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WRITTEN *EX PARTE*

August 27, 2002

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

RE: Competitive Networks, WT Docket No. 99-217

Dear Ms. Dortch:

As BellSouth demonstrates in this *ex parte*, non-ILECs can and do act in ways that restrict tenant choice for communications services. Although they did little to refresh the record, AT&T's most recent written comments¹ also clearly demonstrate that non-ILECs can thwart competitive access to multiple tenant environments (MTEs). For this reason, the Commission should reject AT&T's transparent attempts to heap additional, unwarranted regulation on ILECs alone in the MTE market place. AT&T, for the most part, reiterates the untenable positions it took in its comments and reply comments. Specifically, AT&T continues to propose that ILECs alone be prevented from entering into preferential marketing agreements with MTE owners, and that only ILECs should be subject to an FCC-imposed "service cut-off rule" in circumstances where an MTE owner denies access to a competing LEC.

ILECs are already subject to substantial and disparate regulatory requirements that operate to safeguard CLEC competitive access to MTEs. CLECs, on the other hand, have just as much of an opportunity to leverage relationships with MTE owners in a manner that excludes competing ILEC access, without the same regulatory access

¹ AT&T Comments (filed Mar. 8, 2002).

safeguards currently imposed on ILECs. To promulgate additional, unwarranted regulatory requirements on ILECs alone would distort the competitive market and confer an unfair competitive advantage on CLECs such as AT&T.

I. AT&T'S PROPOSALS ARE UNWARRANTED, AND WOULD INCREASE REGULATORY DISPARITY, DISTORT THE COMPETITIVE MTE MARKETPLACE, AND CONFER UNFAIR REGULATORY ADVANTAGES ON CLECS SUCH AS AT&T.

Since the time BellSouth filed comments in these proceedings opposing both the "service cut-off" rule and AT&T's first proposal to restrict ILECs alone from using preferential marketing agreements, no CLEC has complained that BellSouth has denied competitive access to any MTE. Ironically, however, during the same period there have occurred at least two occasions where an MTE owner has denied BellSouth physical access to its property to serve tenants, and the CLEC serving the MTE has frustrated BellSouth's requests for competitive access. The attachment to this letter describes these incidents in more detail.² These examples demonstrate that CLECs, which are not under the same regulatory network access requirements as ILECs are with respect to in-building MTE network facilities, can and will frustrate competitive access by other LECs, particularly ILECs. These examples illustrate that ILECS face fierce competitive pressures in the MTE marketplace today, and that there is no compelling reason to adopt AT&T's proposals.

The Commission rejected earlier proposals to limit the prohibition against exclusive service arrangements to ILECs.³ The Commission should follow the same reasoning here to reject AT&T's continuing advocacy of its proposal to ban ILECs alone from entering into preferential marketing agreements but allow CLECs all the benefits of

² These incidents involved the same CLEC and occurred in newly constructed retail shopping malls in separate locations in Georgia and North Carolina. In Georgia the CLEC denied that it had an exclusive agreement with the MTE owner in violation of current FCC rules. The details are set out in Exhibit 1. The North Carolina example is described in BellSouth's formal Intervention in *ALLTEL Carolina, Inc. v. CTC Exchange Services, Inc.*, State of North Carolina, Utilities Commission, Docket No. P-89, Sub 79, which is attached as Exhibit 2. In both examples the CLEC, and only that CLEC, has served mall tenants since opening day.

³ *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, WT Docket No. 99-217, *et al.*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22998, ¶ 30 (2000) ("*Competitive Networks Order and NPRM*") ("In this environment, applying an exclusive contract prohibition only to the incumbent LEC could distort competitive outcomes and ill serve end user interests. Moreover, in the case of competitive LECs, an exclusive contract may essentially constitute a device to create market power. That is, such a contract could entrench a competitive LEC as the sole provider in a building – or as one of two providers, along with the incumbent LEC – and foreclose any further competition.").

such agreements.⁴ BellSouth has already refuted the contention that this is permissible regulatory disparity in its February 2001 Reply Comments. Moreover, the majority of the commenters clearly recognize that preferential marketing agreements *per se* encourage competitive facilities deployment and do not convey any access advantage.⁵ They should be available to all competitors in the MTE marketplace, and any restrictions on their use should fall equally on all competitors.

AT&T also continues to advocate for an ILEC-only service cut-off rule. That is, if an MTE owner served by an ILEC denies a CLEC access to her building, the appropriate Commission response would be to prohibit that ILEC from providing broad categories of services to the tenants of the building.⁶ As BellSouth explained in its comments and reply comments, the proposal itself unfairly punishes tenants and it is clear that the "service cut-off" remedy does not lie within the Commission's powers. Even in the post-1996 domestic telecommunications market, where the roles of state and federal regulators have transformed to reflect the market-opening provisions of the Act, the states, and not the Commission, still retain jurisdiction over ILEC provision of intrastate telephone services.⁷

In any event, the Commission has enacted regulations in this and other proceedings that effectively limit an ILEC's incentive or ability to impede competitive access to MTE.⁸ BellSouth has demonstrated that ILECs are simply not in a position to lawfully deny a request for competitive access for any illegitimate reason.⁹ Yet, CLECs are in a position to frustrate ILEC access to MTEs, as BellSouth's examples show, and as AT&T demonstrates.¹⁰ Moreover, BellSouth's experience is not unique. An unaffiliated ILEC's formal complaint against the same CLEC described in Attachment 1 has resulted in a recent Order by the North Carolina Utilities Commission finding that the CLEC's relationship with the MTE owner is anticompetitive.¹¹

⁴ AT&T Comments at 20 (filed Mar. 8, 2002); AT&T Comments at 43-46 (filed Jan. 22, 2001).

⁵ See, e.g., Broadband Office Communications Comments at 16-19 (filed Jan. 22, 2001); CoServ Comments at 7-8 (filed Jan. 22, 2001); Real Access Alliance Comments at 66 (filed Jan. 22, 2001); Sprint Comments at 9-10 (filed Jan. 22, 2001); and Verizon Comments at 1-3 (filed Jan. 22, 2001).

⁶ AT&T Comments at 8 (filed Mar. 8, 2002).

⁷ BellSouth Reply (filed Feb. 21, 2001) at 6, citing 7 U.S.C. § 152(b). See *Louisiana Public Service Commission v. F.C.C.*, 476 U. S. 355 (1986). Interstate calls are as critical to tenants in MTEs as intrastate calls, so even a prohibition limited jurisdictionally to interstate service would unreasonably punish innocent tenants.

⁸ BellSouth's Comments (filed Jan. 22, 2001) at 2.

⁹ *Id.* at 6.

¹⁰ AT&T March 8, 2002 Comments at 15 (describing a relationship between a large MTE owner and Level III in Atlanta, Georgia).

¹¹ *ALLTEL Carolina, Inc. v. CTC Exchange Services, Inc.*, State of North Carolina, Utilities Commission, Docket No. P-89, Sub 79 (Order Ruling on Contract Provisions, Aug. 15, 2002).

If regulatory intervention is necessary at all, it should only be to balance the current regulatory disparity between CLEC and ILEC that distorts the effectiveness of competition in the MTE market place. But it should be a light touch; the heavy-handed service cut-off proposal should apply neither to ILEC nor CLEC. As shown in BellSouth's earlier filed comments, current regulation effectively assures CLEC access to MTEs served by an ILEC regardless of the MTE owner. In cases, however, where an MTE owner denies physical access to an MTE served by a CLEC that does not have the obligations of an ILEC under the Commission's rules, or a corresponding duty under state law, that CLEC should have an obligation to negotiate in good faith with any requesting LEC (ILEC or CLEC) toward the conclusion of a commercially reasonable facilities access agreement so that customers can be assured of their choice of telecommunications service providers.¹²

Such a rule would avoid all of the problems BellSouth and others earlier documented with the Commission's proposed "service cut-off" rule.¹³ Service to existing tenants would not be interrupted. Supervised settlement negotiations before the Enforcement Bureau staff in the context of an Accelerated Docket complaint should assist the parties in concluding rapid and reasonable commercial arrangements that will assure tenants their right to choose, and MTE owners their right to control physical access to their property.

As the North Carolina Utilities Commission noted in its recent *Alltel* Order:

As the Commission noted in the Order Ruling on Oral Argument, CLPs are obliged under Section 251(a)(1) to interconnect with other carriers. The Commission also has the authority under G.S. 62-110(f1) to adopt rules it finds necessary to provide for the reasonable interconnection of facilities. It would therefore behoove a preferred provider CLP in an MTE setting to enter into a reasonable interconnection agreement with another carrier if requested to do so. Its obligation to do so is not contingent upon the existence of a contract term "authorizing" it, but exists at law.¹⁴

¹² The Commission should require that, in these situations, negotiations for facilities access should commence within five business days of the initial request. A CLEC's refusal to enter into such negotiations, or its actions in negotiating unreasonably or in bad faith, should be a basis for a formal complaint under the Commission's accelerated docket procedures. This process would not supplant any existing ILEC obligations, including subloop unbundling requirements and the Commission's network demarcation relocation rules.

¹³ See BellSouth's Comments at 4-8 (filed Jan. 22, 2001); Broadband Office Communications Comments at i-ii (filed Jan. 22, 2001); Verizon Comments at 2 (filed Jan. 22, 2001); United States Telecom Association Reply Comments at 4-5 (filed Feb. 21, 2001); Real Access Alliance Further Reply Comments at 18-19 (filed Feb. 21, 2001).

¹⁴ *ALLTEL . v. CTC*, *supra*, n. 10 (Order, Aug. 15, 2002 at 12) (Attached as Exhibit 3).

In sum, the Commission should both reject proposals to prohibit ILECs from using preferential marketing agreements and decline to adopt the service-cut off rule proposed in its most recent *NPRM*.¹⁵ Current ILEC regulatory requirements provide sufficient safeguards to assure CLEC access to ILEC network facilities within MTEs. The Commission should, in the absence of any state access requirements applicable to CLECs, require any CLEC serving an MTE the owner of which refuses access to any other requesting LEC to negotiate in good faith with any other LEC requesting access along the lines BellSouth suggests in this letter.¹⁶

II. THE COMMISSION SHOULD TAKE ADDITIONAL ACTION ON ISSUES PENDING IN THIS PROCEEDING.

There are a number of other matters that the Commission can and should address in this proceeding. BellSouth supports competitive access to MTE-serving LEC terminals and cross connects under reasonable terms and conditions. BellSouth customers, however, have experienced an increase in service disruptions caused by CLECs that have accessed BellSouth's terminals and cross connect locations, but that neither sought permission nor gave notice of their intent to do so. Recent events, moreover, have highlighted the critical importance of the nation's telecommunications services and infrastructure. The challenge for the Commission is to strike the right balance between competitors' need to access each other's terminals and cross connects and each carrier's need to ensure that its telecommunications facilities are properly secured so that the public is assured of prompt access to 911 and other critical telecommunications services.

The Commission should also clarify that a tenant has a role in any network demarcation point relocation negotiation between a serving LEC and an MTE owner if that relocation would affect the tenant's service. As BellSouth, other carriers, customers and State Regulatory Commissions have shared with this Commission, there can be significant service issues and cost considerations associated with the relocation of the demarcation point.¹⁷ The Commission should reject arguments that there is no evidence in the record showing the potential impact of relocating the network demarcation point from the customer's premises to the MPOE.¹⁸

¹⁵ *Competitive Networks Order and NPRM*, 15 FCC Rcd at 23041-52, ¶¶ 131-58.

¹⁶ *Supra*, n.11.

¹⁷ See, e.g., BellSouth Petition for Reconsideration Reply (filed Mar. 26, 2001) ("BellSouth PFR Reply") and BellSouth's *ex parte*, filed November 30, 2001. See also the photographs accompanying BellSouth's June 7, 2000 *ex parte*, which clearly demonstrate the complexities involved in situations involving high capacity broadband facilities.

¹⁸ Cypress Communications Opposition at 5 (filed Mar. 14, 2001). Also, Smart Building Policy Project's ("SBPP") quote from paragraph 35 of the 1990 *Report and Order* in CC Docket 88-57 is taken out of context. SBPP Opposition at 15-16, n. 46 (filed Mar. 14, 2001). In the 1990 *Report and Order* the Commission was considering a different section of Part 68, dealing

BellSouth's Comments, Reply Comments, and detailed *ex parte* responses, as well as white papers filed with this Commission by BellSouth and other carriers, comprehensively catalog the potential operational and economic effects of the relocation of an existing premises demarcation point to the MPOE.¹⁹ It was partly for these reasons, after all, that the Commission declined to adopt a mandatory MPOE demarcation point rule for MTE in the first place.²⁰

The same technical and policy issues and concerns that animated the Commission's decision not to establish a mandatory MPOE rule have the potential to arise anytime that an existing premises demarcation point is relocated to the MPOE, whether the relocation is accomplished by federal rule or at the behest of a building owner. The Commission has determined from evidence in the record that there have been situations when tenants have been prevented from exerting their will with regard to telecommunications access.²¹ MPOE relocations will always result in some modification of the manner in which the tenant end user receives service from the incumbent provider or from a CLEC providing service using unbundled loops or subloops. Because it simply seeks to assure an explicit opportunity for tenants to be fully informed of the effects of a demarcation point change, BellSouth's pending Petition for Reconsideration or Clarification should be granted.²² The denial of this opportunity could lead to unnecessary customer complaints to the Commission or state regulatory agencies about service degradation.²³

The Commission should also take this opportunity to extend the prohibition against carriers entering into exclusive service contracts from commercial properties to cover residential properties too, and to encourage MTE owners to facilitate access by multiple facilities-based providers on their properties, by installing infrastructure

with the consequences of customer installation of a jack at the network interface. More on point is this Commission's statement expressing its long-standing concern that, "in multi-unit buildings in which riser cable and loop distribution facilities are under the control of the building owner, troublesome issues involving the terms and conditions of telephone network access may develop." *In the Matters of Petitions Seeking Amendment of Part 68 of the Commission's Rule Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, et al.*, CC Docket No. 81-216 *et al.*, *First Report and Order*, 97 FCC 2d 527, 533, ¶ 14 (1984).

¹⁹ See BellSouth's Comments (filed Jan. 22, 2001) and BellSouth's Reply Comments (filed Feb. 21, 2001). See also BellSouth's *ex parte*, filed June 7, 2000; BellSouth's *ex parte*, filed August 24, 2000; Verizon's *ex parte*, filed August 24, 2000; and BellSouth's *ex parte*, filed September 6, 2000, at 5.

²⁰ *Competitive Networks Order*, 15 FCC Rcd at 23007, ¶ 53.

²¹ *Id.* at 22994-95, ¶ 23.

²² BellSouth PFR Reply (filed Mar. 26, 2001).

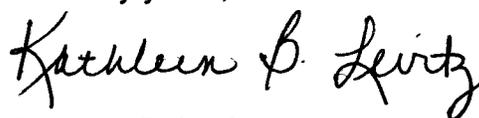
²³ *Id.* See also BellSouth *ex parte*, November 30, 2001.

(conduit, backboards and other support structures) in a way that facilitates service provisioning from multiple carriers with minimum disruption to building occupants.²⁴

Finally, the Commission should also clarify its Part 68 demarcation relocation rules as BellSouth has requested by confirming that the November 7, 2000 *Erratum* continues to be an accurate statement of the rule governing negotiations related to relocation of an MTE's demarcation point.

In accordance with Commission rules, I am filing two copies of this notice and the attachments and request that they be included in the record of this proceeding. Thank you.

Sincerely yours,

A handwritten signature in black ink that reads "Kathleen B. Levitz". The signature is written in a cursive style with a large initial 'K' and a long, sweeping tail on the 'z'.

Kathleen B. Levitz

cc: Leon Jackler
David Furth
Blaise Scinto

²⁴ Existing industry groups such as the Real Access Alliance (RAA), the Building Owner's Management Association (BOMA) and the Building Industry Consulting Service International (BICSI) could assist in the promotion of these best practices. *See also* Bell Atlantic, BellSouth, GTE and SBC *ex parte*, June 7, 2000.

**Exhibit 1 to BellSouth Ex Parte
Competitive Networks Docket WT 99-217**

In April 2001, prior to commencement of construction of a new shopping mall, BellSouth contacted the project developer for the 230-acre suburban Atlanta development in order to secure permission to obtain easements and rights-of-way to allow BellSouth to install buried cable and other network infrastructure necessary to provide service to those future business tenants in the development requesting service from BellSouth, including projected tenants who were then-current BellSouth customers, in time to coincide with the opening day of the mall. The project developer directed all BellSouth inquiries concerning telecommunications to its chosen CLEC-provider as its agent or representative for telecommunications access and services to future mall tenants.

BellSouth then tried to deal with the CLEC as the designated agent of the MTE owner to obtain access to the property in order to install network facilities, but the CLEC failed to grant the needed access. In May, BellSouth advised the CLEC that BellSouth had received at least one order for service from a future tenant of the mall. BellSouth further advised the CLEC that BellSouth expected to receive more orders from future tenants at the mall, and that, in light of this Commission's exclusive contract prohibition, BellSouth invited the CLEC to work cooperatively with BellSouth so that the latter could fulfill current and future customer needs.

The CLEC, however, chose not to acknowledge BellSouth, and finally advised the company two months after BellSouth's initial inquiry that only the project developer, and not the CLEC, could grant BellSouth physical access to the property, notwithstanding BellSouth's uncontested representation to the CLEC that the project developer had directed BellSouth to address all inquiries concerning telecommunications access and service to the CLEC as the developer's agent. The CLEC thus gained a two-month competitive access advantage over BellSouth in serving future tenants of the MTE, as construction was underway and tenants were anxious to make arrangements with their telecommunications service provider of choice in time to open as publicly scheduled. This two-month refusal to even speak to BellSouth after the MTE owner had unambiguously directed BellSouth to the CLEC as the MTE owner's agent for purposes of access, particularly when critical facilities infrastructure needed to be established, effectively constituted a material bar to BellSouth's ability to serve its customers on the premises. Nevertheless, BellSouth immediately wrote jointly to the project developer and the CLEC in order to confirm the CLEC's representations concerning access.

BellSouth expressed its concern about the effects of the relationship between the MTE owner and the CLEC upon mall tenants' ability to select the

telecommunications provider of their choice at the mall. BellSouth advised the MTE owner that communications with the CLEC concerning access to the MTE were thus far unsatisfactory, and that the delays BellSouth experienced were only frustrating customers and impairing their right to choose among telecommunications service providers. BellSouth requested a written response concerning the details for BellSouth's service provisioning at the MTE.

BellSouth then formally requested access to the property under nine alternative methods, each of which was posed as a possible way to serve BellSouth's customers in the mall.

During the remainder of August and into early September, neither the CLEC nor the project developer responded to BellSouth's requests. BellSouth's Account Representatives continued to attempt to serve existing customers that were leasing space as new tenants in the mall. Their customers, however, advised the Account Representatives that the project developer had told them that the CLEC was in fact the exclusive telecommunications provider at the mall. Other customers advised BellSouth that as a practical effect of the relationship between the project developer and the CLEC, the only way these tenants could obtain telephone service prior to the mall's fall 2001 public grand opening was to take service from the CLEC. To insist on receiving service from BellSouth, these customers explained, was to risk not obtaining any service until well after the mall opened to the public.

With this information, and given both the complete lack of response from the project developer or the CLEC, and the fact that the public opening of the mall was imminent, BellSouth sent the CLEC a certified letter on September 10, 2001, advising it of these facts and contending that the relationship between the MTE owner and the CLEC violated the FCC's prohibition against exclusive contracts. The letter also stated that BellSouth anticipated filing a formal complaint against the CLEC. In an undated letter BellSouth received immediately prior to the opening of the mall, and well after the date by which BellSouth had requested a response, the CLEC denied that its relationship was exclusive and denied that it had any legal right or practical ability to grant BellSouth access to any space located on mall property. Further, the CLEC refused to consider interconnecting any of its facilities, until certain unrelated issues were resolved under the parties' current interconnection agreement.

On October 2, 2001 BellSouth again wrote to the project developer, requesting that it work directly with BellSouth in order to coordinate access to the MTE. In the meantime, BellSouth investigated and reported to the CLEC on the myriad of unrelated interconnection disputes alleged by the CLEC that the CLEC had used as reasons to deny BellSouth interconnection with the CLEC's facilities pursuant to the parties' interconnection agreement. Meanwhile, the mall opened to the public without BellSouth's ever having obtained any sort of access to the mall or its tenants, and thus with no tenant receiving service from BellSouth.

On October 18, 2001, the MTE owner, through counsel, responded to BellSouth's August 16 and October 2 letters. The owner acknowledged that it had a contract with the CLEC calling for the latter to construct and maintain the facilities to provide telecommunications services to the mall management offices and the mall tenants. The owner added that it was "not inclined" to grant additional physical access to the mall or its equipment room for such services. The MTE owner said that BellSouth was free otherwise to provide services to mall tenants and requested that BellSouth work with the CLEC to do so, noting further that BellSouth had declined the CLEC's offer to resell the CLEC's services. Opining that it had no role to play in the matter, the MTE owner admonished BellSouth to work out its "dispute" with the CLEC. As indicated, BellSouth subsequently investigated and reported back to the CLEC on all of the CLEC's unrelated service objections. Nevertheless, the CLEC refused, and continues to refuse, to allow BellSouth access to any customers on the MTE property, except through resale of the CLEC's services, and despite the MTE owner's request that the parties work together to "resolve their dispute."

Exhibit 2

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

**OFFICIAL COPY
FILED**

JAN 15 2002

Clerk's Office
N.C. Utilities Commission

In The Matter of:

ALLTEL Carolina, Inc.,)
)
 Complainant,)
)

vs.)
)
 CTC Exchange Services, Inc. and)
 Carolina Income Management Group,)
)
 Respondents)

Docket No. P-89, Sub 79

PETITION TO INTERVENE

BellSouth Telecommunications, Inc. ("BellSouth"), hereby petitions for leave to intervene in this proceeding pursuant to Rule R1-19 of the Rules and Regulations of the Commission. In support of its Petition, BellSouth states as follows:

1. BellSouth is a public utility as that term is defined in North Carolina General Statutes § 62-3(23)a.6 and provides general, comprehensive telecommunications services to persons within its certificated areas of North Carolina. BellSouth's mailing address is Post Office Box 30188, Charlotte, North Carolina 28230.

2. On November 29, 2001, ALLTEL Carolina, Inc. filed a complaint against CTC Exchange Services, Inc. and Carolina Income Management Group concerning problems it has encountered in securing right-of-way and obtaining access to install facilities necessary to serve residence and business customers.

3. The resolution of this matter could significantly impact BellSouth and accordingly, BellSouth seeks to intervene in the above-captioned docket.

WHEREFORE, BellSouth respectfully requests the Commission to enter an order granting it leave to intervene in this docket as a party.

Respectfully submitted this 15th day of January, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



Edward L. Rankin, III
300 South Brevard Street
Post Office Box 30188
Charlotte, North Carolina 28230
(704) 378-8833

Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record by placing a copy of same in the U.S. Mail, first class postage prepaid, this the 15th day of January, 2002.

Dorothy Black

Exhibit 3

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-89, SUB 79

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
ALLTEL Carolina, Inc.,)
Complainant)
v.) **ORDER RULING ON**
CTC Exchange Services, Inc. and Carolina) **CONTRACT PROVISIONS**
Income Management Group,)
Respondents)

BY THE COMMISSION: On May 8, 2002, the Commission issued an Order Ruling on Oral Argument in this docket, in which the Commission dismissed CTC Exchange Service, Inc.'s (CTC's) Motion to Dismiss, dismissed Carolina Income Management Group (CIMG) as a party, and sought additional briefing from the parties on the following questions:

- 1. Whether there are any material facts concerning alleged anticompetitive provisions at issue that necessitate an evidentiary hearing; and**
- 2. Assuming there are not, further argument on whether the contract provisions previously cited by the various parties as anticompetitive are or are not anticompetitive.**

This docket revolves around an allegation that CTC, by contract with CIMG, has entered into an agreement which tends to prevent ALLTEL Carolina, Inc. (ALLTEL) from providing telecommunications service to customers in Morrison Plantation, a residential and commercial multiple tenant environment (MTE) development in Mooresville, located in the territory served by ALLTEL as an incumbent local exchange company (ILEC). The Commission concluded that it had jurisdiction to hear the complaint as to alleged anticompetitive contract provisions between CTC and CIMG. Specifically, the parties identified the following provisions as anticompetitive:

ALLTEL cited to Section 2.2 (CTC to provide telecommunications services to all users, other than developer and affiliates, on project property); Section 3.1 (developer not to grant rights-of-way across project property to other providers; CTC to have exclusive right-of-way); and Appendix F, Section 2 (CIMG to earn additional referral fee credits based on number of subscriber lines which subscribe to CTC).

BellSouth Telecommunications, Inc. (BellSouth) cited to Sections 2.2, 3.1, 9.1 (a term provision for the contract of five years except that the easement and license granted to CTC pursuant to Article 3 shall survive termination of the agreement); and Appendix C (defines the telecommunications services to be provided by CTC on a preferred basis).

Public Staff identified Section 3.1 and Appendix F, Section 2.

In the May 8, 2002 Order, the Commission discussed the applicability of the Federal Communication Commission's (FCC's) **Fifth Report and Order and Memorandum Opinion and Order**, CC Docket No. 96-98, adopted October 12, 1998 (**MTE Order**). In Paragraph 30 of that Order, the FCC stated that "we believe that it is necessary to prohibit both competitive and incumbent telecommunications service providers from entering into **exclusive** access contracts in commercial settings, in order to ensure the competitive neutrality of the market." (Emphasis added). In Paragraph 37, the FCC added that "we emphasize that contracts between building owners and local carriers that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access, are also prohibited." While the Commission did not view the **MTE Order** as having preempted its jurisdiction to hear complaints concerning anticompetitive provisions, the Commission noted that "it may be appropriate for the Commission to allow the principles of the **MTE Order** to inform its own analysis of what constitutes anticompetitive activity."

Pertinent Contract Provisions

Section 2.2. CTCES will provide the telecommunications services described in Appendix C to all users (other than Developer and its Affiliates) located on the Project Property; provided, however, nothing in this agreement shall require CTCES to provide telecommunications services to users who do not meet CTCES's requirements for receiving such services. CTCES will be the "preferred provider of such services, as described in Appendix E.

Appendix C. The following services will be offered by CTCES to each end user located at the Project or on the Project Property at the beginning of the end user's occupancy and thereafter:

1. Local telephone service
2. Long distance service
3. Public payphone service
4. Wireless services including only paging and digital mobile communications
5. Internet access and Web design services
6. Data applications agreed upon
7. Phone systems and system installations

Section 4.1. Developer will provide CTCES with the marketing benefits package described in Appendix E to this Agreement.

Appendix E. The marketing benefits package will provide CTCES with the following benefits:

1. Introduction to prospective tenants/lessees/buyers/ developers in the Project or the Project Property.

2. Exclusive license rights to the phrase "Official Provider of Telecommunications Services for [insert name of Project or Project Property]"...and the non-exclusive license rights to use the Developer/Project/Project Property logos in connection with CTCES advertising.

3. Allowance of bill boards or other public signage...designating CTCES as "Developer's Official Provider of Telecommunications Services for [insert name of Project or Project Property]...on all property within the Project Property....

4. The grant of easements and right of ways reasonably necessary for CTCES to effectively and properly provide the Telecommunications Services to the Project or the Project Property as more fully described in Article 2 of the attached Agreement.

5. Developer will represent and designate to its existing and prospective tenants, lessees, buyers, developers, partners, and business contacts that CTCES is the official and preferred provider of the Telecommunications Services to the Project and the Project Property and will not enter any agreement for co-marketing and revenue sharing or other similar arrangement with competing telecommunications service providers. For example, CTCES will be identified as the official and preferred provider in all information packages prepared by Developer or its affiliates for the benefit of the Project or the Project Property, and CTCES will be the only provider of telecommunications services represented at marketing and construction meetings with existing or prospective tenants, lessees, buyers, developers, partners, and business contacts. In addition, Developer will publicly and actively endorse CTCES' telecommunications services for the Project and the Project Property.

Section 3.1. Developer and Affiliates will provide CTCES such rights-of-way and easements as may be reasonably necessary to permit CTCES to provide the telecommunications services listed in Appendix B and C to this agreement...Subject to the applicable law and to the exceptions set forth in Section 3.1, Developer will not grant a right-of-way across the Project Property to another person for use in providing any telecommunications services of the type being provided by CTCES under this Agreement. Any such right-of-way shall not be subject to the foregoing sentence at such time as the portion of the Project Property in which the right of way is located (i) becomes a public

street, road, or highway or otherwise become public property or (ii) is sold as a developed lot to a residential or business user of such lot. CTCES will continue to have an exclusive right-of-way in any property that is leased by the Developer to others (e.g., an apartment complex or shopping center); provided however that CTCES agrees that it will, upon request of a tenant and of another provider of telecommunications services who wishes to provide such services, enter into and maintain an interconnection agreement as required by law.

Appendix F, Section 2. Referral Fee Credits. For each residential and business subscriber line located on the Project Property who subscribes to local telephone service from CTCES during the term of this Agreement, Developer will earn the following additional referral fee credits.... [Note: Appendix F, Section 1 provides for an Initial Referral Fee. The additional referral credits are on a sliding scale from first 500 subscriber lines, next 500 subscriber lines, and all lines over 1000].

Section 9.1. The terms of this Agreement will begin on the date of this Agreement, and, subject to earlier termination as provided in Sections 9.2 and 9.3, end on the earlier of (a) five (5) years or (b) the date on which the all of [sic] the Developer and its Affiliates cease to have an equity interest in the Project or the Project Property; provided that the easements and license granted to CTCES pursuant to Article 3 shall survive any termination of this agreement.

Comments

Carolina Telephone and Telegraph Company, Central Telephone Company, and Sprint Communications Company L.P. (collectively, Carolina) stated that its chief concerns were (a) the limitation of customer choice in areas such as Morrison Plantation, (b) the lack of a level playing field between carriers that have entered into exclusive contracts and those that have not, and (c) the possibility that if these types of contracts are permitted, carriers such as Carolina will be unduly burdened with carrier-of-last-resort obligations.

Time Warner Telecom of North Carolina, LP (TWT) stated that, while there may be various factual issues disputed between ALLTEL and CTC, there do not appear to be any material issues that would affect resolution of the principal legal issue in this docket. The Commission may, however, wish to have further proceedings on other issues related to exclusive contracts. TWT noted that the **MTE Order** of the FCC in 47 CFR 64.2500 (Subpart Z of Part 64 of the FCC Rules) prohibited common carriers from entering into any contract that "would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises," while also noting that this Order was prospective as to the effective date of the Rule and pertains only to contracts affecting commercial, not residential, users. Nevertheless, the **MTE Order** is instructive, and it seeks to prohibit all contracts that effectively restrict an MTE owner from providing access

to any other telecommunications provider. The prohibition includes contracts limiting access to providers using a particular technology, oral contracts establishing exclusive arrangements, and contracts that "establish such onerous prerequisites...that they effectively deny access."

Specifically, TWT analyzed the provisions alleged to be anticompetitive by ALLTEL as follows:

Section 2.2 does not grant CTC the exclusive right to telecommunications services but grants it "preferred provider" status. Other contract provisions allow CTC to have exclusive license rights to the phrase "Official Provider of Telecommunications Services" and allow it to have public signage to that effect. TWT found it more problematic that the developer is also prohibited from entering into any agreement for co-marketing or revenue sharing or other similar arrangements with other carriers, and the developer is prohibited from allowing other carriers to attend marketing and construction meetings with existing or prospective tenants, lessees, developers, partners and business contacts. (Contract, Appendix E, Sec. 5). These prohibitions go farther than typical marketing arrangements and are anticompetitive as a serious and practical restriction on the competitor's ability to obtain customers and do business in the development. They "effectively deny access" because they keep competitors from engaging in customary sales activity.

Section 3.1, which prohibits CIMG from granting other carriers right-of-way, is a direct restriction on the competitor's ability to serve customers and is plainly anticompetitive.

Paragraph 2 of Appendix F grants the developer certain "referral credits" based upon the number of residential and business subscriber lines located in the development that subscribe to CTC during the Contract. These give CIMG a powerful incentive to withhold access to Morrison Plantation from CTC's competitors and are also anticompetitive.

Public Staff stated its view that no evidentiary hearing was necessary but stated that it was willing to defer to another party that is able to identify specific material factual issues. The Public Staff identified the following provisions as anticompetitive:

Section 3.1, which contains the right-of-way restriction, essentially forces competitors to obtain access to customers through public rights-of-way, which may not be practical; to obtain access through poles and conduits pursuant to the federal pole attachment statute, which is costly and time-consuming; or through condemnation of a right-of-way, which is also costly and time-consuming. The language allowing other companies to provide service by interconnection is insufficient to save the provision from invalidity because certain companies, like ALLTEL, believe that they provide service profitably through their own facilities, but not otherwise.

Paragraph 2 of Appendix F restrains competition through indirect means by the creation of an incentive to CIMG to ensure that every customer in the development chooses CTC as a supplier.

Section 2.2 is anticompetitive, inasmuch as it incorporates Appendix E by reference, and Section 5 of Appendix E requires CIMG to exclude CTC's competitors from marketing and construction meetings at Morrison Plantation. This is an inappropriate restraint of trade but admittedly not as severe as that imposed by Section 3.1 or Section 2 of Appendix F.

With respect to the other provisions, such as Section 9.1 and Appendix C, the Public Staff said it was not convinced they are anticompetitive in and of themselves but are part of an anticompetitive scheme at odds with the purposes of House Bill 161. The Public Staff recommended that the Commission invalidate Section 3.1; Section 2 of Appendix F; and Section 2.2 and Section 5 of Appendix E, at least to the extent that it is required that CIMG exclude CTC's competitors from marketing and construction meetings. The Public Staff also asked that the Commission give consideration to invalidating the other contractual provisions challenged by the parties.

CTC stated that there are no disputed issues of material fact, but the evidentiary record may require supplementation or clarification as to undisputed issues of material fact. CTC pointed out that ALLTEL has unfettered physical access to residential customers in Morrison Plantation; that CTC has provided special access facilities to ALLTEL for the provision of service to end-users but ALLTEL has refused to do so similarly at another location; that ALLTEL or one of its affiliates is currently providing service to a commercial tenant over ALLTEL's physical facilities installed in public right-of-way; and that ALLTEL has initiated but not followed through on a request for access to CTC's poles and conduits within Morrison Plantation pursuant to federal law. CTC further contended that no part of the Agreement between CTC and CIMG, including Section 2.2, grants CTC exclusive service rights within the property except for CIMG and its affiliates, and no tenant or resident that desires service from a carrier other than CTC is being denied the ability to receive such service.

With respect to specific provisions, CTC contended that none of the provisions of the Agreement were unlawfully anticompetitive. Some perspective is needed. All contracts in a deregulated environment have an anticompetitive effect because they remove potential customers from the marketplace, rendering them unavailable to others for a period of time. Competitors are not guaranteed a perfectly level playing field in a competitive market. Practically speaking, it is clear that ILECs have largely held their own since the enactment of the Telecommunications Act of 1996, while competing local providers (CLPs) are struggling to survive. The only significant exception to this is where CLPs have teamed up with developers to enter into preferred provider/marketing arrangements and bargained for private easements upon which to place their facilities

before public rights-of-way become available. ALLTEL apparently feels it has the right to overbuild its facilities at any time within its service territory, without negotiating or otherwise obtaining access from the property owner. There are numerous ways an ILEC can obtain access to potential customers. The important question before the Commission is whether the contract unlawfully prevents ALLTEL from providing service to a customer it desires to serve or whether it simply creates a rational economic relationship between CTC and CIMG, with no harm to end-users.

CTC analyzed the various provisions called into question as follows:

Section 2.2 is not anticompetitive, because it does not purport to provide exclusive service rights to residents within Morrison Plantation but rather simply describes the services it will provide or make available to third-party customers. Section 2.1 and Appendix B address the services to be provided to the developer and its affiliates, which are different from those to be provided or made available to all other end-users which are described in Section 2.2 and Appendix C. While Section 2.1 makes clear that CTC will be the "sole provider" of the services defined in Appendix B to the developer and its affiliates, Section 2.2 contains no such statement with respect to the service to be made available to other end users under Appendix C. Section 2.2 does not contain the word "exclusive" or similar language. Section 3.1 specifically obligates CTC to enter into an interconnection agreement with another carrier upon the request of a tenant in order to facilitate service by the other carrier to that tenant. Since ALLTEL is serving customers at the property, plainly Section 2.2 is not effectively barring service by other telecommunications providers.

Section 3.1 is not anticompetitive because the provision simply implements an agreement between CTC and CIMG for facilitating physical access to CTC. The exclusivity provision is meant to protect the investment made by CTC and paid to the developer for the private easement and constitutes a legitimate business purpose. While it may have the effect of somewhat limiting the ability of other carriers to negotiate additional private easements, the ability to obtain a private easement is not a matter of right in any case. A developer can refuse to grant private easements for any or no reason.

Section 9.1 is not anticompetitive because it is simply the term provision of the Agreement. It is was argued that it was anticompetitive only by BellSouth, the only possible rationale being that it establishes the effective period for the provisions of Section 3, which BellSouth and others contend are anticompetitive. If Section 3 is not found to be anticompetitive, there is no independent basis for concluding or even arguing that Section 9.1 is anticompetitive.

Appendix F, Section 2 of the Agreement is not anticompetitive because arrangements for preferred providers are common and do not exclude any other provider from competing for these customers or seeking similar type arrangements.

In conclusion, CTC argued that while the Commission has the authority to modify or reject contracts entered into by public utilities subject to its jurisdiction if such contracts are contrary to the public interest, it is required that there be evidence of some discrete public harm from the contract sufficient to overcome the parties' rights under and the interests in the contract at issue. That showing has not been made here.

Attorney General noted, among other things, that ALLTEL is presently able to serve residential customers at Morrison Plantation through its infrastructure installed in the public rights-of-way but is unable to serve certain commercial customers in the development over its own facilities using the public rights-of-way. It is providing service to Harris Teeter by leasing a T-1 circuit from CTC at CTC's retail FCC-tariffed rate, after being denied an easement by CIMG citing to Section 2.2 in the Agreement between CIMG and CTC. The Attorney General argued that Sections 2.2 and 3.1 are anticompetitive on their face, but there is not sufficient evidence in the record to determine whether the referral fee provision (Appendix F, Section 2) is anticompetitive.

With respect to Sections 2.2 and 3.1, the Attorney General noted that Connecticut and Nebraska had found this type of exclusive contract to be inherently anticompetitive. MTE Order, Para. 27, fn. 73. Massachusetts took a slightly different approach by adopting a rebuttable presumption that such contracts were anticompetitive. Id. These provisions are anticompetitive on their face because they restrict the right of CIMG to provide access to other carriers and seek to establish CTC as the monopoly telecommunications provider in the commercial part of Morrison Plantation. These provisions inhibit ALLTEL's ability to serve customers over its own facilities, which provides more potential benefits to the customer than interconnection.

With respect to Appendix F, Section 2, the Attorney General said that it is unclear how the referral fee provision, standing alone, impacts the market. The FCC's MTE Order withheld judgment on these types of provisions and asked for further public comment on the issue. MTE Order, Paras. 165-168. Referral fees are commonly employed in the telecommunications marketplace; there is nothing inherently repugnant about such arrangements. They do not constitute an attempt to monopolize a market or to deny access to other carriers. However, they are of some concern inasmuch as they may give CIMG an incentive to "tip the competitive playing field" by denying easements to carriers other than CTC or by demanding disproportionately larger payments from carriers other than CTC in return for an easement. While an evidentiary record might be helpful, the Attorney General conceded that, even if the Commission held an evidentiary hearing, it still might not be clear whether the referral fee provision is against public policy.

ALLTEL argued that the Commission could receive evidence on the impact of these types of agreements on the ILEC's ability to provide service, since there are indications that there is a generic problem out there. ALLTEL identified the following provisions as being anticompetitive:

Section 2.2 is plainly anticompetitive because it purports to give CTC the exclusive right to provide a broad range of telecommunications services to "all users" at Morrison Plantation. It also raises universal service concerns because CTC will serve all users, except for those users "which do not meet CTCES's requirements for receiving such services."

Section 3.1 is also plainly anticompetitive because it states that CIMG cannot grant a right-of-way to anyone but CTC. It purports, in essence, to secure a permanent monopoly for CTC at least as to those shopping center and apartment tenants which CTC wants to serve. The attempted saving grace--that CTC will "upon request of a tenant and of another provider of telecommunications services...enter into and maintain an interconnection agreement as required by law"--is misleading, as illustrated by ALLTEL's experience in its provision of service to Harris Teeter. ALLTEL argues that, with respect to interconnection, while CTC does have an obligation to interconnect under the law, it can charge whatever it wants since, as a CLP, CTC is not subject to the requirements of Section 251(c) of the Telecommunications Act. Other options, such as condemnation or access to poles and conduits, are not economically practical.

Appendix F, Section 2 is anticompetitive because it provides a continuing financial incentive for CIMG to exclude ALLTEL and all other CTC competitors from Morrison Plantation. The fee structure established in Sections 2 and 3 of Appendix F enables CIMG to receive additional payments from CTC, whereas an up-front payment would not.

In summary, the Commission should not only invalidate these provisions but should extend its remedial reach to the same or similar provisions entered into by CIMG and CTC anywhere in North Carolina, or between CTC and some other entity. The Commission should also order CTC and all other CLPs and ILECs to cease entering into exclusive telecommunications service provider agreements or those which otherwise provide an incentive for developers or premises owners to refuse access to other telecommunications service providers.

BellSouth stated its belief that CTC had entered into exclusive providers agreements covering at least 30 developments in BellSouth's North Carolina service territory, including Triangle Town Center Mall in Raleigh and Concord Mills Mall and numerous residential subdivisions in the Charlotte area. BellSouth noted that in this docket there did not appear to be a genuine issue of material fact. It found especially objectionable Sections 2.2 and 3.1, and Appendix F, Section 4.2, which provides for CTC to pay CIMG for its exclusive access to customers on the property. The contract restricts customer choice and promotes barriers to facilities-based competition, rendering CTC a de facto monopoly provider in the Morrison Plantation.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

There are two issues that the Commission needs to resolve in this matter. The first issue is procedural and is whether there needs to be an evidentiary hearing to properly resolve the issues in this docket. The second issue is which, if any, of the provisions of the agreement between CTC and CIMG are anticompetitive and should be stricken. As noted in the Order Ruling on Oral Argument, it is well-established in appropriate circumstances that the Commission has the power to invalidate a contract if it is in violation of public policy. Thus, the Commission has the authority to invalidate contract provisions between a utility and a third-party which violate the law or public policy, and the invalidation of the contract provisions with reference to the utility necessarily means that the third party cannot itself effectually enter into such a contract.

The first issue is the easier of the two. Based upon the comments of most of the parties and upon the Commission's own assessment, it appears that an evidentiary hearing is not necessary in order to reach appropriate legal conclusions as to whether certain provisions are or are not anticompetitive. The Commission likewise does not believe that it would be desirable to open a generic hearing on MTEs at this time. The Commission notes that the FCC is continuing its investigation of MTE issues. See, MTE Order, Paras. 165-168. Since the Commission recognized in its Order Ruling on Oral Argument that "it may be appropriate for the Commission to allow the principles of the MTE Order to inform its own analysis of what constitutes anticompetitive activity," this would suggest that the Commission should be cautious in establishing a generic docket which may end up being duplicative or inconsistent.

The second issue is by far the more complex. It breaks down into two major categories. The first relates to those provisions of the agreement which are anticompetitive on their face. The second relates to those provisions of the contract which are not necessarily anticompetitive on their face but are said to be anticompetitive in their effect.

The MTE Order has provided us with some analytical guidance in answering these questions. In the MTE Order, the FCC promulgated 47 CFR 64.2500 as follows: "No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises." The FCC's gloss on this regulation is to be found in Paragraphs 30 and 37. Paragraph 30 stated that "we believe that it is necessary to prohibit both competitive and incumbent telecommunications service providers from entering into exclusive access contracts in commercial settings, in order to ensure the competitive neutrality of the market." In Paragraph 37, the FCC addressed contracts not explicitly denying access by

saying that “we emphasize that contracts between building owners and local carriers that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access, are also prohibited.” (Emphasis added).

Applying these standards to the instant case, the Commission believes that two provisions are anticompetitive on their face. The first is the language in Section 2.2 which states: “CTCES will provide the telecommunications services described in Appendix C to all users (other than Developer and Its Affiliates) located on the Project Property....” This evinces an intent that CTC shall be the exclusive provider to all the tenants of the Morrison Plantation property. The second concern goes to that portion of Section 3.1 which states: “Developer will not grant a right-of-way across the Project Property for use in providing any telecommunications services of the type being provided by CTCES under this Agreement.” This in essence provides that only CTC can have physical access through a permissive right-of-way and, as such, constitutes a provision that is exclusive on its face and should be struck down.

The other contract provisions that were argued to be anticompetitive fall within that category of being not necessarily anticompetitive on their face but being anticompetitive in effect. The provisions that raised the most comment related to “preferred provider” status to CTC (Section 4.1; Appendix E, Section 5) and to the referral fee credits (Appendix F, Section 2). The former were argued to confer unfair advantage on CTC in the marketing of its services to tenants, and the latter were said to give an incentive to CIMG to “tip the playing field” in CTC’s favor. It is the Commission’s view that not every practice that tends to provide an advantage to one party over another is anticompetitive but only those practices that are unreasonable. It does not appear unreasonable to the Commission for CIMG to grant CTC “preferred provider” status which provides it with special entree to tenants. This is so because there are many other means by which an aspiring provider can contact tenants. The provider can call the tenants, or go by their stores, or contact their home offices. In short, there are many ways by which that provider can solicit tenants as potential customers. As to the referral fee credits, these are like commissions. Commissions are very common in the telecommunications world and, as the Attorney General observed, there is nothing inherently repugnant about them. The Commission cannot say that they are necessarily unreasonable in this or other contexts. Accordingly, the Commission concludes that it should not find that the provisions noted above are anticompetitive, at least at this time. However, the Commission notes that the FCC has sought additional comment on the subject of “preferential arrangements.” Should the FCC consider “preferential arrangements” such as the above to be anticompetitive, the Commission could then reconsider its views.

Section 9.1 is not anticompetitive, since it is essentially a term provision and ensures that CTC's easements and license survive the termination of the agreement. Indeed, the five-year term appears reasonable and will enable other carriers at that time to seek their own "preferred provider" status from CIMG.

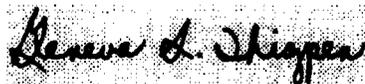
Finally, the Commission notes that the Order Ruling on Oral Argument observed that the Commission "is without power to provide comprehensive relief as to all methods of access to an aggrieved competitor who believes itself shut out of an MTE but can only provide such relief as is within our jurisdiction to provide." This remains true and should be remembered. The Commission cannot force a developer to grant a right-of-way to a competing carrier; it can only remove a contractual impediment preventing the developer from doing so. The Commission does not regulate access to poles and conduits. It cannot condemn property. It generally lacks jurisdiction over non-utilities, and its only way of influencing this contract is through the regulated company. The Commission commends CTC and CIMG to the extent that, instead of attempting to enter into a thorough-going exclusive contract, they at least included an explicit provision in Section 3.1 stating that CTC would, upon request of a tenant or another provider, enter into and maintain an interconnection agreement as required by law. As the Commission noted in the Order Ruling on Oral Argument, CLPs are obliged under Section 251(a)(1) of the Telecommunications Act to interconnect with other carriers. The Commission also has the authority under G.S. 62-110(f1) to adopt rules it finds necessary to provide for the reasonable interconnection of facilities. It would therefore behoove a preferred provider CLP in an MTE setting to enter into a reasonable interconnection agreement with another carrier if requested to do so. Its obligation to do so is not contingent upon the existence of a contract term "authorizing" it, but exists at law.

IT IS, THEREFORE, ORDERED that the above-identified portions of Sections 2.2 and 3.1 be, and the same are hereby, found to be anticompetitive and shall be stricken from the contract between CTC and CIMG.

ISSUED BY ORDER OF THE COMMISSION.

This the 15th day of August, 2002.

NORTH CAROLINA UTILITIES COMMISSION



Geneva S. Thigpen, Chief Clerk

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