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Richard S. Whitt
Director/Senior Counsel
Internet/Data Law and Policy
Law and Public Policy

1133 19th Street, NW
Washington, DC 20036

EX PARTE OR LATE FILED

March 23, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket Nos. 98-147, 96-98

Dear Ms. Salas,

At a meeting with representatives from WorldCom on March 9, 2001, in reference to the above-captioned proceeding, staff requested that WorldCom provide an appropriate "gating" principle that made clear what kinds of equipment could and could not be collocated under a rule that was faithful to the terms of section 251(c)(6) as construed by the court in the GTE case. Most commenters agreed with WorldCom that the appropriate statutory question is what kind of equipment is "necessary" to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself," section 251(c)(2)(C), or nondiscriminatory access to all of the "features, functions and capabilities that are provided by means of [a leased] facility." Section 3(29).

Defining the gating principle for "necessary" equipment

Physical collocation of equipment by a CLEC is necessary if:

- (a) the inability of a CLEC to utilize such equipment for interconnection or UNE access would seriously impair or obstruct its ability to compete with the ILEC on a facilities basis, giving the ILEC an unreasonable competitive advantage ("competitive impact");
or
- (b) the equipment is at least equal in type or functionality to that provided by the ILEC to itself or to any subsidiary, affiliate, or any other party to which the carrier provides physical collocation ("discriminatory impact").

In essence, part (a) of the test is the ceiling – focusing on the potential adverse competitive impact on CLECs, while part (b) is the floor – focusing on the ILECs' actual practices in installing and utilizing telecommunications equipment.

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Part (b) of the test derives its substance from the intersection of Section 251(c)(6) (which requires just, reasonable, and nondiscriminatory terms and conditions for collocation) and other relevant “nondiscrimination” provisions of the 1996 Act, including:

- Section 251(c)(2): the duty to provide, for the facilities and equipment of any requesting carrier, interconnection “that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection.” Such interconnection must be on terms and conditions that are just, reasonable, and nondiscriminatory (“nondiscriminatory interconnection”).
- Section 251(c)(3): the duty to provide, to any carrier, nondiscriminatory access to unbundled network elements (“nondiscriminatory access to UNES”).
- Section 256: the FCC must promote nondiscriminatory accessibility to public telecommunications networks, including “the efficient and effective interconnection of public telecommunications networks used to provide telecommunications service.” (“nondiscriminatory access to, and interconnection with, public telecom networks”).

Application of the “gating principle” to multifunctional equipment

The “competitive impact” of a restriction on the use of multifunctional equipment is clear beyond cavil. There is no longer a bright line that separates routing, cross-connects, and concentration, and equipment that incorporates these functions should be considered interconnection equipment. Vendors continue to make equipment faster and multi-functional, yet with a smaller footprint and requiring less power and cooling. As many commenters noted, the distinction between interconnection and, for example, switching and routing, is rapidly disappearing. Interconnection is no longer characterized by a “dumb” connection between two networks, but more and more incorporates the ability to move traffic intelligently from point to point and to differentiate among different types of traffic. Manufacturers like Nortel make equipment that is designed, for example, to offer interoperability and scalability, QOS, load balancing, fault recovery, and route optimization, all in a compact footprint. Competitors that are unable to utilize this type of functionality when deploying new equipment in today’s evolving network will be about as useful as a telephone switchboard operator – unable to compete in today’s marketplace.

The “discriminatory impact” of an ILEC refusal to collocate multifunctional equipment is equally clear. An ILEC rule that prohibited CLECs from making use of other, related, functionality that is part of the equipment would be pointless discrimination, designed only to injure CLECs. ILECs can and do use multifunctional equipment in their own networks – they must, in order to provide the scalability and reliability within their network, and increase network management functionality (and reduce their costs). The Commission could and should make clear that a prohibition on CLEC collocation of multifunctional equipment is prohibited by the plain terms of (c)(5), which expressly requires ILECs to allow collocation of equipment necessary for interconnection and UNE

access on nondiscriminatory terms. Nothing in the provision gives ILECs the license to discriminate against CLECs insofar as the discrimination relates to matters other than interconnection and access.

Limitations on the “gating principle”

Supporting collocation of multifunctional equipment under the “competitive impact” rationale has obvious limits. While many different functionalities can fairly be considered interconnection (or access) functionalities, of course many functionalities cannot. To use the example that troubled the court of appeals, “enhancements that might facilitate payroll or data collection,”¹ plainly do not relate to interconnection or access to elements, and collocation of multifunctional devices that include such features could not be justified on this ground. Similarly, while some switching and routing functionality is becoming part of interconnection functionality, that principle could not be stretched so far as to justify, for example, collocation of an entire Class 5 switch on the rationale that the switch is “necessary” to facilitate interconnection. In that regard, a functionality that might in some application conceivably support interconnection or UNE access, but whose primary purpose is wholly unrelated to interconnection or UNE access, should not be justified on the ground that it is “necessary” for those functions, at least when there is some less expensive, physically smaller piece of equipment that provides the interconnection or UNE access function.

The “discriminatory impact” rationale also implies very real and concrete limits to the kinds of equipment that can be collocated. As indicated, the Commission would be well within its rights to require that the principal uses of the collocated equipment are necessary for interconnection and UNE access, to guard against the possibility of collocation of equipment that only marginally provides interconnection and UNE access functions, where a CLEC might be tempted to rely on those incidental functions as a pretext to locate non-interconnection and access equipment in an ILEC central office. Similarly, the Commission could avoid any conceivable “takings” concerns by requiring that absent some showing of critical need mixed use equipment cannot take up more space in an ILEC central office than similar equipment that provides only the interconnection and access functionality.² Finally, again to avoid any pretextual use of the Act’s collocation provisions, the Commission could require that the non-interconnection and access uses of the equipment must at least relate in some technical or engineering way to the interconnection and access functions with which they are combined. Thus, CLECs and vendors would be prohibited from pretextual uses of the Act’s collocation requirements by adding on wholly unrelated functionalities to interconnection equipment as a way to provide such functionalities out of the ILECs’ offices. This limitation fully satisfies the court’s concern that a CLEC could use an ILEC central office to generate its office payroll.

¹ GTE Service Corp. v. FCC, 205 F.3d 416, 424 (D.C. Cir. 2000).

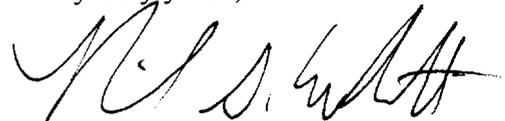
² A phone company is most emphatically not like a newspaper whose constitutional rights are implicated when it is forced to open its pages to editorial content with which it disagrees. Instead, the “taking” here is taking of physical space. A rule which allows space to be taken only insofar as expressly authorized by the Congress raises no constitutional issue if it also allows other incidental uses of the same space because the equipment that meets the statutory standard happens to provide other functionality as well.

Conclusion

In sum, the Commission should adopt a rule that permits collocation when it is necessary because the “competitive impact” or “discriminatory impact” of providing access or interconnection without that equipment, cross-connect, or functionality would contradict the intentions of the Act. Any rule that permits collocation of equipment that is needed to permit CLECs to interconnect as efficiently as the ILEC interconnects, or to allow a CLEC to access all of the features and functionalities of a network element, plainly meets the statutory requirement under virtually any definition of “necessary.” Such a rule also plainly excludes collocation of equipment that provides only non-interconnection or access functions. Additionally, requiring CLECs to disable functions of multi-functional equipment that obviously is necessary for interconnection when the ILECs themselves make full use of that equipment plainly a discriminatory practice prohibited by section 251(c)(6). Moreover, multifunctional equipment should be permitted if all of the functions are necessary for interconnection or access so conceived, or if the primary function of the equipment is necessary for interconnection or access, so long as the equipment takes up no more space than analogous single function interconnection equipment, and the related non-interconnection or non-access functionality is related in some way to the interconnection or access functionality. This definition too serves a clear gate-keeping function that would prohibit the collocation of a wide variety of equipment.

We hope this information is helpful. If you need additional information, we will of course do our best to provide it to you.

Very truly yours,



Richard S. Whitt

cc: William Kehoe
Jerry Stanshine
Brent Olsen
Shanti Gupta
Alexis Johns
Kimberly Cook
Johanna Mikes
Elizabeth Yockus