

d. We disagree with these arguments. In the first place, to put the Eighth Circuit Court's decision in context, we note that the proceeding before the Court concerned the validity of FCC rules and the nature of FCC authority under the Act. To the extent the Court generally commented upon State authority to establish access and interconnection obligations under the Act--this issue arose in the course of the Court's invalidation of the FCC's attempts to preempt State policies (*Iowa Utilities Board*, pages 806-07)--the Court observed that the States retain independent power to adopt access and interconnection requirements. See discussion below.

e. As stated above, USWC argues that any State requirement that incumbents combine network elements for competitors is preempted by the Act, particularly the provisions of § 251(c)(3). State law is preempted if that law actually conflicts with Federal law, or if Federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, at 2617. In this instance (i.e., on the question as to whether the Commission is empowered to order USWC to combine network elements for competitors), we agree with the CLECs that the Act is not intended to preempt State law.

f. Notably, § 251(d)(3) expressly provides:

(3) Preservation of State access regulations--In prescribing and enforcing regulations to implement the

requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Further, §§ 261(b-c) of the Act state:

(b) Existing State regulations--Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements--Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

These provisions make clear that Congress, in the Act, did not intend to preempt State adoption and enforcement of access and interconnection requirements to apply to ILECs such as USWC.

g. According to the above provisions, State-imposed access or interconnection policies need only be "consistent with" the Act. In this case, USWC contends that a State requirement that it combine network elements would be inconsistent with the Act as interpreted by the Eighth Circuit. We disagree. The Court itself, in interpreting § 251(d)(3),

simply that the FCC could not compel ILECs to combine network elements for CLECs under the Act. We note that requiring USWC to do the combining of elements (assuming such a policy is permitted under State law) may very well be consistent with the intent of the Act to promote competition. See *Iowa Utilities Board*, page 816 (one purpose of the Act is to expedite the introduction of pervasive competition into the local exchange market). In this event, a State requirement that the Company combine network elements for CLECs would be consistent with the Act. Therefore, we determine that Federal law does not preempt a Commission requirement that USWC combine network elements for competitors.

2. Commission Authority Under State Law

a. Having decided that Federal law does not preempt a State policy regarding the combination of network elements, we must determine whether the Commission, in fact, possesses authority under Colorado law to adopt such a policy. USWC suggests that State law does not permit the Commission to require incumbents to combine network elements for competitors. The CLECs contend that a number of provisions under Colorado law grant the Commission authority to adopt such a requirement.

b. We find that State law provides the Commission broad authority to review network use and interconnection in the competitive market. The Joint Brief correctly points out that the Commission possesses comprehensive authority to regulate the rates, terms, and conditions of services provided by ILECs such as USWC. For example, § 40-3-102, C.R.S., provides:

The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction. . . .

c. We point out that the present case is an investigation and suspension docket conducted by the Commission pursuant to the provisions of § 40-6-111, C.R.S.⁵ That statute states that whenever the Commission conducts a hearing under its

⁵ In § 40-15-503(2)(g)(II), C.R.S., the Legislature directed the Commission to conduct proceedings, under § 40-6-111, C.R.S., for each telecommunications carrier that will provide unbundled facilities or functions, interconnection, services for resale, or local number portability.

provisions, ". . . the commission shall establish the rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules, or regulations . . . which it finds just and reasonable." Accord § 40-3-111, C.R.S. (the Commission, after hearing, may determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be observed by any public utility); § 40-4-101, C.R.S. (Commission shall prescribe rules and regulations for the performance of any service furnished or supplied by any public utility). Finally, we conclude that, to the extent we determine it is necessary for USWC to combine network elements for competitors in order to promote competition in the local exchange market, such a directive to the Company would be consistent with the Legislative intent set forth in § 40-15-101, et seq., C.R.S.

d. For these reasons, we conclude that State law empowers us to order USWC to combine network elements for CLECs if appropriate. Whether such an order is proper depends upon the factual investigation presently being conducted in this case. For example, the CLECs in their Joint Brief contend that the Company's proposed method of giving access to network elements to competitors (i.e., the SPOT frame proposal) is discriminatory, unjust, and unreasonable. This suggestion constitutes a factual assertion which must be considered in light of the evidentiary hearing. We will issue further orders on this question in light of the evidence presented at hearing.

II. ORDER

A. The Commission Orders That:

1. We determine that the Telecommunications Act of 1996 does not preempt Commission authority under State law to order U S WEST Communications, Inc., to combine network elements for competing local exchange carriers.

2. We further determine that the Commission is empowered under State law to order U S WEST Communications, Inc., in this docket, to combine network elements for competing local exchange carriers, if we determine that such a requirement is necessary and appropriate.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
February 18, 1998.

(SEAL)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT J. HIX

ATTEST: A TRUE COPY

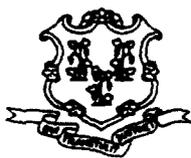
Bruce N. Smith

Bruce N. Smith
Director

R. BRENT ALDERFER

Commissioners

COMMISSIONER VINCENT MAJKOWSKI
ABSENT



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 98-02-01 DPUC INVESTIGATION INTO REBUNDLING OF
TELEPHONE COMPANY NETWORK ELEMENTS

July 8, 1998

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Linda Kelly Arnold

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision the Department of Public Utility Control (Department) orders the Southern New England Telephone Company and the New York Telephone Company to file proposed tariffs for rebundled network element offerings. The proposed tariffs will be applicable only for use in serving residential customers and small business (nonPBX and nonCentrex) customers and will only be available for a period of five years from the date of effectiveness, with a possibility of an extension for a period of not longer than three years. The narrowly tailored availability of this product is intended to promote competition in the residential and small business markets. The Department also rules the subject of extended loops, proposed by Cablevision Lightpath - CT, Inc., as outside the scope of this proceeding.

B. PROCEDURAL FRAMEWORK

By Request for Written Comments dated March 17, 1998 (Request) the Department of Public Utility Control (Department) requested written comment from all interested parties regarding the provisioning practices of incumbent local exchange carriers (ILEC), specifically the Southern New England Telephone Company (Telco) and New York Telephone Company (NYTel) concerning network elements and facilities.

This investigation was initiated in partial response to a petition (Petition) filed by the Southern New England Telephone Company (Telco) to reopen its Agreement for Network Interconnection and Resale between the Telco and MCImetro ATS, Inc. (MCI) (Agreement) regarding combinations of unbundled elements.¹ The Telco sought to reopen these provisions of the Agreement in light of the Eighth Circuit Court's Opinion in Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753 (Eighth Cir. 1997), cert. granted, 118 S.Ct. 879 (1998), and Iowa Utilities Board v. Federal Communications Commission, Order on Petitions for Rehearing (Eighth Cir. October 14, 1997) vacating that portion of the Federal Communications Commission's (FCC) First Report and Order requiring incumbent local exchange carriers ILECs to combine unbundled elements. At the time the Petition was filed, the Department delayed its response, instead taking the issue under advisement without acting on the Telco's request, effectively making no judgment on the issues presented in the Petition.

The Petition did however, raise a number of issues which the Department believes merit some further exploration before it can rule on the merits, irrespective of the procedural questions raised by a request to intervene on behalf of a party to an arbitrated proceeding. To the question of merit, the Department has not previously determined in any proceeding: a) the need for "rebundled network elements" or "Unbundled Network Element-Platforms" (UNE-P) to facilitate competition, b) the statutory authority available to the Department if it determined such offerings were

¹ Telco Motion to the Department of Public Utility Control dated November 14, 1997.

needed, or c) whether making such offerings available would be in the long-term best interest of the general public and/or competition. Accordingly, the Department on February 1, 1998, initiated the instant proceeding to investigate the issues noted above. This proceeding, however, will not address the procedural issues raised by the Telco in its Petition, but will provide the policy foundation needed for the Department to respond.

C. STATUTORY FRAMEWORK

1. Public Act 94-83

On July 1, 1994, Public Act 94-83, An Act Implementing the Recommendations of the Telecommunications Task Force (Act),² became Connecticut law. The Act was a broad strategic response to the changes facing the telecommunications industry in Connecticut. The technological underpinnings, the framework for a more participative, and ultimately more competitive, telecommunications market, and the role of regulation envisioned by the legislature are essential to the future realization and public benefit of an "Information Superhighway" in Connecticut.

At the core of the Act are the principles and goals articulated therein. In particular, General Statutes of Connecticut (Conn. Gen. Stat.) § 16-247a provides in pertinent part:

Due to the following: affordable, high quality telecommunications services that meet the needs of individuals and businesses in the state are necessary and vital to the welfare and development of our society; the efficient provision of modern telecommunications services by multiple providers will promote economic development in the state; expanded employment opportunities for residents of the state in the provision of telecommunications services benefit the society and economy of the state; and advanced telecommunications services enhance the delivery of services by public and not-for-profit institutions, it is, therefore, the goal of the state to (1) ensure the universal availability and accessibility of high quality, affordable telecommunications services to all residents and businesses in the state, (2) promote the development of effective competition as a means of providing customers with the widest possible choice of services, (3) utilize forms of regulation commensurate with the level of competition in the relevant telecommunications service market, (4) facilitate the efficient development and deployment of an advanced telecommunications infrastructure, including open networks with maximum interoperability and interconnectivity, (5) encourage shared use of existing facilities and cooperative development of new facilities where legally possible, and technically and economically feasible, and (6) ensure that providers of telecommunications services in the state provide high quality customer service and high quality technical service.

Conn. Gen. Stat. § 16-247a (a).

² The Act was later codified into the General Statutes of Connecticut (Conn. Gen. Stat.). In particular, see Conn. Gen. Stat. §§ 16-247a-16-247k.

The central premise of the Act was the belief that broader participation in the Connecticut telecommunications market will be more beneficial to the public than will broader regulation. It is significant, however, that the Act does not chart a detailed plan for realization of its goals and compliance with its principles. Rather, the Act entrusts the Department with the responsibility of implementing both the letter and spirit of its important provisions, and endows the Department with broad powers and procedural latitude as it seeks to achieve the legislative goals through the facilitation of the development of competition for all telecommunications services.

In light of the Act, the Department must redirect its future efforts to facilitate market conditions and create regulatory conditions that will maximize the benefits of future competition for the user public of Connecticut. As articulated by the Department in Docket No. 94-05-26, General Implementation of Public Act 94-83, the passage of Public Act 94-83 places the Department and the telecommunications industry at an unprecedented point in Connecticut regulatory history with an opportunity to define a markedly different future for Connecticut telecommunications. That future is not predetermined by the legislation nor preempted by the wishes of a single party or group.

The Department subsequently established a framework for the implementation of Public Act 94-83 that allowed it the opportunity to fully and publicly explore all the alternatives available to it under the terms and conditions of the legislation and establish therefrom appropriate regulatory mechanisms to reflect legislative intent. Through such means the concerns and proposals of the industry and other interested parties continue to be fully examined and the Department ensures that the interests of the public are satisfied.

2. The Telecommunications Act of 1996

Public Act 94-83 and the policy decisions adopted by the Department were conceived to be compliant with the generally accepted interpretations of the Telecommunications Act of 1934 and attendant rulings of the Federal Communications Commission (FCC). However, on February 8, 1996, the United States Congress enacted The Telecommunications Act of 1996 (Telcom Act) amending Title 47 of the United States Code and the principal laws governing the conduct of the telecommunications industry. The scope of change presented to the statutory foundation of the telecommunications industry by the Telcom Act was significant as it presumed change to the operational environment of the industry at such a magnitude that it directly challenged many of the companion rules and regulations employed by state commissions and required further revision at the state level. Consequently, the Department has been required to review competitive policies adopted under Public Act 94-83 to ensure that they comport with those contained 47 U.S.C. § 261(b) and 47 U.S.C. § 261(c).

Since May, 1996 the Department has supplemented its Public Act 94-83 responsibilities with a series of initiatives directed at implementing specific portions of the Telcom Act. These include approving interconnection agreements, conducting arbitration proceedings, reforming access charges, setting wholesale prices for telecommunications services and unbundled network elements, establishing funding

rules for universal service, lifeline and telephone relay services. Additionally, the Department has revised certain rules previously adopted governing pay telephone service operators, and cable television unbundling requirements to bring them into compliance with federal prescriptions

As part of its implementation of the Telcom Act, the Department has established provisioning conditions and pricing terms for individual unbundled elements in its April 23, 1997 Decision in Docket No. 96-09-22, DPUC Investigation into the Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund in Light of the Telecommunications Act of 1996, and approved product descriptions and cost studies supporting such elements in its May 20, 1998 Decision in Docket No. 97-04-10, Application of the Southern New England Telephone Company for Approval of Total Service Long Run Incremental Cost Studies and Rates for Unbundled Elements.

While the above-referenced Decisions were issued within the context of the Department's implementation of the Telcom Act, this proceeding investigates whether the Department can and should establish carefully tailored pro-competitive policies under its own initiative.

II. SCOPE OF THE PROCEEDING

The Department initiated this Docket as an uncontested proceeding for the expressed purpose of determining whether the General Statutes of Connecticut offer an alternative statutory platform to the Telcom Act and, if so, do the merits of rebundling warrant invoking that statutory authority to make rebundling available to prospective users. On March 17, 1998 the Department solicited comments from interested parties on four questions:

- Would a state order requiring the provision of rebundled network elements assembled by a telephone company be necessary to further competition in the provision of telephone exchange service or exchange access?
- Does Conn. Gen. Stat. § 16-274b(b) provide a legal basis for ordering the provision of rebundled network elements assembled by a telephone company?
- Would a state order requiring the provision of rebundled network elements assembled by a telephone company be inconsistent with Part II of Title II of the Communications Act of 1934, as amended by the Telecommunications Act of 1996?
- To what extent would the provision of shared transport by telephone company to a competitive local exchange carrier (CLEC), under the Federal Communications Commission's (FCC) First Report and Order, CC Docket No. 96-98, Implementation of the Local Competition Provisioning in the Telecommunications Act of 1996, supply functionality equivalent to that of a rebundled network element platform assembled by a telephone company? Contrast your expectations of the functionality of these products from the standpoint

of a CLEC.

March 17, 1998 Request For Written Comments, p. 1.

In response to the Request, the Department received written comments from the Telco, NYTel, Office of Consumer Counsel (OCC), AT&T Communications of New England (AT&T), Cablevision Lightpath - CT, Inc. (Lightpath), MCI Telecommunications corporation (MCI), and Sprint , Communications Company, L.P. (Sprint). Reply Comments were filed by the Telco, NYTel, OCC, AT&T, Sprint and WorldCom, Inc. (WorldCom).

III. POSITIONS OF THE PARTIES

A. OFFICE OF CONSUMER COUNSEL

1. Competitive Need

OCC encourages the Department to require the Telco to provide UNEs to requesting carriers in any combination that is technically feasible, will not impair the ability of other carriers to obtain access to unbundled networks or to interconnect with the Telco. According to OCC, such action will enhance competition and promote consumer welfare. OCC asserts that CLECs are likely to have neither the facilities nor the access to the Telco's network necessary to combine network elements to provide services to customers. OCC suggests that the Telco is wrong to imply that the CLECs should not attempt to maximize their opportunities to enter the market by minimizing their costs. In the opinion of OCC, all parties attempting to enter this market face risk and costs that are impossible to predict or avoid. OCC proposes that the Department extend rebundling obligations to combinations ordinarily found in the Telco's network as well as any other requested combination that is technically feasible, thereby providing new and creative combinations that will further the Telcom Act's goal of increasing innovation in telecommunications services in Connecticut. OCC Comments, p. 1; OCC Reply Comments, p. 2.

2. Statutory Authority

OCC maintains that the Department has the authority under Connecticut law to order the Telco to provide combinations of network elements. According to OCC, Public Act 94-83 requires the Telco to provide reasonable nondiscriminatory access to all equipment, facilities and service necessary to provide telecommunications services to its customers and that the Department has the necessary power to effectuate that goal. The OCC expresses the belief that the Department should take advantage of this opportunity to require rebundling of network elements and thereby further competition and promote consumer welfare. OCC Comments, p. 1.

3. Regulatory Constraint

OCC argues that the Telcom Act preserved state authority to impose interconnection requirements and to control certain aspects of access. Furthermore, OCC argues that the clear purpose of Public Act 94-83 is to promote local telephone competition and is in agreement with the Telcom Act's objectives. As for the Eighth Circuit, OCC contends that there was no question of state regulatory authority at issue. OCC Reply Comments, pp. 2 and 3.

4. Shared Transport

OCC maintains that the Telco's argument that shared transport provides transport parity to CLECs is unsupportable. OCC concludes that all of the network elements needed by the CLECs to provide service in the manner which they have determined makes the most sense to entering competition in the state are not presently available, and therefore, cannot be endorsed. OCC asserts that the Department must determine whether shared transport includes only transport links and access to routing tables in the ILECs switches or if it should include more. OCC Reply Comments, p. 3.

B. AT&T COMMUNICATIONS OF NEW ENGLAND, INC.

AT&T strongly urges the Department to require the Telco to provide combinations of network elements, including the network element platform, at cost-based prices so that it and other CLECs can enter the Connecticut residential market in a significant way. AT&T argues that requiring the provision of combined network elements is well within the authority of the Department under Conn. Gen. Stat. § 16-247b(b), is necessary to promote the pro-competitive goals set by the Connecticut legislature and is consistent with the Telcom Act, which does not preempt state power to order LECs to provide combined network elements.

AT&T asserts that the issue presented in this proceeding is whether the Department will allow the Telco to dismantle existing combinations of network elements, including the network element platform, and then require CLECs to perform the wasteful and inefficient effort of recombining the network elements through a collocation facility. AT&T contends that the Department has characterized the subject in question as "rebundling;" however, AT&T argues that rebundling only becomes an issue in most cases if the Telco is allowed to disassemble the elements in the first place. AT&T also argues that if a CLEC wishes to purchase a group of elements which are already connected in the network, it is not necessary for the Telco to take apart all the pieces in order to allow the CLEC to use those network elements in their combined, "as is" state.

In the opinion of AT&T, there is no disaggregation necessary for the Telco to provide the network element platform. Thus, the focus of this proceeding should not be on whether the Telco should be required to "rebundle" network elements, but rather whether the Telco can be prohibited from affirmatively harming competition by doing needless, costly and destructive disassembly of network elements that are already physically combined. The issue before the Department in this proceeding, according to AT&T, is whether it will allow the Telco to impose needless costs and inefficiencies, which act as a significant barrier to competition, by physically disconnecting parts of its existing local exchange network for no reason other than to make it more difficult and costly for CLECs to purchase them in combinations.

AT&T also contends that no legitimate engineering, economic, or policy justification exists to allow the Telco to disassemble currently connected network elements and requiring CLECs to reassemble them through a convoluted collocation process. AT&T cites the experience of Michigan, Colorado and Washington which have already determined that nothing in the Telcom Act or in the recent decision of the Eighth Circuit limits the power of state commissions acting under state law to regulate the provisioning of network element combinations. The authority of this Department has not, according to AT&T, been preempted by the Telcom Act. To the contrary, AT&T is of the opinion that the Telcom Act expressly preserves the Department's authority to establish or enforce requirements of state law with respect to interconnection agreements.

AT&T argues that the implications for competition will be devastating if the Department fails to take decisive action to require efficient provisioning of combinations of elements by the Telco. AT&T also argues that if the Department does not act, the

Telco will be able to tear apart the existing network connections for any of its present customers who choose to switch their local service to a CLEC. The consequences, according to AT&T, will include significant service degradation, significant increases in the potential for network failure, the imposition of substantial additional and unnecessary costs on CLECs (including the costs of installing multiple collocation facilities and the costs of incurring multiple nonrecurring charges, all payable to the Telco), and the introduction of substantial delays in the ability of CLECs to provide service to their customers. AT&T Comments, pp. 2-5.

1. Competitive Need

In the opinion of AT&T no improvement in service quality or network efficiency will be created by any of the network reengineering presumed necessary by the Telco. Furthermore, no CLEC order for element combinations will ever be able to flow through the Telco's ordering and provisioning OSSs in the way that the Telco's own customer orders will flow through. This has both quality of service and cost consequences which are totally unnecessary. From the viewpoint of AT&T, there is no technical reason why a CLEC could not be allowed to provide service to an existing customer location through the existing loop and port without the Telco dismantling those elements and forcing the CLEC to incur substantial costs and delays of reconstructing them through a collocation cage.

AT&T maintains that true facilities-based competition is not likely to develop any time soon for much of the market, particularly the residential segment. The cost of building duplicative facilities, in the opinion of AT&T, is simply too high, the local service wholesale discount available simply does not enable a new entrant to compete, and the wholesale offering of the Telco does not provide it the ability to distinguish its product from that of a pure reseller. AT&T asserts that network elements are all that remain as a way to provide Connecticut consumers with the benefits of competitive local exchange service. AT&T contends that requiring the provision of combinations of network elements at cost-based prices without additional charges or inefficiencies is absolutely essential to the development of the kind of telecommunications competition that will benefit all Connecticut customers. AT&T Comments, pp. 7 and 8.

2. Statutory Authority

AT&T states that the Connecticut Legislature has delegated to the Department broad powers under Conn. Gen. Stat. § 16-247a(a) to regulate the manner in which the Telco operates its local exchange network in Connecticut. AT&T further argues that Conn. Gen. Stat. § 16-247b(b) mandates that any telephone company must provide access to all equipment, facilities and services. AT&T contends that the broad wording of the statute encompasses the network element platform currently serving a telephone customer as well as other combinations of existing elements. In the opinion of AT&T the Department has the authority and is required by state statute to assure that the Telco makes such facilities available to CLECs. AT&T further maintains that the Department is required to make sure that the Telco does not impose any undue, discriminatory burden on CLECs in the provisioning of such facilities suggesting that recombining elements through a collocation facility results in the kind of discriminatory access that the statute prohibits.

AT&T asserts that the unilateral decision to dismantle existing network element combinations, rather than make them available to CLECs, is fundamentally incompatible with the state's goal of eliminating arbitrary and unnecessary barriers to competition. According to AT&T, the Department has the power to prevent the Telco from imposing such barriers to efficient competition and it must exercise that authority here. AT&T Comments, pp. 10-12.

3. Regulatory Constraint

AT&T maintains that the Telcom Act does not preempt state power to order local exchange carriers to provide combined network elements. Under general principles limiting federal preemption of state authority, the Telcom Act must be read as not barring the Department from regulating network element combination. AT&T also maintains that federal law establishes a dual regulatory system under which the Department retains the power to regulate intrastate facilities.

AT&T argues that the Telcom Act specifically preserves state authority to impose additional access or interconnection requirements. In the opinion of AT&T, the language of 47 U.S.C. § 251(c)(3) does not support any argument that state regulatory authority with respect to network element combinations is overridden or in any way constrained by the Telcom Act. To the contrary, AT&T contends that at least four different provisions of the Act (47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c) and 601(c)) expressly preserve the authority of state commissions to impose additional access or interconnection requirements on ILECs beyond those imposed by the Telcom Act, as long as those obligations are not "inconsistent" with that act. An order by the Department that the Telco must provide network element combinations would not, in the opinion of AT&T, be "inconsistent" with the Telcom Act. AT&T argues that because the Telcom Act expressly contemplates additional state requirements, the Telcom Act itself merely establishes minimum standards that must be met by ILECs. AT&T Comments, pp. 12-16.

Separately, AT&T argues that nothing in the Eighth Circuit's Decision presents the Department from requiring network elements be provided in combinations. First, in the opinion of AT&T, the Eighth Circuit did not address any issue of state regulatory power under state law. Rather, the Eighth Circuit's decision dealt only with a narrow question of federal law and concluded that the FCC did not have the authority under the Telcom Act to impose obligations on ILECs to provide combined network elements or to forbid ILECs from disconnecting already combined network elements. AT&T argues that no question of state regulatory authority was at issue in that decision. In the opinion of AT&T, the actions of the Eighth Circuit do not bar the Department's authority to adopt pro-competition policies and requirements that are incremental to and harmonious with those established by the Telcom Act. Second, AT&T contends that the Eighth Circuit did not reach any question as to whether network element combinations could result from contractual negotiations or arbitration awards. Third, the Eighth Circuit's decision does not question the rights of CLECs under the Telcom Act to purchase all of the unbundled network elements that they need to provide service to end-users. In the opinion of AT&T the Court emphatically reaffirms the rights of CLECs to buy network elements in all possible combinations (and always at cost-based rates).

Finally, AT&T argues that other state commissions have determined that the Eighth Circuit's decision in no way limits their power to regulate network element combinations under state law. According to AT&T, Michigan, Colorado and Washington have recently issued decisions indicating that the states have the authority even after the Eighth Circuit decision to require incumbent telephone companies to provide combined network elements.

AT&T summarizes its position on jurisdictional authority by asserting that the Eighth Circuit decision expressly recognizes state authority to regulate unbundled network elements because they are fundamentally intrastate in character and that the FCC's rules regarding network combinations were beyond the scope of the FCC's authority. According to AT&T, the conclusion is logically inescapable that state commissions acting under state law are free to impose a requirement to provide network element combinations. AT&T Comments, pp. 18-24.

4. Shared Transport

In the opinion of AT&T shared transport is a very important network element but it is not a substitute for the entire network element platform. Shared transport does not include, according to AT&T, the network interface device (NID), the loop, or the entire switching function. According to AT&T, shared transport includes only the transport links and access to the ILEC's routing tables in its switches that are necessary to access the transport on a shared basis. Even with the availability of shared transport, AT&T contends it will have to combine transport with the NID, the loop and the switch functions to provide customer service using only network elements. This produces the same inefficiencies, unnecessary costs and potential service degradation already described and will not solve the broader issue of combinations. AT&T Comments, pp., 24 and 25.

C. NEW YORK TELEPHONE COMPANY

1. Competitive Need

NYTel asserts that provisioning UNE combinations by ILECs is neither necessary to promote effective local exchange competition nor required by the Telcom Act. ILECs, in the opinion of NYTel, cannot be required to provide their competitors with an assembled network element platform as any such requirement is unnecessary to provide full local exchange competition. NYTel contends that the provision of unbundled separate network elements (unbundled) rather than combined network elements (UNE-P) is precisely what is required by the Telcom Act and nothing more. NYTel argues that it has introduced a shared transport offering that provides CLECs with at least some of the functionality of a comprehensive network and nothing more is really needed by competitors to enter the market.

NYTel maintains that the Eighth Circuit's Decision made clear that a carefully articulated regime of balanced rights and obligations (created by the Telcom Act) would be undermined if ILECs were compelled to provide their competitors with UNEs in combined form, whether or not the elements in questions were originally combined in

the incumbent's network. According to NYTel, all that is required by the Telcom Act is that telephone companies provide their competitors with access to UNEs in a manner that enables them to combine the elements themselves. NYTel states that Congress made expressed judgments about the capabilities that competing carriers would need to enter the market, and that incumbents would therefore be required to provide, but declined to impose broader, open-ended requirements on incumbents.

NYTel asserts that the environment that the Telcom Act sought to nurture is one of competition between incumbents and new entrants. In the opinion of NYTel, mandatory ILEC obligation to provide interconnection, resold services, and UNEs are narrow exceptions to the principle of competition and were not intended to displace it (i.e., competition). NYTel maintains that ILECs are expected to comply with their statutory obligations, but they are equally permitted to, and expected to compete with carriers once those obligations are met. Any requirement that ILECs recombine elements would, in the opinion of NYTel, destroy the balance by forcing one market participant to assist its competitors to an extent beyond that which Congress found appropriate.

NYTel also argues that recombination would undermine the pricing provisions of the Telcom Act. NYTel contends that the Eighth Circuit concluded that requiring ILECs to make a UNE-platform available at cost-based rates would be inconsistent with the distinct pricing regimes that the Telcom Act establishes for resold service on the one hand, and unbundled elements, on the other. NYTel maintains that its proposed service offerings give competitors numerous options, and provides ample opportunity for full and effective competition.

NYTel proposes to give competitors a means to combine UNEs through physical and virtual collocation arrangements that, in its opinion, satisfies the statutory requirements of an ILEC under the Telcom Act. In particular, NYTel offers requesting carriers the ability to combine network elements with reduced physical collocation requirements significantly improving current ILEC standards. NYTel also expresses its support for virtual collocation provided that the equipment a carrier chooses for its use has the capability to remotely establish the connection of the UNEs without assistance from the ILEC. NYTel Comments, pp. 2-4.

2. Statutory Authority

In the opinion of NYTel, state and federal regulatory bodies must honor the boundaries that the Telecom Act has drawn between UNE and resale obligations of ILECs. NYTel asserts that the question of how far incumbents may be required to go in assisting their competitors through the provision of network elements is not a policy decision to be debated in regulatory arenas, but one that has already been addressed by Congress and clarified by the courts. NYTel states that the Eighth Circuit ruling did not merely set a limitation on the regulatory jurisdiction of the FCC, but simultaneously interpreted the Telecom Act as a source and a limitation of ILEC obligations to facilitate competitive entry. NYTel further asserts that the Eighth Circuit ruling does not make combinations "illegal," but prevents ILECs from being compelled to offer combined elements. The Telecom Act, according to NYTel, articulates a balanced regulatory scheme in which incumbents are to play a very specific role lying somewhere between fully independent market participation and mere handmaidens to their competitors' market entry plans.

NYTel asserts that under the Telecom Act an ILEC may not be required to offer element combinations such as those sought by many of the new competitors. NYTel argues that the Telecom Act imposes limits on the extent to which ILECs can be required to depart from their role as competitors in order to assist other companies' market entry plans through the provision of network elements. NYTel also argues that imposing a recombination or rebundling requirement on ILECs, whatever its source, would simply be inconsistent with the regulatory scheme that the Telecom Act established. NYTel notes that § 261(c) of the Telecom Act provides that the state regulatory authorities such as the Department may not establish requirements which are inconsistent with the Telecom Act. NYTel cites to regulatory actions in Massachusetts and Maryland where the respective state commissions acknowledged the limitations imposed by the Eighth Circuit on state attempts to require ILECs to offer element combinations. NYTel suggests that the issue here is not the affirmative scope of the Department's regulatory jurisdiction under the General Statutes of Connecticut; rather, whether the Telecom Act forbids the imposition of these specific combination requirements. NYTel also notes that absent the Telecom Act's prohibition, nothing in Connecticut law warrants the Department requiring ILECs to offer element combinations. Specifically, NYTel argues that nothing in Conn. Gen. Stat. § 16-247b(b) directly relates to the issue of provisioning element combinations to competitors. NYTel Comments, pp. 9 and 10.

3. Regulatory Constraint

NYTel maintains that the Telecom Act imposes limits on the extent to which ILECs can be required to depart from their role as competitors in order to assist other companies' market entry plans through the provision of network elements. NYTel argues that imposing a recombination or rebundling requirement on ILECs whatever the source, would be inconsistent with the regulatory scheme that the Act established. NYTel further cites the separate experiences of Massachusetts and Maryland where each state concluded that further action on this issue was not permitted. NYTel argues that no Department order or rule requiring it to offer element combinations is required or would be permissible under the Telecom Act. NYTel Comments, pp. 11 and 12.

Additionally, NYTel claims that provisions of the Telcom Act do not prevent ILECs from voluntarily agreeing to provide element combinations in an interconnection agreement or otherwise. However, NYTel contends that any agreement approved by NYTel providing UNE-Ps and dated prior to the Eighth Circuit's ruling can hardly be interpreted as voluntary. NYTel contends that its agreements include specific provisions that in effect, amend such agreements automatically to reflect changes such as those introduced by the Eighth Circuit interpretation. NYTel asserts that because questions relating to intent and effect of provisions in interconnection agreements must be resolved in the light of the unique language, terms, and provisions of each agreement, such issues should be addressed separately in proceedings brought by parties to particular agreements, and not in a general proceeding such as the instant docket. NYTel Comments, p. 21.

4. Shared Transport

NYTel claims that it has made available for a specified time period, pursuant to its merger agreement, shared interoffice transport in conjunction with UNE switching including access to signaling functions used on a shared basis. It is the opinion of NYTel that by combining these functionalities into a single, available package, shared transport provides a significant portion of the functionality that would be available through a UNE platform. NYTel Comments, p. 14.

D. CABLEVISION LIGHTPATH - CT, INC.

1. Competitive Need

In its comments, Lightpath proposes that loop-transport interconnection be considered by the Department. According to Lightpath, to date, neither the Department nor the FCC have specifically addressed this topic; however, Lightpath asserts that loop-transport interconnection at cost-based rates is essential to further competition. Lightpath contends that the Telco is required to interconnect unbundled network elements at cost-based rates as a means to promote true facilities-based competition in the Connecticut local exchange market. Lightpath argues that nothing in the Eighth Circuit's order relieved ILECs such as the Telco from their obligation to interconnect a loop and dedicated transport, thereby providing extended loops for a requesting carrier. To the contrary, Lightpath argues that the Eighth Circuit did not address the FCC's separate rule under § 251 of the Telcom Act that ILECs must provide the simple cross connection inside central offices needed to interconnect a loop and dedicated transport. Lightpath also suggests that provisioning such extended loops is not burdensome and has previously agreed to interconnect unbundled elements in a number of its interconnection agreements, including its agreement with SNET America, Inc. (SAI). Lightpath contends that current agreements are of limited duration and asks the Department to make extended loops a part of the permanent competitive landscape by affirming the Telco's obligation to interconnect unbundled elements including loop-transport interconnection at cost-based rates.

Additionally, Lightpath argues that extended loops are essential to its strategy. In Lightpath's opinion extended loops, like ordinary-length loops, require a CLEC to use its

own facilities and do not involve an end-end combination, as does the UNE platform. Lightpath claims that in extended loop arrangements, CLECs provide the dial tone, originating from their own switches, and not the ILEC. Furthermore, extended loops are implemented through the interconnection of two unbundled network elements: (1) an ordinary voice-grade loop that connects the customer's premises to the serving central office at the subscriber distribution frame; and (2) a dedicated, voice-grade interoffice transmission channel that runs from the trunk distribution frame in the serving central office to the requesting carrier's designated collocation node in another central office. In the opinion of Lightpath, there is no controversy over the ILEC's obligation to provide each of these unbundled elements on a stand-alone basis and at cost-based rates. Lightpath contends that in order to make extended loops work as a critical transitional strategy for true facilities-based CLECs, both the voice-grade loop and the voice-grade dedicated interoffice transmission element, as well as the cross connection, must be made available at cost-based rates pursuant to § 252(d)(1) of the Telcom Act.

The importance of cost-based extended loops, implemented through loop-transport interconnection, to facilities-based competition cannot be understated in the opinion of Lightpath. Lightpath asserts that extended loops allow a facilities-based CLEC to provide facilities-based service at a reasonable cost to a distant customer who would otherwise only be able to obtain service from the Telco. Specifically, loop-transport interconnection allows a facilities-based CLEC an ability to serve its customers using simple cross connections rather than collocating in each end office. Lightpath Comments, pp. 3-6.

2. Statutory Authority

Lightpath maintains that the Telco's refusal to rebundle network elements is consistent with the positions taken by a number of ILECs since the Eighth Circuit Court ruled last year. In the opinion of Lightpath, the disagreement between the Telco and the CLECs centers on whether a request by a CLEC for an ILEC to provide UNE-Ps, end-to-end combinations are an attempt to obtain finished local exchange services for resale at a wholesale discount greater than the statutory wholesale discount for such services.

Lightpath, however, asserts that the Department has independent authority under the General Statutes of Connecticut to order the Telco to provide loop transport interconnection at cost-based rates. Lightpath also maintains that its request for cost based loop transport interconnection from the Telco does not raise the legal issues being addressed by the Eighth Circuit. In particular, Lightpath argues that extended loops are not end-to-end combinations and therefore, do not implicate the distinction between the UNE-P and the resale of finished local services. Extended loops have not been a subject of disagreement, according to Lightpath, because they cannot under any circumstance, serve as a substitute for resale or a competitor's use of its own facilities. Second, the extended loop transport interconnection sought by Lightpath is not an existing network element combination and, therefore, is not subject to the limitations set out by the Eighth Circuit for recombined network elements. Lastly, unlike the UNE platform, extended loops do not require shared transport; rather, loop transport interconnection uses dedicated transport to route calls to and from remote customers. Therefore, Lightpath concludes that the legal issues that have occupied the Eighth Circuit are simply irrelevant to loop-transport interconnection.

In the opinion of Lightpath, a Department order that the Telco must provide extended loops is entirely consistent with the goals set forth by the Conn. Gen. Stat. § 16-247a. Lightpath maintains that extended loops allow a facilities-based CLEC to provide high quality, affordable telecommunications services to residential and business customers. According to Lightpath, extended loops will increase competition and provide customers with a wider selection of services.

Lightpath also contends that Conn. Gen. Stat. § 16-247b(b) provides the Department with broad authority to require the Telco to furnish cross connections and rebundle network elements. Lightpath asserts that this provision does not limit the type of equipment or facilities, nor does it dictate how that equipment must be provided (i.e., the Department may order the Telco to unbundle network elements or have them recombined). Further, Lightpath maintains that the Telco currently uses cross connections to provide services to its customers and must by law treat the CLECs in the same manner it treats itself and its affiliates. It is Lightpath's contention that the Telco has voluntarily entered into an interconnection agreement with its affiliate SAI, wherein it committed to interconnect unbundled elements, presumably at cost-based rates. Lightpath states that the Telco must now do so for any requesting carrier or it would be in violation of the nondiscriminatory requirements of Conn. Gen. Stat. § 16-247b(b).

Lightpath strengthens its argument for loop transport interconnection by noting that the Telco currently provides CLECs cost-based cross connections between unbundled loops and collection nodes. Lightpath claims that these cross connections are necessary to connect a loop with dedicated transport and involve nearly the identical functionality. Lightpath considers the current position of the Telco to constitute tacit discrimination and asserts that the Department should order the Telco to provide loop transport interconnections, and extended loops, at cost-based rates.

Additionally, Lightpath maintains that the Department has the authority to confirm and clarify the scope of ILEC obligations directly under §§ 251 and 252 of the Telcom Act. (This is the same authority that the Department typically exercises when it arbitrates interconnection agreements under §§ 251 and 252 of the Telcom Act). However, Lightpath notes that the Department need not concern itself with the interplay of federal-state authority intrinsic to these two sections because requiring extended loops at cost-based rates is perfectly consistent with FCC rules.

Lastly, Lightpath encourages the Department to exercise its authority under §§ 251 and 252 of the Telcom Act to confirm that FCC requirements set forth in its Local Competition Order regarding cross connections are complied with by the Telco. Lightpath also suggests that the Department has independent authority under state law (specifically Conn. Gen. Stat. §§ 16-247a(a), 16-247a(f) and 16-247b(b)) to require extended loops. According to Lightpath, various sections of the Telcom Act make it clear that the states continue to have authority, pursuant to their own state law, over interconnection agreements and other matters addressed by the local competition provisions of the Telcom Act. Lightpath Comments, pp. 7-12.

3. Regulatory Constraint

Lightpath suggests that nothing in the Eighth Circuit decision limits the authority of state commissions acting pursuant to independent state law to impose element combination obligations on ILECs. Lightpath claims that the ILECs have argued that the Eighth Circuit's decisions should be read expansively not only as foreclosing an extended loop requirement under § 251 of the Telcom Act, but also as affirmatively preempting an extended loop requirement under independent state law. Lightpath also suggests that such a reading is specious because the Eighth Circuit did not review, let alone preempt, any independent state laws. To preempt state law, Lightpath asserts that the Eighth Circuit would have needed to conduct a specific preemption analysis such as the one contemplated by § 251(d)(3) of the Telcom Act. In summary, Lightpath maintains that the Department continues to have the full authority, under state law to require ILECs to provide loop-transport interconnection (and thereby offer extended loops) at cost-based rates. Lightpath Comments, p. 12.

4. Shared Transport

Lightpath maintains that shared transport is an essential component of the UNE platform sought by competitors to the ILEC. Lightpath defines shared transport as a traffic-sensitive transmission functionality, charged on a per-minute basis, that enables individual phone calls to be carried between the serving ILEC end office and the terminating ILEC end office (sometimes through a tandem). Lightpath asserts that ILECs must make shared transport available to CLECs as an UNE if they are to be in compliance with FCC rules. Lightpath also notes that ILECs have challenged this determination, arguing that shared transport is not a single element capable of unbundling but is inextricably tied to switching functionality.

Additionally, Lightpath notes that loop transport interconnection does not require shared transport like the UNE platform relying instead on dedicated transport. In the opinion of Lightpath, the shared transport issues raised by the ILECs before the Eighth Circuit and the Department have no relevance in the matter of loop-transport interconnection. Accordingly, Lightpath believes the Department should have no reservations ordering the Telco to provide loop-transport interconnection and thereby extended loops. Lightpath Comments, pp. 13 and 14.