BELLSOUTH

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March 31, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98

Dear Ms. Salas:

On March 30, 1999, I met with Rick Chessen, Senior Legal Advisor to Commissioner Tristani and Christi Shewman also of Commissioner Tristani's staff. During the meeting we discussed the analysis and process that BellSouth believes the Commission should apply in the wake of AT&T v. Iowa Utilities Board to determine whether access to a network element should be made available for purposes of Section 251(c)(3). On the same day I had teleconferences with Linda Kinney, Legal Advisor to Commissioner Ness, and Kevin Martin, Legal Advisor to Commissioner Furchtgott-Roth to discuss these same issues. Attached is the document prepared by BellSouth that formed the basis for those conversations.

In accordance with Section 1.1206 (b)(2), I am filing two copies of this notice in the proceeding identified above and ask that they be included in the record of that proceeding.

Sincerely,

Kathleen B. Levitz

Kathleen B. Levitz

cc: Rick Chessen
Christi Shewman
Linda Kinney
Kevin Martin

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Giving Substance to the Necessary and Impair Standards in Sec. 252(d)(2)

In the wake of the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, the Commission will be addressing its definition of unbundled network elements.

BellSouth believes that the Commission should lay out a series of tests and related standards to address the Supreme Court's criticism and vacation of Sec. 51.319 of the Commission's rules. Specifically, the Commission should specify a series of tests that a state commission could follow in determining, as a finding of fact and either through an arbitration or through its evaluation of a filed SGAT, whether a proposed or requested unbundled network element (UNE) meets the Act's "necessary and impair" requirement. It is imperative that the state commissions play an important part in defining network elements due to their knowledge of local market conditions and their extensive experience in making factual determinations about local competition issues.

A possible test is described below. It presumes that: a) the party requesting the UNE in question is a telecommunications carrier as that term is defined in the Act, and b) the UNE requested by said carrier will be used in the provision of a "telecommunications service" as that term is defined by the Act. Of course, if either presumption is not satisfied, the incumbent LEC would have no obligation to provide the requested UNE.

An essential first step in determining whether the necessary or the impaired test is satisfied would be to determine the relevant product market in which the UNE will be offered. Procedures or guidelines for defining markets that either the Department of Justice or the FCC might rely on to assess antitrust complaints or proposed mergers could be used for this purpose.

The FCC's evaluation of this issue must be based on the realities of the telecommunications marketplace and requires that the Commission collect and evaluate credible data concerning the availability and cost of various telecommunications services and facilities. At a minimum, the Commission should consider the scope of the networks already constructed by non-ILECs; the costs of expanding these networks to provide additional functionality and additional geographic coverage; and the availability and cost of purchasing facilities or services from non-ILEC sources. This detailed fact-based inquiry is at the heart of the task facing the Commission. It will require the Commission to gather extensive real-world data, including information in the control of the CLEC industry.

Once the relevant market for the UNE in question is defined a simple two-part test would apply:

1. *Necessity Test:*

   Is the UNE proprietary in nature? If yes, continue. If no, skip to the *Impairment Test* (# 4 below).

   Is the functionality provided by the requested UNE absolutely necessary for the provision of the proposed telecommunications service? If yes, continue. If no, the ILEC has no obligation to provide the requested UNE.

Are there alternative sources of supply for the requested UNE, either via self-provision or provisioning by third parties? If yes, the ILEC has no obligation to provide the requested UNE. If no, then the ILEC's obligation to provide the requested UNE would depend upon the outcome of the impairment test below. However, in recognition of the proprietary nature of the UNE and to provide the proper incentives for innovation, the price of the UNE should be market driven (i.e., not set based on a regulated forward-looking cost standard).

2. *Impairment Test:*

Are there alternative sources of supply for the requested UNE, either via self-provision or via third parties? If no, then the ILEC has an obligation to provide the requested UNE. If yes, continue.

Do any shortcomings, expressed in terms of quality or price, of the alternative sources of supply reach the common meaning of "impair" (*i.e.,* of real importance or great consequence)? In other words, would having to rely on non-UNE sources of supply truly impair the requesting carrier's ability to offer its proposed telecommunications service? If yes, then the UNE must be made available by the ILEC. If no, then the ILEC has no obligation to provide the UNE.

Obviously, Section 271 specifically addresses unbundling of loops, local switching and local transport by RBOCs. However, even in the case of requests to RBOCs for these network elements, state commissions could use the Impairment Test to determine, as a finding of fact, whether the application of the forward looking pricing standard is appropriate and should continue to be required. For example:

> Given that in certain geographic areas, competitors to the RBOCs have installed their own local switching capability, a state commission could conclude that if the local switching UNE were not made available by the ILEC, its lack would not "impair" competitive provision of local exchange service. Such a finding could be reconciled with the language of Sec. 271 by still requiring the local switching UNE to be made available (as required by the Act) but at a market based price, and not as part of any UNE combo.
>
> Similar examples could include local transport, directory assistance, operator call completion services.

Questions the Commission might consider asking about this general framework include:

1. What constitutes a "proprietary interest" in an unbundled network element (UNE)? Did Congress not contemplate a higher burden for a CLEC to obtain a UNE under Sec. 251 if the UNE is proprietary (*e.g.,* not readily available "off the shelf" through alternative vendors)? Is such burden necessary to preserve an ILEC's ownership of proprietary technology that it develops for purposes of adding value to its network or for differentiating its services from those of its competitors? Did Congress not contemplate preserving

ownership rights to proprietary network elements as a necessary condition for encouraging incumbent carriers to innovate?

2. What test should the Commission adopt to determine whether a UNE functionality is absolutely required for the provision of a telecommunications service?

3. Should the question of whether UNE functionality is available from non-ILEC sources be answered differently for proprietary and non-proprietary UNEs? In answering this question, should the Commission consider the possibility of non-ILEC development of UNE functionality, *e.g.*, vendor development of software or hardware?

4. What pricing paradigm could adequately compensate an ILEC for making a proprietary functionality available on a UNE basis?

5. What standards should the Commission adopt to determine (a) that a non-ILEC source of requested UNE functionality is deficient in terms of price or quality; and (2) that the level of the deficiency rises to the level of "real importance of great consequence?"

6. Should the "essential facilities" doctrine be incorporated into the necessary and impair standards, and, if so, how? Are there other principles or doctrines from antitrust law that the necessary and impair standard should reflect?

7. What information and evidence should the Commission request or require to be provided, both by ILECs and competitors, in the upcoming UNE "necessary and impair" rulemaking? The answer to this question depends, of course, on the standard ultimately adopted by the FCC. Would the Commission benefit from seeking current information on CLEC use of UNEs?

8. Section 251(d)(2) states that the Commission "shall consider, at a minimum" the factors listed in subsections 251(d)(2)(A) and (d)(2)(B). What other factors should the Commission consider in determining whether a network element must be made available for purposes of Section 251(c)(3)? For example, as it frames its necessary and impair standards, what consideration should the Commission give to the public policy objective of fostering innovation and the deployment of new technology?

9. What geographic area should be used when applying the necessary and impair standard? Should the test be on a market by market, study area or some other geographic basis? Should the test be carrier specific?

10. Should the necessary and impair standards change over time or as competitive markets develop?

11. If the Commission seeks to re-establish a list of UNEs then how should it apply the necessary and impaired test to those UNEs? What process should the FCC use to determine whether UNEs should be made available? What role could or should state public service commissions play in this determination? Should evidentiary hearings be required? Are rebuttable presumptions an appropriate and lawful tool in this context?