing Examiner in the case determined that the PSC had no authority to order Bell Atlantic to provide combinations in light of the Eighth Circuit decision. *See* Proposed Order of Hearing Examiner, Md. UNE Combinations Case, at 15-16 (Jan. 16, 1998). The Hearing Examiner's decision is on appeal to the full Commission.

State	Staff Recommendation	Commission Action
Massachusetts		The Massachusetts Department of Public Utilities ordered Bell Atlantic to develop alternatives to collocation for combining network elements, based on its belief that "provisioning UNEs solely through collocation may not be adequate to meet the Act's UNE provisioning requirements in Subsection 251(c)(3)." *See* Consolidated Petitions Pursuant to Section 252(b) of the Telecommunications Act of 1996, Mass. D.P.U./D.T.E. 96-73/74 et al., pp. 13-14 (March 13, 1998); *see* id. at 14 ("insistence on collocation as the only answer to the UNE questions very well may not meet the Act's Section 251 interconnection requirements as they relate to UNEs"). In addition, the DPU found that, contrary to the Eighth Circuit's decision, "it is clear that collocation requires a competing carrier to own a portion of a telecommunications network." In these and other statements, the DPU strongly hinted that Bell Atlantic would not receive approval under Section 271 if it insisted upon collocation. However, it ordered further negotiations on the issue.
Michigan		The Michigan PSC issued a significant decision finding that MCI was entitled to interconnection to Ameritech's network, using a GR303 capability to carry unbundled loops to MCI's switch. *See* Opinion and Order, Michigan Public Service Commission, In the Matter of the Application and Complaint of MCIMetro Access Transmission Services against Ameritech Michigan Requesting Non-Discriminatory, Efficient, and Reasonable Loops Using GR303 Capability, Case No. U-11583 (June 3, 1998). Although the decision did not involve combining elements via a recent change capability, it provides very substantial support for AT&T's position. In the case, MCI requested that Ameritech provide GR303 digital terminals. MCI asked that Ameritech locate the equipment at Ameritech's end office, and then send unbundled lops over the terminals, in multiplexed form, over transport, to MCI's switch at another location. Ameritech argued that it should not be required to provide the interconnection, because it did not use the GR303 capability in its network, and because MCI could collocate its own equipment at the end office to send the loops to its switch. Relying solely on state law and the parties' interconnection agreement (reducing somewhat the value of the decision), the MPSC sided with MCI. In particular, it rejected Ameritech's view that MCI could use collocation to deploy the equipment, finding that "nothing in the interconnection agreement, the [Federal Telecommunications Act], or the [Michigan Telecommunications Act] required MCI to interconnect with Ameritech Michigan's network through use of collocation. Rather MCI may request interconnection with Ameritech Michigan's network in any technically feasible manner pursuant to . . . the interconnection agreement." Id. at 30. *See* also In the Matter, On the Commission's own Motion, to Consider the Total Service Long Run Incremental Costs and to Determine the Prices of Unbundled Network Elements, Interconnection Service, Resold Services, and Basic Local Exchange Services for Ameritech Michigan, Michigan PSC Case No. U-11280 (Jan. 28, 1998) at p. 26 (collocation not required for transport). Under the rationale of the MPSC in the case, a CLEC may request access to Ameritech's recent change capability to combine UNEs, and is not limited to use of collocation, even if the requested interconnection requires Ameritech to develop new systems not currently in place in its network (i.e., a firewall for the recent change capability).

State	Staff Recommendation	Commission Action
Montana		The Montana Public Service Commission rejected US WEST's position that it need not combine network elements for CLECs and that CLECs may only combine network elements themselves in collocated space. First, the PSC found that if US WEST is "unwilling to allow CLECs access to its network in any manner except by collocating equipment, " then it must combine elements for CLECs: "US WEST cannot have it both ways - - either it permits CLECs to purchase combined network elements or it permits access to its network so that CLECs can perform the combinations, without requiring collocation." *See* Public Service Commission of the State of Montana, Dep't of Public Service Regulation, In the Matter of The Petition of AT&T Communications of the Mountain States, Inc., Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms and Conditions of Interconnection With US WEST Communications, Inc., Docket No. D96.11.200, Order No. 5961d (April 30, 1998), par. 13 (emphasis added). The PSC rejected collocation as the sole means of access to UNEs, stating that: "[c]ollocating a 'cage' and the accompanying cost of connecting with US WEST's network in every central office and by every CLEC is likely to be quite costly to entrants and perhaps to US WEST as well . . . [Such conditions] may constitute a barrier to entry to CLEC entry, which this Commission cannot support . . . It makes little economic sense to require the CLEC to invest this heavily to enter the market." Id. pars. 15-16 (emphasis in original). Like other state commissions, Montana PSC found that US WEST's collocation requirement "is contrary to the Eighth Circuit's holding that CLECs can provide services entirely through the ILEC's unbundled elements without owning or controlling any of their own facilities. Although the FCC's rule prohibiting the disassembling of currently combined network elements has been vacated, US WEST must provide access to its network to enable AT&T to recombine elements, and it may not do so in such a way as to discriminate against other competing providers or to create anticompetitive barriers to entry." Id. pars. 19.
New York		The ALJ recommended that the Commission reject Bell Atlantic's offering of various collocation-based methods as sufficient to comply with the Act. *See* Proposed Findings of Administrative Law Judge Eleanor Stein, Proceeding on Motion f the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements, NY PSC, Case 98-C-00690 (Aug. 4, 1998). The ALJ found that the collocation methods offered by Bell Atlantic "are unacceptable to support combination of elements to serve residential and business customers on any scale that could be considered mass market entry." Id. at 10. The ALJ concluded that "an electronic method for obtaining and combining network elements, or a comparable substitute, appears essential for mass market competition. Id. at 46. The ALJ also rejected arguments by Bell Atlantic that electronic methods to recombine UNEs constitute "sham" unbundling. She concluded that any electronic method that "functionally unbundles and recombines elements . . . complies with the Act." Id. at 14. Based on these findings, she recommended that electronic means for accomplishing the combination of network elements, including the recent change method, be discussed in a collaborative process. Id. at 46.
Pennsylvania		The ALJ recommended that the PUC deny a petition by Bell Atlantic declaring that its business services are subject to competition. *See* Recommended Decision, Petition of Bell Atlantic – Pennsylvania, Inc. For a Determination Whether the Provision of Business Telecommunications Services is Competitive Under Chapter 30 of the Public Utility Code, Penn. PUC, Docket No. P-00971307 (July 24, 1998). The ALJ noted that "from a purely technical standpoint, it makes no sense to require collocation," which "not only imposes unnecessary costs on the CLECs" it also "wastes collocation for space for no good reason." Id. at 27.

State	Staff Recommendation	Commission Action
Texas		The Texas PUC rejected SBC's collocation-based proposals and instead required SBC to "offer at least . . . three methods to allow CLECs to recombine UNEs," including "virtual collocation of cross-connects at cost-based rates, access to recent change capability of the switch to combine loop port combinations, and electronic access such as Digital Cross Connect for combining loop port at cost based rates." *See* Commission Recommendation, Public Utility Co. of Texas, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, PUC Project No. 1621, at 4 (adopted May 21, 1998). Under the first method of virtual collocation of cross-connects, the CLECs would provide ILECs "with rolls of their own wire. When a customer changes carriers from the ILEC to a CLEC, the ILEC would . . . untie and remove the ILEC's wire, and insert and tie the CLEC's wire" that had been provided. Id.
Utah		The Utah Public Service Commission has re-affirmed its finding that it is "illogical, inefficient and discriminatory for [US WEST] to use available combinations of elements to provide its own services, while requiring entrants to incur the delay and expense of separating and recombining them." *See* In the Matter of the Interconnection Contract Negotiations Between AT&T of the Mountain States, Inc., and US WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252 et al., Utah PSC, Order on Reconsideration, Dockets No. 96-087-03 et al., at 8 (June 9, 1998). It found "credence" in the claim that "the act of separating and reconnecting network elements heightens the possibility of service transfer errors and delays the advent of competitive market benefits." Id.
Vermont	A Hearing Officer of the Vermont Public Service Board recommended that the Board find that it has authority to order ILECs to provide UNE-combinations and that the Board should "address the factual and policy issues related to UNE combinations." *See* Hearing Officer, Proposal for Decision, Investigation into New England Tel. & Tel. Co. (NET's) tariff filing re: Open Network Architecture, including the unbundling of NET's network, expanded interconnection, and intelligent networks in re: Phase II, Module Two, Vt. PSB, Docket No. 5713 (May 12, 1998).	
Washington		The Washington Utilities and Transportation Commission found that GTE's proposal to recombine elements through the use of jumpers "is not desirable from a technological point of view" or from "an economic point of view." *See* In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Inc., Washington UTC Order Partially Granting Reconsideration, Docket No. UT-960307 (March 16, 1998), at Section IV. As to the technological drawbacks to GTE's manual recombination proposal, the UTC found it technically undesirable because it is "requires extra connections (i.e., extra potential service failure points) and coordination between technicians from both companies (i.e., more potential service failure points)." Id. Moreover, "the use of jumpers would put customers out of service for a period of time long enough to discourage customers from switching to AT&T's service." Id. The UTC also concluded that GTE's jumpers approach was significantly flawed as an economic matter, because it would "increase the costs for both" ILECs and CLECs, and thereby would cause "Washington consumers to suffer." Id. Accordingly, the UTC found that a manual recombination approach "would not be consistent with the overall goal of a rapid transition to competitive markets because it would hamper entry." Id.

112 State Street
Drawer 20
Montpelier, VT 05620-2701
Tel.: (802) 828-2358

TTY/TDD (VT): 1-800-734-8390
Fax: (802) 828-3351
E-Mail: clerk@psb.state.vt.us
Internet: http://www.state.vt.us/psb

State of Vermont
Public Service Board

May 12, 1998

TO PARTIES IN PSB DOCKET NO. 5713

RE: Proposal for Decision Regarding Federal Preemption

Dear Parties:

Pursuant to 30 V.S.A. Section 8 and 3 V.S.A. Section 811, I am enclosing my Proposal for Decision concerning Federal Preemption with regard to Phase II, Module Two, of the above docket.

If you have any comments, please file them on or before May 22, 1998. Any comments will then be submitted to the Public Service Board along with the Proposal for Decision for final determination. If you wish, you may request oral argument before the Board.

It should be emphasized that the enclosed Proposal is not a final decision of the Board and may be subject to modification by the Board.

Very truly yours,

FWeston III

Frederick Weston
Hearing Officer

Enclosure

cc: Susan M. Hudson, Clerk of the Board

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 5713

Investigation into New England Telephone	)
and Telegraph Company's (NET's) tariff filing	)
re: Open Network Architecture, including	)
the unbundling of NET's network, expanded	)
interconnection, and intelligent networks	)
in re: Phase II, Module Two	)

Order entered:

PRESENT: Frederick W. Weston, III
Hearing Officer

APPEARANCES: Sheldon Katz, Esq.
for the Vermont Department of Public Service

Thomas M. Dailey, Esq.
for New England Telephone & Telegraph Company
d/b/a Bell Atlantic-Vermont

John H. Marshall, Esq.
Downs, Rachlin & Martin
for Atlantic Cellular Company, L.P. d/b/a Cellular One
and Hyperion Telecommunications of Vermont, Inc.

William B. Piper, Esq.
Paul J. Phillips, Esq.
Primmer and Piper, P.C.
for Champlain Valley Telecom, Inc.
Franklin Telephone Company
Ludlow Telephone Company
Northfield Telephone Company
Perkinsville Telephone Company
Shoreham Telephone Company, Inc.

STE/NE Acquisition Corp.
d/b/a Northland Telephone Company of Vermont, Inc.
Topsham Telephone Company, Inc.
Waitsfield-Fayston Telephone Company, Inc.
d/b/a Waitsfield Telecom

Melinda B. Thaler, Esq.
for AT&T Communications of New England, Inc.

Robert Glass, Esq.
Glass, Seigle and Liston
for MCI Telecommunications Corporation

Stephen Whitaker, *pro se*
for Design Access Network

Evelyn Bailey, Executive Director
for the Enhanced 911 Board

PHASE II ORDER RE: FEDERAL PREEMPTION OF STATES' AUTHORITY TO REQUIRE THE RECOMBINATION OF UNBUNDLED NETWORK ELEMENTS

I. INTRODUCTION

This proposed order concludes that the federal Telecommunications Act of 1996 ("Act"[1]) does not preempt state power to order local exchange companies ("LECs") to provide unbundled network elements ("UNEs"), on a recombined basis, to competitive LECs ("CLECs") and other telecommunications providers who request them. This order also concludes that the Public Service Board has sufficient authority under current state law to direct incumbent LECs to recombine UNEs for CLECs, if the Board concludes that such recombination is appropriate – which is to say, will promote efficient competition in the Vermont local exchange market, thus assuring consumers adequate service at just and reasonable rates.

A. Procedural Background and Scope of this Order

During a status conference (by telephone) on December 23, 1997, the New England Telephone & Telegraph Company (d/b/a Bell Atlantic-Vermont, "BAVT" or "Company"),[2] AT&T Communications of New England, Inc. ("AT&T"), and the Department of Public Service ("Department" or "DPS") asked the Board to determine whether it has authority under Vermont law to regulate the manner in which incumbent LECs provide UNEs to CLECs and other telecommunications providers. They agreed that the Board could take up this jurisdictional question without holding evidentiary hearings, relying instead upon pleadings that they would file. A schedule for the submission of those pleadings and additional relevant documentation was set.[3]

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1. The Act amends, and adds to, many sections of Title 47 of the United States Code (47 U.S.C.).
2. BAVT is a division of the Bell Atlantic Corporation, which operates in thirteen eastern states and the District of Columbia. In this Order, "Bell Atlantic" refers to the corporation in its entirety; when it is followed by a hyphen and a state's name, it refers to the company's division operating in that state.
3. BAVT Letter 12/23/97 at 1-2; AT&T Letter 1/9/98 at 3. The parties agreed to adopt part of the record from a Massachusetts Department of Telecommunications and Energy proceeding, specifically, Dockets DPU 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Hearing Volume No. 25, December 16, 1997, which includes the testimony and relevant exhibits of Bell Atlantic witness Amy Stern and AT&T witness Robert Falcone.

The parties further agreed that, if the Board finds that it does have such authority, then it may later, in this or another proceeding, take up any remaining technical issues that UNE provision – in particular, recombination – raises.[4] However, later in its written submission, the DPS argues that a second phase in which the Board would develop a policy on UNE recombination is unnecessary and that the Board could, on the basis of the filings, reach a final determination on whether UNE recombination should be required if requested by a CLEC.[5] I disagree. The parties consented to brief and discuss only the narrow questions of federal preemption and state authority. A subsequent inquiry into whether and, if so, how incumbents should be required to combine, or refrain from disassembling, UNEs will likely necessitate an evidentiary record, and I therefore leave it for another time.

B. Positions of the Parties

AT&T alleges that, upon the issuance of the Eighth Circuit's Rehearing Order in a proceeding concerning the validity of rules issued by the Federal Communications Commission ("FCC") to implement provisions of the Act,[6] Bell Atlantic-Massachusetts made the decision to "rescind prior commitments and representations as to its willingness to provide unbundled network element combinations."[7] AT&T asserts that Bell Atlantic's proposed changes to UNE provisioning in that state have implications for its UNE provisioning in Vermont. According to AT&T, such a UNE provisioning policy would be unnecessary, costly, and detrimental to service quality.[8] AT&T asks that the Board order BAVT to refrain from disassembling "existing combinations of unbundled network elements, and more generally require Bell

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4. AT&T Letter 1/9/98 at 1-3.

5. DPS Memorandum of Opposition to Bell Atlantic's Network Dismantlement Proposal 1/23/98 ("DPS 1/23/98") at 3.

6. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997); *Iowa Utilities Bd. v. FCC*, No. 96-3321 et al., 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997)("Rehearing Order" or "Eighth Circuit Decision"). The relevance of this decision to today's proposed order is described in the following sections.

7. Memorandum of AT&T Communications of New England, Inc. 1/23/98 ("AT&T 1/23/98") at 4.

8. "The real issue," according to AT&T, "is not whether Bell Atlantic can be required to 'assist' CLECs by combining UNEs, but rather whether Bell Atlantic can be prohibited from affirmatively harming competitors and competition by doing needless, costly, and destructive disassembly of network elements that have already been physically combined." AT&T 1/23/98 at 11.

Atlantic to provide unbundled network combinations to competing local exchange carriers."[9] The DPS joins in AT&T's request.[10] In response, BAVT argues that, even if state law would permit the Board to consider a requirement for BAVT to provide combined UNEs, such authority has been preempted by the Act.[11]

II. FEDERAL PREEMPTION OF STATE LAW

In the Rehearing Order, the Eighth Circuit concluded that § 251(c)(3) of the Act does not require incumbent LECs such as BAVT to combine UNEs for CLECs, and the Court therefore vacated an FCC rule mandating such "recombination." Among other things, this section of the Act imposes upon incumbents the duty:

> [T]o provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. *An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*[12]

The Eighth Circuit concluded that the second (and final) sentence of this section "unambiguously indicates that requesting carriers will combine the unbundled elements themselves," and that "this language cannot be read to levy a duty on the incumbent LECs to do the actual combining of elements."[13]

BAVT argues that the Board has no authority to "lawfully compel BAVT to provide 'combined' network elements to other telecommunications carriers."[14] It contends that § 251(c)(3) of the Act requires an incumbent LEC to provide access to the elements of its

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9. *Id.* at 10. AT&T asserts that, if the Board agrees with AT&T as to the extent of the Board's ability under Vermont law to mandate UNE provisioning according to AT&T's view, then in the subsequent phase to this proceeding, AT&T will argue that the Board should order BAVT to provide unbundled network combinations in order to further the Board's pro-competition goals. *Id.*

10. DPS 1/23/98 at 3 n.2.

11. Memorandum of Law of Bell Atlantic-Vermont 1/23/98 ("BAVT 1/23/98") at 1.

12. Act, § 251(c)(3).

13. Rehearing Order at 813.

14. BAVT 1/23/98 at 11.