

ORIGINAL

BELLSOUTH

Kathleen B. Levitz
Vice President-Federal Regulatory

EX PARTE OR LATE FILED

August 23, 1999

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EX PARTE

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

RECEIVED

AUG 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 96-98

Dear Ms. Salas:

On August 20, 1999, Richard Teel, Robert Blau, Jonathan Banks, and I, representing BellSouth, met with Jake Jennings and Chris Libertelli of that Bureau's Policy and Program Planning Division. During the meeting we discussed the written ex parte filed by BellSouth on August 16, 1999. In the letter part of that ex parte we discussed a test that BellSouth proposed be used to determine whether denial of access to specific transport and entrance facilities would impair a requesting carrier's ability to provide the service it sought to offer. At the staff's request, I am including in this notice a copy of that letter without attachments.

In accordance with Section 1.1206(b)(2), I am filing two copies of this notice in the docket identified above. If you have any questions concerning this, please call me.

Sincerely,



Kathleen B. Levitz
Vice President – Federal Regulatory

Attachment

cc: Jake Jennings
Chris Libertelli

No. of Copies rec'd 0+2
List ABCDE

BELLSOUTH

Kathleen B. Levitz
Vice President-Federal Regulatory
August 16, 1999

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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WRITTEN EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TWB-204
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STAMP and RETURN

Re: CC Docket No. 96-98

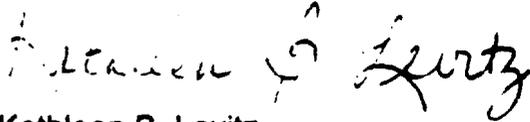
Dear Ms. Salas:

The attached letter from Ernest Bush, Assistant Vice-President of BellSouth Telecommunications was sent on August 16, 1999 to Lawrence Strickling, Chief of the Common Carrier Bureau. Copies of the letter were also sent to: Robert Atkinson, Deputy Chief of that Bureau; Carol Matthey, Chief of that Bureau's Policy and Program Planning Division; Jake Jennings of the Policy and Program Planning Division; Dorothy Atwood, Legal Advisor to Chairman Kennard; Linda Kinney, Legal Advisor to Commissioner Ness; Kyle Dixon, Legal Advisor to Commissioner Powell; Sarah Whitesell, Legal Advisor to Commissioner Tristani; and William Bailey, Legal Advisor to Commissioner Furchtgott-Roth.

Please note that we are filing under seal Attachment A and Attachment B of the Bush letter as material "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER." See Order in CC Docket No. 96-98, DA-99-1536, released August 5, 1999. Subject to the terms of the protective order, parties wishing to review the requested confidential information may do so at the offices of BellSouth D.C., 1133 21st Street, NW, Suite 900, Washington, D.C. 20036.

In accordance with Section 1.1206(b)(1), I am filing two copies of this notice and that ex parte in the docket identified above. If you have any questions concerning this, please call me at 202.463.4113.

Sincerely,



Kathleen B. Levitz
Vice President – Federal Regulatory

Attachment

cc: Lawrence Strickling
Robert Atkinson
Carol Matthey
Jake Jennings
Dorothy Atwood
Linda Kinney
Kyle Dixon
Sarah Whitesell
William Bailey

BELLSOUTH

August 16, 1999

Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036
(202) 463-4100

Lawrence Strickling-Chief
Policy & Program Division
Common Carrier Bureau
445 12th Street SW, Room 5-C450
Washington, DC 20554

Dear Mr. Strickling:

Outlined below is BellSouth's proposal for a test to resolve whether dedicated transport elements, including transport elements used to provide special access, qualify for unbundling under section 251(d)(2). As required by the Supreme Court's *Iowa Utilities Board* opinion, the test would mandate unbundling of incumbent LEC transport facilities wherever a transport alternative does not exist and would result in no unbundling mandate where a transport alternative does exist. Where unbundling would not be required, CLECs would be free to negotiate for transport with the alternative provider(s) and the incumbent LEC, which would be free to provide transport pursuant to business reasons rather than regulatory requirements. This letter describes the test, its application and the results of applying it based on BellSouth's currently available data.

Special Access Facilities

The primary elements used to provide special access service are dedicated transport from wire centers to IXC POPs,¹ "entrance facilities" in special access terms, interoffice transport and end user premises "channel terminations." These facilities are dedicated to providing exchange access service only. The Commission has not yet resolved the issue, currently pending before it, of whether transport network elements used solely to provide access should be subject to the Act's unbundling provisions.² As spelled out in a recent BellSouth letter, the Commission has at least the legal authority, if not the duty, to refrain from unbundling dedicated access facilities at present.³

¹ An IXC Point of Presence (POP) is the demarcation point between a local and a long distance network. See 47 C.F.R. § 69.2 (qq).

² Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 12 FCC Rcd 12460, 12462, 12494-96 (1997), *aff'd sub nom. SBC v. FCC*, 153 F. 3d 597 (8th Cir. 1998) ("Local Competition Third Order on Reconsideration") (Further NPRM seeks "comment on whether requesting carriers may use dedicated transport facilities to originate or terminate interexchange traffic to customers to whom the requesting carrier does not provide local exchange service").

³ Letter from William Barfield (BellSouth) to Lawrence Strickling (FCC), Docket No. 96-98, filed August 9, 1999.

However, should the Commission elect to apply the Act's unbundling provisions to special access elements, those elements, like any other network element, must meet the requirements of section 251(d)(2) before their unbundling can be mandated. Section 251(d)(2) allows unbundling of non-proprietary elements only if the requesting carrier's ability to "provide the services that it seeks to offer" would be impaired.⁴ Carriers seeking to demonstrate that special access facilities should be unbundled must demonstrate that, absent unbundling, their ability to offer the services they seek to offer -- in this case, the special access services that the facilities are dedicated to providing -- would be impaired.

There is no factual evidence in the record that would suggest that CLECs would be impaired in their ability to offer special access services without a regulatory entitlement to incumbent LEC special access facilities at cost-based prices. Where CLECs have addressed dedicated transport issues, they have limited their cases to the interoffice link between incumbent LEC wire centers. The record is thus bare of support for any finding of impairment on the transport link between POPs and incumbent LEC wire centers.

The absence of factual evidence of impairment should be no surprise because CLECs (and CAPs before them) have been successfully competing in the special access arena for more than a decade without access to unbundled incumbent LEC special access network elements. As ALTS explains, "[b]eginning in the late 1980s, the competitive access providers ("CAPS") began to construct fiber ring facilities in the central business districts of many urban areas in order to supply the IXCs and their customers with alternatives to ILEC provided special access services."⁵ The Commission and the market have long recognized that these CAP networks provide alternatives to incumbent LEC facilities. The Commission has been actively encouraging the growth of facilities-based special access competition from CAPs since well before the 1996 Act was passed.⁶

The degree of competition for special access services and the presence of alternative facilities to those of incumbent LECs led ALTS to counsel the Commission that "[i]t is in the switched services that new carriers are finding barriers to entry and bottlenecks that prohibit their growth There are not significant issues for new entrants relative to dedicated services."⁷

Definition of Transport Network Facilities

⁴ 47 U.S.C. § 251(d)(2)(B).

⁵ Daniel Kelly, "Deregulation of Special Access Services: Timing Is Everything," ALTS White Paper, Docket No. 96-262, filed July 25, 1999, at 7.

⁶ See, *In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7451-55 (1992); *In the Matter of Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141 (Transport Phase I), Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7423-25 (1993).

⁷ ALTS Comments, *In the Matter of Local Competition Survey*, CC Docket No. 91-141, filed June 8, 1998, at 3, 9 (emphasis added).

The Commission has defined dedicated transport as "incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers."⁸ This definition does not specifically include transport between incumbent LEC wire centers and IXC POPs.⁹ Similarly, when Congress defined Bell company obligations to unbundle transport under section 271, it included only switched transport, excluding dedicated (unswitched) transport between incumbent LEC wire centers and IXC POPs.¹⁰

Should the Commission subject special access network elements, including specifically the link between incumbent LEC wire centers and IXC POPs, to analysis under section 251(d)(2), the definition above would have to be amended. The link between the incumbent LEC wire center and an IXC POP should be defined separately from the general definition of local dedicated transport because this link has long been subject to separate regulation by the Commission and the competitive and regulatory environment surrounding it is distinct.

The Test

BellSouth's proposed test looks to whether CLECs have alternatives to incumbent LEC dedicated transport on particular routes. Consistent with the Supreme Court's order, where an alternative exists, no unbundling of incumbent LEC transport would result.

Incumbent LEC dedicated transport facilities would not be unbundled under section 251:

- (1) between incumbent LEC wire centers in which alternative providers are collocated and which are served by alternative transport facilities, and
- (2) between an incumbent LEC wire center and an IXC POP where an alternative provider is collocated at the incumbent LEC wire center and the wire center is served by alternative transport facilities.

This test provides an accurate and conservative measure of whether a CLEC would be impaired without unbundled incumbent LEC dedicated transport facilities because it

⁸ 47 C.F.R. § 51.319(d)(1).

⁹ The Commission did discuss the unbundled provision of transport to IXC POPs in its *Local Competition Order*. First Report and Order, Implementation of the Local Competition Provision in the Telecommunications Act, 11 FCC Rcd 15499, 15718 ¶ 440, vacated in part, Iowa Utilities Board v. FCC, 120 F. 3d 753 (8th Cir. 1997), rev'd in part, aff'd in part sub nom. AT&T Corp. v. Iowa Utilities Bd., 119 S Ct. 721 (1999). However, as set out above, whether dedicated facilities used to provide access, such as transport to IXC POPs, are even subject to the Act's unbundling provisions, is an issue still pending before the Commission. See *Local Competition Third Order on Reconsideration*.

¹⁰ 47 U.S.C. § 271(c)(2)(B)(v).

looks to the presence of alternative facilities at particular points, indicating the presence of alternative transport between those points. Interoffice transport between two incumbent LEC wire centers would not be unbundled only if both wire centers were served by alternative facilities and alternative providers were collocated in each office.

Special access entrance facilities providing transport between incumbent LEC wire centers and IXC POPs are broken out separately because whether alternative transport present in an incumbent LEC wire center actually runs to an IXC POP is not information to which the incumbent LECs are privy. However, it is more than reasonable to assume that alternative transport facilities entering an incumbent LEC wire center provide transport to IXC POPs for at least the three reasons set out below. Certainly, there is no record evidence to the contrary.

First, providing links from particular incumbent LEC wire centers to POPs has been a focus of alternative transport construction for over a decade. In its comments, MCI WorldCom explains that “[a]lternative providers have focused their investments on one type of link – the ‘entrance facility.’”¹¹ These providers have built extensive fiber rings in urban and suburban areas throughout the country.¹² All but admitting that there are substantial alternatives to incumbent facilities linking wire centers and POPs, MCI WorldCom contrasts the availability of alternatives for these entrance facilities with the “very few alternatives” it believes exist for the link between incumbent LEC end offices.¹³

Alternative provider business plans focus on providing links to POPs within an area, regardless of the particular carriers involved, because POPs are nodes where large amounts of traffic and therefore revenue are concentrated. NextLink “design[s] each network to connect the maximal number of businesses, long distance carriers’ points of presence and ILEC principal central offices in the area to be served.”¹⁴ GST Telecommunications “designs its networks with a ring architecture with connectivity to the ILEC’s central offices, POPs of long distance carriers and large concentrations of

¹¹ MCI WorldComm Comments at 64.

¹² As set out in the *UNE Fact Report*, 46 of the top 50 MSAs have at least 3 alternative fiber providers. 149 of the top 150 MSAs have at least one alternative fiber facility. Nearly 75% of the top 150 MSAs already have 3 CLEC fiber providers; 55% have 4. P. Huber and E. Leo *UNE Fact Report*, Prepared for Ameritech, Bell Atlantic, BellSouth, GTE, SBC, and US West, attached to the comments of the United States Telephone Association, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, filed May 26, 1999 at Appendix B. No party has taken issue with the accuracy of the *UNE Fact Report*’s city-by-city listing of alternative transport facilities.

¹³ *Id.* ALTS similarly admits that “an investigation of entrance facilities may show that ILECs have lost significant market share in a particular wire center. Daniel Kelly, “Deregulation of Special Access Services: Timing is Everything,” ALTS White Paper, Docket No. 96-262, filed June 25, 1999 at 14. ALTS goes on to caution that the competitiveness of the link between wire centers and POPs should not provide a basis for deregulating an entire special access service, including interoffice transport and channel terminations. This simply reinforces the legitimacy of BellSouth’s proposed test, because, where satisfied, it would remove only particular links, in this case, the wire center to POP link.

¹⁴ NextLink Communications, Inc. Form 10-K dated March 29, 1999 at 11.

telecommunications intensive end-users.”¹⁵ Similarly, ICG’s “designs a ring architecture with a view toward making the network accessible to the largest concentration of telecommunications-intensive businesses in a given market.... The Company’s networks are constructed to access long distance carriers.”¹⁶

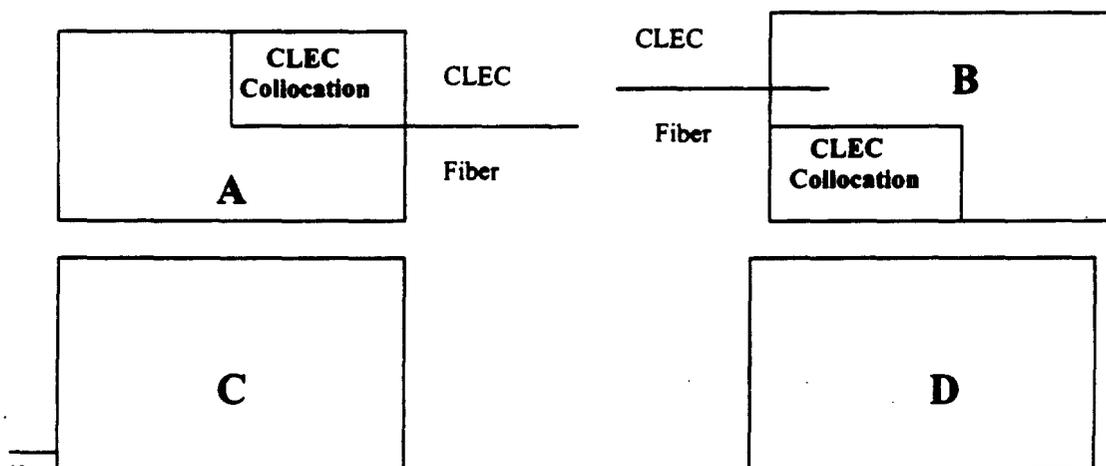
Second, alternative providers sell transport to and among POPs, demonstrating that their networks link incumbent wire centers with multiple POPs of different carriers. For example, Time Warner Telecom “provides dedicated transport between local exchange carrier central offices and customer designated POPs of an IXC” as well as lines “linking the Points of Presence of one IXC or the POPs of different IXCs in a market, allowing the POPs to exchange transmissions for transport.”¹⁷ Similarly, e.spire provides “alternative local access to long distance carrier networks.”¹⁸

Third, IXCs have considerable flexibility to locate and link POPs. This creates the potential for extensive transport networks providing alternatives to incumbent LEC transport. IXCs have acted to more than fulfill this potential by, among other things, deploying substantial numbers of POPs. For example, the Big Three IXCs collectively have established 244 POPs in Atlanta, 302 in S.E. Florida, 57 in Charlotte, NC and 38 in Birmingham, AL. IXCs can provide transport among POPs over their own networks or obtain it through alternative provider services linking POPs, like the POP-to-POP service provided by Time Warner Telecom described immediately above.

The following diagrams illustrate the application of BellSouth’s proposed test. The first diagram treats transport between incumbent LEC wire centers. The second treats transport between incumbent LEC wire centers and POPs.

DIAGRAM 1

TRANSPORT BETWEEN INCUMBENT LEC WIRE CENTERS



¹⁵ GST Telecommunications, Inc. Form 10-K dated March 12, 1999, at 2.

¹⁶ ICG Communications, Inc. Form 10-K dated March 31, 1998, at 10.

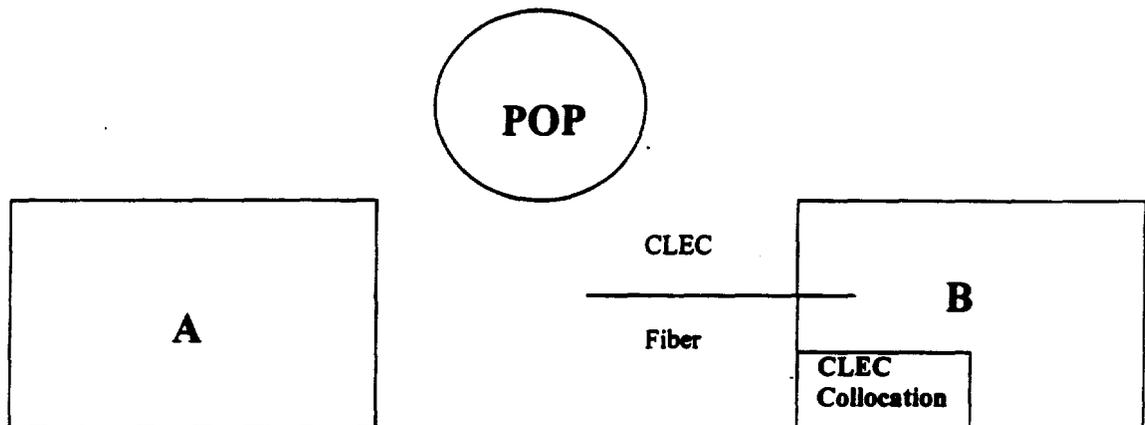
¹⁷ Time Warner Telecom LLC Form 10-k dated March 31, 1999 at 6.

¹⁸ E.spire Special Access Service Marketing Information at 1, available at <http://www.2.espire.net/products/voice/special_access.cfm>

In the example set out in diagram 1, transport between incumbent wire centers A and B would not be unbundled because alternative facilities exist at the two offices, indicating that alternative transport is available. Transport between wire centers C and D would be unbundled, as there is no current alternative between these points. Transport from C to A and from C to B and from D to A and from D to B would also be unbundled. Thus, a CLEC could obtain unbundled dedicated transport between any wire centers without alternatives and from any wire center without an alternative to any wire center with an alternative provider. Transport between wire centers A and B could be obtained from an alternative provider or from the incumbent LEC, at terms based on competition rather on regulatory mandate.

DIAGRAM 2

TRANSPORT BETWEEN INCUMBENT LEC WIRE CENTERS & POP



In the example set out in diagram 2, unbundled transport would be available from wire center A to the POP because no alternative transport facilities exist. Transport from wire center B to the POP would not be available on an unbundled basis.

Results Of Applying The Test

In BellSouth's region there are 1,558 wire centers. Attachment A, which contains confidential information and is subject to the protective order entered in this docket, sets out the number of actual and pending alternative transport facilities and the number of actual and pending collocation arrangements in each of BellSouth's wire centers, along with other information. Of BellSouth's wire centers, 302 or 19 percent have at least one actual or pending collocation arrangement and one actual or pending alternative entrance facility. Applying the test set out above, BellSouth's dedicated transport facilities linking these offices to each other and to IXC POPs could not be unbundled under section 251(d).

Eighty-one percent of BellSouth's wire centers do not have alternative transport and collocation. Transport to and from these offices would be unbundled under section 251(d) and provided at cost-based prices. Thus, CLECs could obtain unbundled transport at cost-based prices between these offices as well as between these offices and the 19 percent of BellSouth's wire centers that do have alternative transport facilities and collocation. Transport at cost-based prices would also be available between offices without alternative entrance facilities and collocation and IXC POPs. CLEC would be able to obtain cost-based dedicated transport on any route where no alternative is indicated.

Additional Points

Several additional aspects of BellSouth's proposed test are discussed below.

- 1) The test measures whether section 251(d)(2)'s impair standard is met on a point-to-point basis. All the parties to this proceeding appear to agree that dedicated transport is a point-to-point service that is available or not between particular points.¹⁹
- 2) The test measures whether an alternative exists in an incumbent LEC wire center based on the presence of alternative transport facilities and collocation. As set out in Attachment A, BellSouth has inventoried actual and pending alternative entrance facilities and collocation in its wire centers. Alternative entrance facilities, whether CLEC, CAP or other, are fiber facilities entering BellSouth wire centers and terminating in a collocation space.²⁰ These fiber facilities provide an alternative to BellSouth's transport facilities. There are no meaningful time or cost impediments to utilizing these alternative transport facilities.
- 3) Generally, alternative entrance facilities consist of two fiber sheaths, indicating that the provider has a fiber ring or is providing at least some route diversity. The fiber sheaths commonly contain 24 strands of fiber. Depending on the electronics attached, these fiber facilities can carry huge amounts of traffic. Thus, the capacity of these transport alternatives cannot be an issue.
- 4) Alternative fiber facilities entering BellSouth wire centers are being used extensively today to provide transport. Attachment B, which contains

¹⁹ See, e.g., AT&T Reply Comments at 130; Covad Comments at 45; BellSouth Comments at 49.

²⁰ Generally an alternative provider's fiber terminates in its collocation space, but this is not universally true. At times, one provider's fiber terminates in another's collocation space. Alternative providers can and do share collocation space, and may also cross-connect separate collocation space within a wire center. Thus, one provider's fiber facility may serve the transport needs of multiple providers.

confidential information and is subject to the protective order entered in this docket, provides information on actual usage of alternative transport facilities located in BellSouth wire centers. For example, BellSouth provides DS3 loops (channel terminations) between its wire centers and end users. CLECs and other providers can purchase these loops and combine them with their own transport facilities. On a region-wide basis, 27% of these DS3 loops are cross-connected to collocation spaces. Transport for the traffic on these DS3s is currently provided over alternative facilities. In 5 BellSouth LATAs, over 50% of these DS3s are cross connected to collocation spaces. Of course, even these percentages understate the presence of transport alternatives because they do not reflect the significant amounts of special access traffic that simply by-passes the incumbent LEC network altogether.

- 5) The proposed test assumes that alternative providers will sell transport to one another at wholesale and also interconnect their local networks. Beyond common sense and section 251(a)'s legal requirement of interconnection, the facts show the reasonableness of this assumption. There is substantial evidence that these alternative providers are selling and will sell service to each other. First, the record in this proceeding demonstrates that there is a market for alternative transport today. According to MCI WorldCom's comments filed in this UNE Remand proceeding, MCI WorldCom uses alternative local transport facilities to reach 1,200 incumbent LEC end offices.²¹ 1,200 end offices is a very substantial number, sufficient to blanket the nation's top metro areas. Covad uses transport alternatives for more than 15% of its transport needs.²²

In addition to the evidence above concerning alternative provider sales of transport services, Attachment C contains press reports of CLECs providing local transport service and/or capacity to other CLECs. These reports show the following: Metromedia provides local capacity in Dallas, New York City and other large metros across the U.S. to various CLECs including Time Warner, Allegiance, Hyperion and Focal; KMC supplies dedicated local access service to MCI WorldCom in at least 18 markets; Williams supplies Frontier with local fiber ring capacity in at least four cities, and Qwest leases special access facilities from ICG Communications.

Finally, the FCC's 1998 Local Competition Survey bears all this out. That survey reports that alternative providers account for about 14% of the private line and special access service sold to other carriers for resale. This means that a substantial part of the dedicated transport services sold at wholesale are sold by alternative providers.²³

²¹ MCI WorldCom Comments at 64.

²² Covad Comments at Section III.B.

²³ This percentage certainly understates the extent of CLEC alternatives. First, the Commission does not collect from CLECs systematic information that would provide for accurate data. 1998 Local Competition Survey at 3 ("the Commission, however, gathers almost no systematic information from new entrants"). Second, the percentage above does not include self-supply of transport. Third, the percentage is a

- 6) BellSouth's proposed test also reflects the fact that CAPs and CLECs have been making build/buy decisions on special access elements for over a decade. This has led to substantial investment in competitive transport facilities. Allowing substitution of unbundled network elements under the Commission's prescribed TELRIC methodology for special access will reduce incentives for CLECs to continue constructing these alternative networks.

As set out above, the Commission should not apply section 251(d)'s unbundling provisions to network facilities used to provide special access services. Should the Commission proceed to do so, however, dedicated transport and special access elements can be unbundled under the Act only when the requirements of section 251(d)(2) are met. Where there are alternatives to incumbent LEC transport facilities between particular points, section 251(d)(2)'s impairment standard is not met. BellSouth's proposed test correctly implements section 251(d)(2) by looking directly to the presence of alternatives. Consistent with the 1996 Act and the Supreme Court's opinion, BellSouth's test would provide CLECs access to unbundled dedicated transport and transport to IXC POPs at cost-based prices wherever a transport alternative does not exist.

Sincerely,



Ernest L. Bush, Jr.
Assistant Vice President
BellSouth Telecommunications

nationwide one, even though CLEC facilities are concentrated in particular local markets. *See, e.g., In re Application of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer Control of Corporation's Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, *Memorandum Opinion and Order*, 13 FCC Rcd 15236, 15257-58 (1998). Thus, far more than 15% of transport sold at wholesale in urban areas comes from alternatives to incumbent LECs.