

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Application of Sections 251(b)(4) and 224(f)(1)  
of the Communications Act of 1934, as amended,  
to Central Office Facilities of Incumbent Local  
Exchange Carriers

CC Docket No. 01-77

**BELLSOUTH OPPOSITION**

**BELLSOUTH CORPORTION**

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BellSouth Corporation (“BellSouth”), on behalf of itself and its wholly-owned subsidiaries, respectfully submits its opposition to the petition for declaratory ruling filed by the Coalition of Fiber Providers (“Coalition”) in the above-captioned proceeding.<sup>1</sup> The Coalition asks the Commission to determine that Sections 251(b)(4)<sup>2</sup> and 224(f)(1)<sup>3</sup> of the Communications Act of 1934, as amended, require an incumbent local exchange carrier (“ILEC”) to provide access to the facilities leading to, or located in, ILEC central offices.<sup>4</sup> As a threshold matter, the petition is procedurally defective. Moreover, as demonstrated more fully herein, the Coalition’s interpretation of the 1996 Act unlawfully expands the scope of the statute,

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<sup>1</sup> See *Pleading Cycle Established for Comments on Petition of Coalition of Competitive Fiber Providers For Declaratory Ruling of Sections 251(b)(4) and 224(f)(1)*, CC Docket No. 01-77, Public Notice, DA 01-728 (rel. March 22, 2001).

<sup>2</sup> Section 251(b)(4) imposes upon a local exchange carrier “[t]he duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.” 47 U.S.C. § 251(b)(4) (2000).

<sup>3</sup> Section 224(f)(1) states as follows: “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224(f)(1) (2000).

<sup>4</sup> Petition for Declaratory Ruling, Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as amended, to Central Office Facilities of Incumbent Local Exchange Carriers, filed by American Fiber Systems, Inc., Global Metro Networks, Ltd., Fiber

conflicts with existing Commission rules, and undermines long-standing precedent and policies. In fact, the Coalition's request is nothing more than an attempt to make an end-run around the existing collocation rules. Accordingly, BellSouth urges the Commission to deny the petition.

## I. INTROUDCTION AND SUMMARY

The instant petition is the latest in a series of unsuccessful efforts by competitive local exchange carriers and competitive fiber providers to gain unfettered access to ILEC central offices. Just last year, the D.C. Circuit Court of Appeals rejected the argument that Section 251(c)(6)<sup>5</sup> of the 1996 Act imposes a duty on ILECs to allow collocating carriers to cross-connect their equipment with other collocating carriers.<sup>6</sup> Recognizing the illegality of this position as well as the likelihood of its failure in the *Collocation Remand* proceeding currently before the Commission, the Coalition has decided to put a new costume on the same old argument in the hopes that the Commission will not see through the masquerade.

Rather than relying on Section 251(c)(6) as the basis for mandatory co-carrier cross connection, the Coalition has developed a novel theory based on entirely different – but nonetheless inappropriate – provisions of the 1996 Act. Specifically, the Coalition claims that Sections 251(b)(4) and 224(f)(1) mandate that ILECs permit cross-connections between collocating carriers. Under the Coalition's theory, central offices and the equipment therein constitute ducts, conduits, and rights-of-way. Therefore, according to the Coalition, ILECs are

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Technologies, L.L.C., Telergy, Inc., and Telseon Carrier Services, Inc. (collectively the "Coalition") (filed March 15, 2001) ("Coalition Petition").

<sup>5</sup> Section 251(c)(6) provides as follows: "The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to the unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6) (2000).

<sup>6</sup> *GTE v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

obligated to allow fiber providers to install, at a minimum, dark fiber, connector blocks, and distribution frames in their central offices and permit collocating carriers to access this non-ILEC equipment.

The Coalition's argument, though imaginative, must fail. As an initial matter, the petition is procedurally invalid because neither "controversy" nor "uncertainty" exists to warrant the Commission's consideration of this matter.<sup>7</sup> Moreover, the Coalition's interpretation of the 1996 Act unlawfully expands the scope of the statute, conflicts with Congressional intent and the Commission's rules, and undermines established law and policies. The Commission, therefore, lacks the legal authority to mandate that ILECs provide nondiscriminatory access to their central offices pursuant to Sections 251(b)(4) and 224(f)(1).

Notwithstanding the absence of any mandatory obligation to allow co-carrier cross connection, ILECs are free to negotiate agreements that allow such arrangements. As the Commission has "emphasize[d] [ ], under the statute, parties may voluntarily negotiate agreements 'without regard to' the rules . . . establish[ed] under sections 251(b) and (c)."<sup>8</sup> Thus, ILECs are at liberty to negotiate agreements that go beyond the minimum required by law. For example, Verizon's decision to allow CLECs and competitive fiber providers to extend fiber into its central offices is a discretionary business decision<sup>9</sup> permissible under the private negotiation framework established in the 1996 Act. However, neither Verizon nor any other ILEC is under a

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<sup>7</sup> Section 1.2 of the Commission's rules grant the Commission discretionary authority to issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2 (2000).

<sup>8</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd 15499, 15528, ¶ 56 (1996) ("Local Competition Order").

<sup>9</sup> Coalition Petition at 4 n.2, 17.

statutory obligation to permit this type of collocation arrangement. Nor can the voluntary action of one ILEC create a mandatory obligation upon another ILEC.

In sum, BellSouth urges the Commission to deny the Coalition's request. The instant petition is nothing more than collocation disguised as access to ducts, conduits, and rights-of-way. As the saying goes, if it walks like a duck and quacks like a duck, then it must be a duck. The Commission must not be fooled by the Coalition's repackaged collocation request. No matter how many different ways the Coalition tries to spin the same story, the 1996 Act simply does not authorize unfettered access to ILEC facilities and equipment.

## **II. THE COALITION'S PETITION IS PROCEDURALLY DEFECTIVE AND SHOULD BE DISMISSED.**

The Coalition's petition fails to meet the standard for a declaratory ruling and therefore should be dismissed. Section 1.2 of the Commission's rules provide that "[t]he Commission may . . . issue a declaratory ruling terminating a controversy or removing uncertainty."<sup>10</sup> Here, neither "controversy" nor "uncertainty" exists to warrant the Commission's consideration of this matter. The Commission has thoroughly considered the statutory provisions at issue in multiple rulemakings,<sup>11</sup> and the issues contained in the instant petition have never been raised. Clearly, there has been ample opportunity for public comment on the interpretation and implementation

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<sup>10</sup> 47 C.F.R. § 1.2 (2000).

<sup>11</sup> See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Notice of Proposed Rulemaking*, 11 FCC Rcd 14171 (1996); *Local Competition Order; Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, *Notice of Proposed Rulemaking*, 12 FCC Rcd 7449 (1997); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket 97-151, *Notice of Proposed Rulemaking*, 12 FCC Rcd 11725 (1997); *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 (1998); *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, *Report and Order*, 15 FCC Rcd 6453 (2000).

of these statutory provisions. Thus, the Coalition's petition is nothing more than an untimely filed petition for reconsideration. Given the absence of a controversy or uncertainty to resolve, BellSouth urges the Commission to dismiss the instant petition.

**III. THE COALITION'S INTERPRETATION OF SECTIONS 251(b)(4) AND 224(f)(1) IMPERMISSIBLY EXCEEDS THE SCOPE OF THE 1996 ACT AND CONFLICTS WITH ESTABLISHED LAW AND POLICIES REGARDING DUCTS, CONDUITS, AND RIGHTS-OF-WAY.**

The Coalition distorts the 1996 Act by arguing that central offices and the equipment housed within them constitute "ducts, conduits, and rights-of-way" under Sections 251(b)(4) and 224(f)(1). This interpretation unlawfully expands the coverage envisioned by Congress in adopting these provisions. As demonstrated below, it is clear that both Congress and the Commission intended these terms to refer to outside plant, not central office equipment.

The rules of statutory construction provide that, where Congress uses terms that have a settled meaning under common law, Congress is considered to have incorporated the established meaning of such terms into the statute.<sup>12</sup> The three terms at issue – duct, conduit, and right-of-way – each have commonly understood meanings. Moreover, the Commission has established explicit definitions for the terms "duct" and "conduit." As demonstrated more fully below, there is no such thing as a duct, conduit, or right-of-way within a central office pursuant to Sections 251(b)(4) and 224(f)(1). Consequently, the application of these terms to the central office environment is misplaced. Both Sections 251(b)(4) and 224(f)(1) require access to outside plant, not ILEC central offices.

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<sup>12</sup> *Neder v. United States*, 527 U.S. 1, 21 (1999); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); see *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of the country, they are presumed to have been used in that sense.").

**A. The Coalition’s Interpretation of the Pole Attachment Provisions of the 1996 Act Is Contrary to Congressional Intent.**

The Coalition’s proposal completely ignores the history behind the pole attachment provisions of the 1996 Act. Congress enacted the first statute governing access to poles, ducts, conduits, and rights-of-way in the Pole Attachment Act of 1978.<sup>13</sup> The purpose of the Pole Attachment Act was to promote the deployment of cable television service by ensuring that cable operators had access to the poles, ducts, conduits, and rights-of-way owned or controlled by utilities. Congress determined that it was in the public interest to allow cable companies access to the outside plant of utility companies at reasonable rates thereby avoiding the need for cable operators to duplicate the telephone/power poles, underground conduit, and duct already in place.

In 1996, Congress expanded the scope of the pole attachment requirements. For the first time, utilities were required to afford telecommunications carriers, not just cable operators, access to their poles, ducts, conduits, and rights-of-way. The 1996 Act added two new pole attachment provisions and expanded Section 224. One of the new provisions, Section 251(b)(4), imposes a general duty on all local exchange carriers to permit access to their poles, ducts, conduits, and rights-of-way to competing telecommunications carriers.<sup>14</sup> The second new provision, part of the competitive checklist in Section 271, requires a Bell Operating Company (“BOC”) to provide telecommunications carriers with nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by it as a condition of receiving authority to provide long distance service.<sup>15</sup> Finally, Congress expanded Section 224 to provide that all

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<sup>13</sup> Pub. Law No. 95-234, § 6, 92 Stat. 33, 35 (codified at 47 U.S.C. § 224).

<sup>14</sup> 47 U.S.C. § 251(b)(4) (2000).

<sup>15</sup> 47 U.S.C. § 271(c)(2)(B)(iii) (2000).

utilities (including local exchange carriers)<sup>16</sup> provide cable companies and telecommunications carriers access to their poles, ducts, conduits, or rights-of-way.

Section 224 is the cornerstone of the 1996 pole attachment provisions. It is a continuation of the original provision adopted in 1978. Moreover, both Sections 251(b)(4) and 271 reference 224. Thus, the history behind Section 224 cannot be ignored. That history demonstrates Congress's intent to afford access to a limited category of utilities' equipment and facilities – the outside plant and structures. As the Commission pointed out in the *Local Competition* proceeding, “[t]he intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to ‘piggyback’ along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.”<sup>17</sup> Thus, the Coalition's overly expansive interpretation of Section 224 conflicts directly with Congressional intent. Contrary to the Coalition's belief, Sections 251(b)(4) and 224(f)(1) do not confer upon competitive fiber providers a right to install cable and other equipment in ILEC central offices. It is clear that Congress never contemplated such a result.

Congress's intent to limit the scope of the pole attachment provisions of the 1996 Act to outside plant is further supported by Section 271. Section 271 sets forth a fourteen-point competitive checklist that a BOC must satisfy in order to receive authority to enter the long distance market. Checklist item three requires a BOC to provide nondiscriminatory access to the

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<sup>16</sup> Section 224(a)(1) defines the term “utility” as “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.” 47 U.S.C. § 224(a)(1) (2000).

<sup>17</sup> *Local Competition Order*, 11 FCC Rcd at 16085, ¶ 1185.

poles, ducts, conduits, and rights-of-way owned or controlled by it.<sup>18</sup> To date, the Commission has determined that this checklist item has been met in five states.<sup>19</sup>

The Coalition's expanded interpretation of the 1996 Act, however, directly conflicts not only with the Commission's decision to grant 271 authority to both Verizon (formerly Bell Atlantic) and SBC but also with the state commissions' grants of approval. In none of the five instances did the Commission interpret the checklist (or Sections 251(b)(4) and 224(f)(1)) as requiring ILECs to permit co-carrier cross connection in their central offices. Nor could it have. There is simply no statutory basis upon which to support such a radical departure from the traditional interpretation of access to poles, ducts, conduits, and rights-of-way. Moreover, the Coalition's interpretation is directly at odds with Commission precedent.<sup>20</sup> The Commission's findings that the 271 checklist has been met demonstrate that there is neither uncertainty regarding the scope of the pole attachment provisions of the 1996 Act nor a controversy

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<sup>18</sup> 47 U.S.C. § 271(c)(2)(B)(iii) (2000).

<sup>19</sup> See, e.g., *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a/ Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, *Memorandum Opinion and Order*, FCC 01-130, at ¶ 206 (rel. April 16, 2001); *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance For Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, *Memorandum Opinion and Order*, FCC 01-29, ¶ 255 (rel. Jan. 22, 2001); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, *Memorandum Opinion and Order*, 15 FCC Rcd 18354, 18479-480, ¶ 245 (2000); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, *Memorandum Opinion and Order*, 15 FCC Rcd 3953, 4092-4094, ¶¶ 265-267 (1999).

<sup>20</sup> Congress established specific interconnection, unbundling, and collocation provisions to govern access to ILEC facilities and equipment, including the central office, and none of those require co-carrier cross-connection within ILEC central offices. It is unlawful to try and interject access to ILEC central offices into any of the pole attachment provisions of the 1996 Act – Sections 251(b)(4), 224(f)(1) or 271(c)(2)(B)(iii) – when there is absolutely no statutory basis to support such a reading of the statute.

regarding their implementation. Hence, as indicated in Section I above, the essential predicate for a declaratory ruling is absent.

Further, the deficiencies in the Coalition's proposal are magnified by analyzing the potential impact of the Coalition's interpretation on non-LECs. Section 224(f)(1) imposes an obligation on **every utility** to provide nondiscriminatory access to its poles, ducts, conduits, and rights-of-way. Under the Coalition's proposal, all utilities (including LECs, electric, gas, water, steam, and other public utilities)<sup>21</sup> would have to allow telecommunications carriers access to facilities beyond outside plant. In other words, an electric or power company would have to allow CLECs, cable television providers, and even competitive fiber providers access to their power generation plants and substations in order to install equipment and wiring. Non-LEC utilities would be subject to the same obligations as ILECs under the Coalition's expanded interpretation of the 1996 Act. It is doubtful that Congress envisioned such an outcome.

**B. The Coalition's Interpretation of the Pole Attachment Provisions of the 1996 Act Conflicts with Commission Rules and Established Law.**

The Coalition's reading of the statute is not only contrary to Congressional intent but also conflicts with the Commission's existing rules and established law. Adoption of the Coalition's request would require the Commission essentially to rewrite its entire set of regulations governing access to poles, ducts, conduits, and rights-of-way in the absence of any legal authority. The Commission's current rules, however, are consistent with the scope envisioned by Congress and settled law. Accordingly, the Commission should deny the Coalition's request.

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<sup>21</sup> Section 224(a)(1) defines the term "utility" as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State." 47 U.S.C. § 224(a)(1) (2000).

## 1. Definitions

### a. Duct

The Coalition’s proposed definition of the term “duct” is indefensible. The Commission defines a “duct” as a “single enclosed raceway for conductors, cable, and/or wire.”<sup>22</sup> Notwithstanding the explicit requirement that the raceway be “enclosed,” the Coalition requests that the Commission disregard its definition and instead conclude “that it is not necessary for the raceway to be enclosed in the sense of being entirely covered.”<sup>23</sup> This request is illogical. Even the definition quoted by the Coalition contemplates an enclosed structure. Newton’s Telecom Dictionary (as cited by the Coalition) defines a “raceway” as a “metal or plastic channel used for loosely holding electrical and telephone wires in buildings.”<sup>24</sup> A “channel,” in turn, is defined as a “usually tubular enclosed passage: conduit.”<sup>25</sup> Thus, pursuant to the Commission’s rules and a common understanding of the term, a “duct” is an enclosed structure. Since racks, clips and straps<sup>26</sup> are not enclosed, they do not – and cannot – constitute “ducts.” Accordingly, the Coalition’s expanded definition of the term “duct” must fail.

### b. Conduit

The Coalition’s proposed definition of the term “conduit” also misses the mark. The Commission defines “conduit” as “a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.”<sup>27</sup> The Coalition asks the Commission to

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<sup>22</sup> 47 C.F.R. § 1.1402(k) (2001).

<sup>23</sup> Coalition Petition at 10.

<sup>24</sup> *Id.*

<sup>25</sup> Webster’s Ninth New Collegiate Dictionary (1990).

<sup>26</sup> Coalition Petition at 10.

<sup>27</sup> 47 C.F.R. § 1.1402(i) (2001).

determine that it is not necessary for ducts always to be placed in conduit.<sup>28</sup> As with the term “duct,” the Coalition essentially is asking the Commission to engage in a rulemaking to unreasonably expand its rules solely to accommodate competitive fiber providers. However, the Commission’s rules could not be more clear – a conduit contains “**one or more ducts.**”<sup>29</sup> The Coalition’s overly broad definition of “conduit” is simply an attempt to reach a result intended neither by Congress nor the Commission.

Conduit is a structure, usually placed underground, used to support telecommunications cables leading from one outside plant structure to another outside plant structure. Conduit, however, is not part of the central office. As the Commission explains:

Outside plant structure refers to the set of facilities that support, house, guide, or otherwise protect distribution and feeder cable. . . . aerial structure consists of telephone poles and associated hardware such as anchors and guys. Buried structure consists of trenches. Underground structure consists of trenches, **conduit**, manholes, and pullboxes. Underground cable is placed underground within conduits for added support and protection.<sup>30</sup>

Thus, the Coalition’s proposed definition of “conduit” conflicts with the plain language of the Commission’s rules and the common understanding of that term and therefore should be rejected.

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<sup>28</sup> Coalition Petition at 11.

<sup>29</sup> 47 C.F.R. § 1.1402(i) (2001) (emphasis added).

<sup>30</sup> *Federal-State Joint Board on Universal Service; Forward-Looking Mechanism for High Cost Support for Non-Rural LECs*, CC Docket Nos. 96-45 and 97-160, *Tenth Report and Order*, 14 FCC Rcd 20156, 20247-248, ¶ 209 (1999).

**c. Rights-of-Way**

The Coalition goes through similar pains to dissect the definition of the term “rights-of-way” in a light most favorable to its members. To support its argument, the Coalition relies heavily on the Commission’s decision in the *Competitive Networks* proceeding. Such reliance, however, is misplaced. The *Competitive Networks* proceeding was intended to foster telecommunications competition in multiple-tenant environments, such as apartment complexes, office buildings, and campuses.<sup>31</sup> In that proceeding, the Commission was concerned with ensuring access to the intra-building facilities, such as riser cable, located on non-LEC privately owned properties. The Commission, however, never discussed interpreting Sections 251(b)(4) or 224(f)(1) to mandate access to ILEC central offices. Thus, it is misleading for the Coalition to use the *Competitive Networks* decision as a basis for its overly broad interpretation of the 1996 Act.

Moreover, it should be noted that the Commission recognized the dangers of overbroad interpretations when it refused to adopt an expanded meaning of Section 224(f)(1). The Commission expressly stated that it did “not believe that section 224(f)(1) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier’s transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under section 251(c)(6).”<sup>32</sup> Rejecting efforts to extend unlawfully the definition of a pole, duct, conduit, or right-of-way, the Commission appropriately found “that Section 224 does not confer

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<sup>31</sup> *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, CC Docket Nos. 99-217 et al., *First Report and Order*, FCC 00-366 (rel. Oct. 25, 2000) (“*Competitive Networks Order*”).

<sup>32</sup> *Local Competition Order*, 11 FCC Rcd at 16084-16085, ¶ 1185.

a general right of access to utility property.”<sup>33</sup> BellSouth encourages the Commission to adopt a similar approach in the instant case by refusing to find that ILEC central offices contain rights-of-way.

The Coalition also asks the Commission to conclude that the term “right-of-way” includes “‘pathways’ used to run wiring and transmission facilities in ILEC central offices.”<sup>34</sup> Rights-of way do not exist in central offices. Thus, this argument is without merit.

The term “right-of-way” has an established meaning under common law. A right-of-way means the right to pass over the land of another.<sup>35</sup> Thus, there is no such thing as a right-of-way over one’s own property. In addition, the term right-of-way typically refers to the right to use publicly owned or controlled real property (*e.g.*, public streets and highways). Therefore, the right to place fiber in an ILEC central office is not a right-of-way. The Coalition’s attempt to expand the term “right-of-way” clearly conflicts with existing property law and therefore must fail.

Moreover, state law governs rights-of-way. The Commission recognized this fact in the *Competitive Networks Order*<sup>36</sup> when it concluded that “state law determines whether, and the extent to which, utility ownership or control of rights-of-way exists in any factual situation within the meaning of Section 224.”<sup>37</sup> Thus, it would be inappropriate for the Commission to ignore years of common law and states rights by adopting a federal rights-of-way framework simply to allow access to ILEC central offices.

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<sup>33</sup> *Competitive Networks Order*, ¶ 75.

<sup>34</sup> Coalition Petition at 12.

<sup>35</sup> *Black’s Law Dictionary* 1326 (6<sup>th</sup> ed. 1990).

<sup>36</sup> *Competitive Networks Order*, ¶ 85 (citing *Local Competition Order*, 11 FCC Rcd at 16082, ¶ 1179).

<sup>37</sup> *Competitive Networks Order*, ¶ 87.

## 2. Accounting Rules

The Commission's accounting rules also support the conclusion that the terms "duct" and "conduit" refer to outside plant, not central office equipment. The Commission appropriately distinguishes between central office equipment and outside plant. Under the Commission's Uniform System of Accounts, central office assets include (1) central office—switching (which, in turn, includes analog electronic switching, digital electronic switching, and electro-mechanical switching) (2) operator systems and (3) central office—transmission, which includes radio systems and circuit equipment.<sup>38</sup> The Commission has a separate accounts for outside plant that include poles, aerial cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire, and conduit systems.<sup>39</sup> All of the equipment and cable within a central office is charged to the appropriate central office account and is not intermingled with outside plant accounts. Thus, the Commission's accounting rules properly distinguish between equipment and facilities leading to the central office (*i.e.*, duct and conduit) and equipment and facilities housed within the central office. This distinction further demonstrates that ducts and conduits (and rights-of-way) do not exist within ILEC central offices. The Commission should not allow these obvious lines of distinction to become blurred by granting the Coalition's petition.

## 3. Rate Formula

Not only do the Commission's accounting rules fail to support the Coalition's argument, but the Commission's formula for establishing rates to lease space on poles or within ducts,

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<sup>38</sup> 47 C.F.R. §32.2000(j) (2000).

<sup>39</sup> *Id.*

conduits, or rights-of-way<sup>40</sup> also weakens the Coalition's position. The current Commission formulas are simply ill-suited for calculating charges for installing equipment in a central office.<sup>41</sup> This should come as no surprise since neither Congress nor the Commission ever contemplated such a use for these formulas. Here again, the flaws in the Coalition's argument warrant a denial by the Commission.

#### 4. Safety, Reliability, and Engineering Standards

Similar to the rate formulas, the safety, reliability, and engineering standards that apply to the use of poles, ducts, conduits, and rights-of-way are wholly inappropriate for access to central offices. This inconsistency is yet another illustration of the deficiencies in the Coalition's argument. The existing national industry codes used to ensure the safety of personnel and the reliability of services when accessing poles, ducts and conduits are simply not applicable to accessing central offices. Accessing a central office involves accessing different types of equipment and poses different risks to the network than accessing an underground duct or conduit. Thus, the security and safety measures necessary to ensure network reliability and security in the two environments would be distinctly different.<sup>42</sup>

As demonstrated above, the Coalition's proposal is inherently flawed. Its overly broad interpretation of the 1996 Act comports neither with Congressional intent nor existing precedent

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<sup>40</sup> 47 C.F.R. §§1.1409, 1.1417, 1.1418 (2001).

<sup>41</sup> If the Commission were to conclude that Sections 251(b)(4) and 224(f)(1) require access to ILEC central offices, it would have to devise a new formula. At a minimum, the Commission would have to initiate a rulemaking and solicit public comment in order to develop an appropriate formula.

<sup>42</sup> The security measures that would be most appropriate for access to central offices would likely be similar to those governing collocation, given that collocation is really what the Coalition is seeking. See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 4761, 4787-4789, ¶¶ 46-49 (1999); 47 C.F.R. § 51.323(i)(2001).

and Commission rules. Thus, there is no legal basis upon which to support the Coalition's reading of the statute. BellSouth therefore urges the Commission to deny the Coalition's petition.

#### **IV. COST SAVINGS AND EFFICIENCIES ARE INSUFFICIENT BASES UPON WHICH TO GRANT THE COALITION'S PETITION.**

Recognizing the deficiencies in its legal argument, the Coalition tries to convince the Commission to require ILECs to allow cross-connection in their central offices because of the resulting efficiencies.<sup>43</sup> The Coalition asserts that “[g]ranteeing CFPs the right to bring fiber directly into central offices will reduce the time and expense required for a CLEC to expand the number of central offices in which it operates.”<sup>44</sup> The Coalition further claims that “requiring [competitive fiber providers] [ ] to connect with CLECs only outside of ILEC central offices would limit CLECs to obtaining transport from the ILEC or constructing new facilities to a meet point with the CFP.”<sup>45</sup>

The courts have squarely addressed this issue and concluded that potential cost savings is not a sufficient justification for expanding the 1996 Act. Citing the Supreme Court, the D.C. Circuit Court of Appeals stated that “‘delay and higher costs for new entrants . . . [that may] impede entry by competing local providers and delay competition’ cannot be used by the FCC to overcome statutory terms in the Telecommunications Act of 1996.”<sup>46</sup> In rejecting the Commission's finding that Section 251(c)(6) requires LECs to provide or permit cross connections between collocators, the Court of Appeals stated that “the FCC cannot reasonably

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<sup>43</sup> See Coalition Petition at 7-8.

<sup>44</sup> Coalition Petition at 7-8.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> *GTE v. FCC*, 205 F.3d at 423 (citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 389-90).

blind itself to statutory terms in the name of efficiency.”<sup>47</sup> The fact that competitive fiber providers or CLECs have to incur costs does not translate into a statutory requirement that ILECs must allow access to their central offices for co-carrier cross-connection.

**V. THE 1996 ACT DOES NOT AUTHORIZE CARRIERS TO INSTALL EQUIPMENT IN ILEC CENTRAL OFFICES IN ORDER TO COLLOCATE WITH OTHER CARRIERS.**

The Coalition gives a laundry list of items that competitive fiber providers should be allowed to place in ILEC central offices pursuant to Sections 251(b)(4) and 224(f)(1) – dark fiber, connectors between lengths of wiring, signal regenerators, power supplies, and distribution frames.<sup>48</sup> This argument, however, is based on the faulty premise that ducts, conduits, and rights-of-way exist within a central office. As demonstrated above, these terms refer to outside plant; consequently, ducts, conduits, and rights-of-way do not exist within a central office. Accordingly, ILECs are under no statutory obligation to allow CLECs or competitive fiber providers to install equipment and cabling in their central offices pursuant to Sections 251(b)(4) or 224(f)(1). To require otherwise would conflict with the 1996 Act.

Despite the absence of a legal requirement, carriers are not precluded from allowing these type of collocation arrangements. As previously stated, interested parties are free to enter into voluntary agreements to permit co-carrier cross connection. Based on the Coalition’s statements, some parties are taking full advantage of this flexibility.<sup>49</sup> In the absence of any legal authority

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<sup>47</sup> *GTE v. FCC*, 205 F.3d at 424.

<sup>48</sup> Coalition Petition at 15-16.

<sup>49</sup> *See supra* note 9.

to mandate co-carrier cross connections, it is appropriate to allow market forces to determine the success of these type of arrangements.

## **VI. CONCLUSION**

The Coalition seeks to re-write the 1996 Act by arguing that Sections 251(b)(4) and 224(f)(1) require an ILEC to provide non-discriminatory access to its central offices and the equipment housed within them. This interpretation unlawfully expands the scope of the 1996 Act, conflicts with existing Commission rules, and undermines long-standing precedent and policies. Accordingly, BellSouth urges the Commission to deny the instant petition.

Respectfully submitted,

**BELLSOUTH CORPORATION**

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Date: April 23, 2001

**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 23<sup>rd</sup> day of April 2001 served the following parties to this action with a copy of the foregoing **BELLSOUTH OPPOSITION** by electronic filing and/or by placing a copy of same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee \_\_\_\_\_

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