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February 21, 2001

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, S. W. -- Room TWB-204  
Washington, D. C. 20554

Re: Ex Parte, CC Docket No. 98-147/Deployment of Wireline Services  
Offering Advanced Telecommunications Capability; CC Docket No. 96-  
98, Implementation of the Local Competition Provisions in the  
Telecommunications Act of 1996

Dear Ms. Roman Salas:

On Wednesday, February 21, 2001, the attached letter was delivered to William A. Kehoe III of the Common Carrier Bureau's Policy and Program Planning Division. In this letter, AT&T Corp. briefly responds to the arguments set out in the *ex parte* letter filed by SBC Communications Inc. on February 1, 2001 in the above-captioned proceedings. Please include a copy of this submission in the record of the proceedings noted above.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

ATTACHMENT

cc: M. Carey  
K. Cook  
A. Goldberger  
D. Johnson  
W. Kehoe III  
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February 21, 2001

**Ex Parte Presentation**

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

Re: Deployment of Wireline Services Offering Advanced Telecommunications  
Capability and Implementation of the Local Competition Provisions in the  
Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98

Dear Ms. Salas:

In this letter, AT&T Corp. ("AT&T") briefly responds to the arguments set out in the *ex parte* letter filed by SBC Communications Inc. ("SBC") on February 1, 2001 in the above-captioned proceedings ("SBC Letter"). SBC contends that the Commission may not, under any circumstances, require incumbent LECs to permit collocation of any "multi-functional equipment," defined by SBC as equipment that has both capabilities that are concededly "necessary for interconnection or access to unbundled network elements," 47 U.S.C. § 251(c)(6), and other capabilities that, if provided by equipment with only those latter capabilities, would not meet the statutory collocation test.

The vast majority of the SBC Letter is simply irrelevant to the real issues before the Commission. Most of the seven-page letter simply belabors the obvious points that a rule depriving a property owner of the right to exclude others may constitute a taking and that the Commission has no authority to order a taking that Congress has not authorized. *See* SBC Letter at 3-7 ("An agency has no statutory or constitutional power to expand the deprivation authorized by Congress"). But no one disputes that the Commission's rules implementing section 251(c)(6) must remain within the scope of that statutory provision. Rather, the critical issue here is *whether* Congress' broad authorization in section 251(c)(6) can fairly be read as mandating collocation of particular types of multi-functional equipment. And for reasons that SBC never acknowledges or addresses, Congress plainly *has* authorized collocation of certain multi-functional equipment.

First, in many cases, CLECs would be unable to make use of an obviously “necessary” capability of a piece of multi-functional equipment without the ability to use another capability that might not independently (*i.e.*, as a piece of standalone equipment) appear “necessary” for interconnection or access to network elements. In these circumstances, collocation of the multi-functional equipment is certainly encompassed with the obligation to permit collocation of “necessary” equipment. Second, in addition to requiring incumbents to permit collocation of “necessary” equipment, Congress required incumbents to permit collocation on terms and conditions that are “nondiscriminatory.” With respect to multi-functional equipment that the incumbent itself uses, a refusal to permit CLEC collocation of the very same equipment would violate this latter requirement.

1. Throughout this remand proceeding, SBC has repeatedly misread the D.C. Circuit’s opinion in *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), as dictating a particular result on remand. *See* SBC Letter at 2-3. That is not so. To begin with, the Court expressly held that the statutory term “necessary” is ambiguous, and that the Commission’s interpretations are therefore to receive deference. *GTE Service Corp.*, 205 F.3d at 421. Accordingly, Section 251(c)(6) has no plain meaning, and SBC’s claims to the contrary are foreclosed by the Court’s decision. The Court held merely that the interpretation of the Act that the Commission previously selected was not among the permissible ones. *Id.* at 424. Equally important, the Court rejected the Commission’s prior rule on multi-functional equipment because the Court feared that the rule would have permitted collocation of *any* function, no matter how unrelated to “necessary” functions (*e.g.*, payroll functions), so long as such collocation lowered the CLEC’s overall costs. *Id.* The Court expressly stated that it had no intention of vacating the prior order to the extent that it permitted collocation of functions that were “directly related to” interconnection and access to UNEs and the Court even stated that the Commission could go “beyond this” if it had a “better explanation” for doing so. *Id.* at 424. AT&T and many other commenters have made such showings in this remand proceeding – showings that SBC has simply ignored.

In particular, SBC’s entire letter implicitly assumes that the “necessary” and “non-necessary” functions in multi-functional equipment are always easily severable. As AT&T and others have shown, however, that is often not the case. If the CLEC cannot make reasonable use of a “necessary” function unless it is collocated with other functions that would not otherwise be “necessary,” then collocation of the multi-functional equipment is clearly within the scope of the taking authorized by Congress under any fair reading of the Act. To preclude collocation of such equipment would preclude collocation of functions that are concededly “necessary,” which would directly frustrate the will of Congress and would inhibit the ability of facilities-based CLECs to achieve the competitive entry that Congress intended. Thus, even though such multi-functional equipment may perform some functions that would not be deemed “necessary,” on a stand-alone basis, under the Act, the multi-functional equipment *is* “necessary” within the meaning of the Act.

For example, no commenter disputes that multiplexing functions are “necessary” for interconnection or access to unbundled network elements, and thus may be collocated under the statute. There are circumstances, however, in which CLECs cannot make use of multiplexing functions unless certain other functions are also collocated in the central office. Specifically, as AT&T has shown, CLECs cannot use one of the newest and most efficient forms of multiplexing, statistical multiplexing, unless it is collocated with packet switch functionality. (AT&T has demonstrated that packet switch functionality is also “necessary” for interconnection and access to unbundled network elements, and therefore independently qualifies for collocation (Comments of AT&T at 27-31), but for purposes of illustration, we assume here that such functionality is not “necessary” within the meaning of § 251(c)(6).) Collocation of packet switch functionality allows a CLEC to use the same facility to serve multiple parties without having to dedicate the use of any particular facility or channel to a specific customer for the duration of the customer’s transmissions. This approach permits dramatic gains in the efficiency in the use of facilities. But these functions must be performed together to have any practical usefulness. Unless the CLEC can collocate both transmission and packet switch functionality, a CLEC simply could not take advantage of statistical multiplexing at all, even though everyone agrees that multiplexing qualifies for collocation. *See* AT&T Comments at 27-31 (Oct. 12, 2000); AT&T Reply Comments at 30-33 (Nov. 14, 2000). No commenter, including SBC, has attempted to rebut these showings.

2. The SBC Letter also ignores altogether the nondiscrimination requirement of Section 251(c)(6). In that section, Congress expressly stated that LECs must provide collocation on terms and conditions that are “just, reasonable, and nondiscriminatory.” This provision, no less than the requirement to permit collocation of “necessary” equipment, defines the scope of the taking authorized by Congress.

The term “nondiscriminatory” is used throughout § 251 and has a well-settled meaning. As the Commission has repeatedly reaffirmed, § 251’s nondiscrimination principle requires nondiscriminatory treatment as between the CLEC and the incumbent. *See, e.g., Local Competition Order* ¶¶ 218 (“[w]e believe that the term ‘nondiscriminatory,’ as used throughout section 251, applies to the terms and conditions an incumbent LECs imposes on third parties as well as itself” (emphasis added)). Thus, if the incumbent makes use of “necessary” functions anywhere within its own network by integrating them with “non-necessary” functions in multi-functional equipment, it must provide collocation to CLECs on terms and conditions that permit CLECs to perform the same integration of functions in their own collocation space anywhere in the incumbent’s service area. This common sense reading of § 251(c)(6) is reinforced by Sections 251(c)(2) and (c)(3), because the terms and conditions of collocation must be consistent with and facilitate Congress’s independent commands that interconnection be “nondiscriminatory” and “equal in quality” to what the incumbent provides to itself and that access to unbundled network elements be “nondiscriminatory.” *See, e.g., Bennett v. Spear*, 520 U.S. 154, 173 (1997) (the words of a statute must be read together in a way that gives effect to every term); *Halverson v. Slater*, 129 F.3d 180, 184-85 (D.C. Cir. 1997) (same).

Application of this principle in this context is straightforward. As the commenters have abundantly shown, “advances in computer processors and miniaturization have allowed manufacturers to design and build increasingly intelligent boxes that perform more functions but take up no more space and consume less power than did their less advanced predecessors.” Comments of Cisco, at 7 (Oct. 12, 2000). Incumbent LECs use this advanced, multi-functional equipment in their own networks. Therefore, any attempt to insist that CLECs disable “non-necessary” functions in their own multi-functional equipment, as a term and condition of collocation, would be blatantly discriminatory as the Commission has consistently defined that term under Section 251.<sup>1</sup>

This standard is substantially narrower than the previous rule on multi-functional equipment that was vacated by the D.C. Circuit. As the Court found, the Commission’s previous rule potentially required incumbent LECs to permit the collocation of *any* function, no matter how unrelated to the statute, as long as such functions provided costs savings or quality improvements. *See GTE Service Corp.*, 205 F.3d at 424. Applying the nondiscrimination requirement as written, on the other hand, collocation is required only where there is a natural connection between the “necessary” and “non-necessary” functions, such that all parties, including incumbents, are able to integrate such *telecommunications* functions in their own networks. *See GTE Service Corp.*, 205 F.3d at 424.<sup>2</sup>

Once this is understood, SBC’s entire argument falls away. SBC insists that eliminating its ability to deny collocation of “non-necessary” functions eliminates what it calls its “right to exclude” such functions, a right that assertedly has value in the marketplace. SBC Letter at 4-6. But Congress has already taken away that “right to exclude” in the statute, to the extent that such exclusion would constitute a discriminatory term and condition of collocation. Thus, although SBC cites a litany of takings cases, none of those cases presents any analogue to Section 251(c)(6)’s separate prohibition against discriminatory terms and conditions.<sup>3</sup>

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<sup>1</sup> There can be no serious dispute that a CLEC’s right to integrate additional functions with “necessary” functions is a “term and condition” of collocation. Indeed, SBC itself obviously views integration of additional functions as a term and condition of collocation, because its entire purpose here is to seek the “opportunity to bargain with a CLEC, without regard to the statute’s pricing provisions, over the amount it would pay for the right to use its collocation space for unauthorized functions.” SBC Letter at 6.

<sup>2</sup> Such a standard would almost certainly preclude collocation of a broad range of equipment, including some telecommunications functions (such as OS/DA and signalling capabilities) as well as the non-telecommunications payroll and data collection functions cited by the D.C. Circuit, unless a showing could be made that incumbents integrate such functions within their own networks. The D.C. Circuit’s suggestion in *GTE Service Corp.* that such equipment could not be collocated was made in the absence of any such showing and in the context of reviewing the Commission’s previous, broader rule based on mere cost savings.

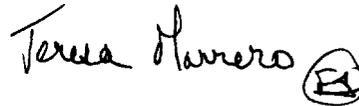
<sup>3</sup> For example, SBC relies heavily on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and its progeny, but those cases are not on point. The issue in *Loretto* was not whether the government could or did compel a property owner to permit the installation of communications equipment, but whether such an installation was a taking for which compensation was due. *See Loretto*, 458 U.S. at 422-39. For present purposes, no one questions that the collocation of CLEC functions on an ILEC’s property is a taking that must be compensated – the only

Moreover, as SBC helpfully concedes, the “volume of space occupied” is actually irrelevant to question whether a taking is authorized under Section 251(c)(6). SBC Letter at 3, 4. As SBC notes, Congress defined the scope of the authorized taking through the substantive terms of the statute, not by reference to the volume of space occupied. Therefore, as long as it can be shown that refusal to permit collocation of integrated functions would be discriminatory, the statute authorizes collocation of the multi-functional equipment, regardless of whether the multi-function equipment consumes more space or not. Of course, the Commission could use its rulemaking authority to impose “just, reasonable and nondiscriminatory” limitations on such collocation – for example, the Commission could require permissible multi-function equipment to fit within a traditional 10’ x 10’ collocation cage. But as long as the statutory prerequisites for collocation are satisfied, the LEC may not refuse collocation (although a higher charge for collocation may be justified in the rare cases in which the equipment truly imposes greater costs on the LEC, such as a need for additional power or HVAC).

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In sum, the Commission has ample authority to require LECs to permit collocation of multi-function equipment in appropriate circumstances, and the SBC Letter does not even address the issues relevant to that question.

Sincerely,

Teresa Navarro 

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question is whether Congress authorized that taking. As discussed above, it clearly did. Similarly, SBC admits that *Preseault v. United States*, 100 F.3d 1525, 1541-44 (Fed. Cir. 1996) (en banc), stands for the unremarkable rule that a property owner who is only compensated for a single, limited taking must receive additional compensation if that taking is expanded beyond its original scope. See SBC Letter at 5; *Preseault*, 100 F.3d at 1541. However, as discussed above, the collocation of multi-functional equipment in certain circumstances is in fact required by § 251(c)(6), and therefore would not constitute an expansion of the scope of the taking authorized by Congress.