

W. Scott Randolph  
Director - Regulatory Matters



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October 23, 2000

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

**Ex Parte: Implementation of the Local Competition Provisions in the  
Telecommunications Act of 1996 - CC Docket No. 96-98**

Dear Ms. Salas,

On October 20, 2000, the attached letter was delivered to Ms. Dorothy Attwood, Chief, Common Carrier Bureau and members of her staff. Pursuant to Section 1.1206(a)(1) of the Commission's rules, and original and one copy of this letter are being submitted to the Office of the Secretary. Please associate this notification with the record in the proceeding indicated above.

If you have any questions regarding this matter, please call me at (202) 463-5293.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Scott Randolph".

W. Scott Randolph  
Director - Regulatory Matters

cc: Dorothy Attwood  
Michelle Carey  
Jodie Donovan-May  
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October 20, 2000

Ms. Dorothy Attwood  
Chief, Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW – Room 5-C450  
Washington, DC 20554

**CC Dkt. No. 96-98**  
**Petitions For Reconsideration on The Third Report and Order**

Dear Ms. Attwood:

In evaluating Reconsideration Petitions on the Third Report and Order, the Commission must eliminate any direct or indirect compulsion for incumbent local exchange carriers (“ILECs”) to create new combinations of network elements. As the Eighth Circuit has reaffirmed, a requirement for such combinations is inconsistent with the Telecommunications Act.

In the Third Report and Order, the Commission properly rejected arguments that it should define combinations of loop and port network elements as a separate network element. Order, ¶ 478. In particular, the Commission deferred to the Eighth Circuit, which had previously invalidated Commission rules that required ILECs to create new combinations of network elements. At the time, the Circuit Court was considering arguments that it should reopen that decision in light of an intervening Supreme Court decision on other aspects of the Eighth Circuit Court’s order. *See id.* at ¶ 479.

Notwithstanding the Commission’s deference to the Eighth Circuit in that portion of the Order, in a different portion of the same order, the Commission conditioned its decision to limit the circumstances in which unbundled switching must be made available under the “impairment” standard of section 251(d)(2) for competition in local switching on, among other things, a requirement that the ILEC make such new combinations of network elements generally available. *Id.* at ¶ 288. The Commission did not address the Eighth Circuit decision in the context of this portion of the Order. Verizon has petitioned for reconsideration of this requirement. *See Bell Atlantic Petition For Reconsideration and Clarification at 3-6 (filed Feb. 17, 2000).*

Ms. Dorothy Attwood  
October 19, 2000  
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Since comments were filed on the Petitions for Reconsideration, the Eighth Circuit has reaffirmed its earlier ruling and clarified that neither the holding nor the reasoning of the Supreme Court review of the earlier Eighth Circuit decision in any way undermines the force of the prohibition on new combination requirements:

“Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall ‘combine such elements.’ It is not the duty of the ILECs to ‘perform the functions necessary to combined unbundled network elements in any manner’ as required by the FCC’s rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: ‘The Act does not require the incumbent LECs to do all the work.’” *Iowa Utilities Board v. FCC*, 219 F.3d 744, 759 (8<sup>th</sup> Cir. 2000).

While the Eighth Circuit has stayed a portion of its order pending Supreme Court review, the prohibition against requiring new combinations has not been stayed. The FCC has sought Supreme Court review of the decision, but pending that review, the Eighth Circuit prohibition is mandatory. See *FCC v. Iowa Utilities Board*, FCC Petition for Writ of Certiorari, No. 00-587 at I (filed October 2000) (presenting the question whether section 251(c)(3) “prohibits regulators from requiring that incumbent local telephone exchange companies combine . . . network elements”).

The Commission may not in the context of a mandatory condition, require what it is otherwise prohibited from requiring. See *Altamont Gas Transmission Company v. FERC*, 92 F.3d 1239, 1248 (DC Cir. 1996) (agency may not “do indirectly what it could not do directly”); see also *Spears v. Merit Systems Protection Board*, 766 F.2d 520, 523 (Fed Cir. 1985) (“it is well settled that regulations promulgated by an agency must be consistent with statutory provisions enacted by Congress”); *ICC v. American Trucking Assn’s, Inc.*, 467 U.S. 354, 365 (1984) (administrative agency may impose a condition only where it is “legitimate” adjunct to “explicit statutory power”).

As a result, the Commission may not, either directly or indirectly (through a condition to a finding that competing carriers are not impaired in provision of local switching), require ILECs to create new combinations of unbundled network elements.

Please call me if you have any questions or would like to discuss this issue further.

Sincerely,

Edward Shakin

Cc: Jodie Donovan-May  
Tom Navin  
Michelle Carey