BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

February 19, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Contested Cost Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements*
Docket No. 97-01262

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to MCI WorldCom's Petition for Reconsideration. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

152345

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Contested Cost Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements***

Docket No. 97-01262

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO MCI WORLDCOM'S PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully responds to the Petition for Reconsideration filed by MCI Telecommunications Corporation and WorldCom Technologies, Inc. (collectively "MCI WorldCom"). Although MCI WorldCom contends that the Supreme Court's recent decision in *AT&T Corp. v. Iowa Utilities Board,* __ U.S. __, 1999 WL 24568 (Jan. 25, 1999), affects "several issues relevant to this docket," the only specific issue it identifies concerns Integrated Digital Loop Carrier ("IDLC") technology. While the Supreme Court's decision may represent "a significant change in the law," it does not authorize the Tennessee Regulatory Authority ("Authority") to "now directly require BellSouth to provide IDLC to competiting carriers," as MCI WorldCom claims. This claim is based upon a selective reading of the Supreme Court's opinion.[1]

[1] It is undisputed that "... IDLC involves the integration of the loop into the switch," Interim Order at 22, and results in a loop and switch port being combined together. The cost model advocated by MCI WorldCom assumed all loops would be provided via IDLC, even though it is impossible for BellSouth to deliver an unbundled loop using this technology. (2/26/98 Tr., Carter at 293). However, it is not accurate to say that BellSouth "will not offer IDLC" to requesting carriers. Interim Order at 23. As BellSouth witness Gray explained, a requesting carrier with its own switch and enough demand to fill a digital lop carrier could request that BellSouth integrate the system directly into the requesting carrier's switch; however no carrier has made such a request. (11/20/97 Tr., Gray at 266 & 354). This issue is a subject of BellSouth's Motion for Reconsideration and Clarification.

Although MCI WorldCom does not say so, its views concerning IDLC apparently are based upon the Supreme Court's decision to reverse the Eighth Circuit and reinstate the FCC rule prohibiting incumbents from separating network elements that are already combined in the network before leasing them to competitors (Rule 51.315(b)). However, that is not all the Court did. First, the Court did not disturb the Eighth Circuit's invalidation of the rules that purported to require an incumbent to combine elements that are not currently combined in the incumbent's network on behalf of a Competing Local Exchange Carrier ("CLEC") Those FCC rules (Rules 51.315(c) - (f)) remain vacated. Accordingly, any demands that BellSouth be required to provide combinations of network elements that are not currently combined in BellSouth's network must be rejected as contrary to the terms of the Telecommunications Act of 1996 ("1996 Act").

Second, the Court also vacated the FCC's rule (Rule 51.319) dictating which facilities qualify as network elements that must be unbundled under Section 251(d)(2) of the 1996 Act. In so doing, the Court held that the FCC promulgated its unbundling rules in violation of the 1996 Act's directive to consider whether access to network elements in question is "necessary," and whether failure to provide such access would "impair" the ability of a CLEC to provide telecommunications services. According to the Court, in interpreting those statutory terms to define unbundled network elements, "the FCC cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." The Court also explicitly rejected the argument that "... *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element 'necessary' and causes the failure to provide the element to 'impair' the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms." The FCC must now conduct further proceedings to determine which network facilities must be provided to CLECs as unbundled network elements consistent with the Court's instructions.

The significance of the Court's decision to vacate Rule 51.319 cannot be understated. Although BellSouth has committed to make available each of the *individual, uncombined* network elements defined in the now-vacated FCC rules as well as in existing interconnection agreements during the pendency of the FCC proceedings on remand, BellSouth cannot be required to provide pre-existing combinations of network elements until after the FCC determines which network elements meet the Supreme Court's necessary and impair standard – and therefore must be made available on a combined basis. In the absence of the FCC's mandated determination, any requirement to provide pre-existing combinations, as would be inherent in requiring "BellSouth to provide IDLC to competing carriers" as urged by MCI WorldCom, would contravene the Supreme Court's decision.

Furthermore, MCI WorldCom's Petition ignores the Supreme Court's obvious expectation that the restrictions Congress imposed on the proper scope of unbundled network elements would limit the availability of combinations. According to the Court:

> We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

In explaining the need for the FCC's remand proceeding, the Court also stated:

> Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding *any* "increased cost or decreased service quality" as establishing a "necessity" and "impair[ment]" of the ability to "provide...services."

In reacting to concerns by the incumbents that the reinstatement of Rule 51.315(b) would circumvent the resale provisions of the 1996 Act, the Court noted that "[a]s was the case for the

all-elements rule, our remand of Rule 319 [*i.e.*, requiring application of the *necessary* and *impair* standards] may render the incumbents' concern on this score academic." MCI WorldCom's demand for immediate access to combinations cannot be reconciled with the Court's approach.

MCI WorldCom's demand for immediate access to IDLC also ignores that incumbents cannot be required to provide a combination of a loop and a switch port, if either of these elements do not survive the FCC's remand proceeding. For example, CLECs operating in Tennessee, including MCI WorldCom, have a number of switches in Tennessee that can be used to provide service to business and residential customers throughout BellSouth's serving territory. If customers are in range of a CLEC switch that is capable of providing local dial tone, the FCC may conclude that it is not "necessary" to obtain that element from BellSouth and the absence of that functionality cannot significantly impair the CLEC's ability to provide competitive service. Because switching is virtually ubiquitously available in BellSouth territory, switching may not constitute a network element that incumbents will be required to provide on an unbundled basis, let alone on a combined basis via IDLC.

Indeed, even CLECs have acknowledged the possibility that switching may not be on the list of unbundled network elements ultimately adopted by the FCC. *See* Letter from John Windhausen, President, Association for Local Telecommunications Services to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission (recommending that, in determining which elements satisfy the "necessary" and "impair" standards, the FCC should consider evidence "relating to UNE purchases by new entrants," which reflects that "few have provisioned their own local loops, while hundreds of switches have been deployed") (copy attached). For example, Daniel Gonzales, Directory-Regulatory Affairs for NEXTLINK Communications, Inc., was recently quoted as saying that it was not "necessarily a slam-dunk" that the FCC would reinstate its specific list of unbundled network

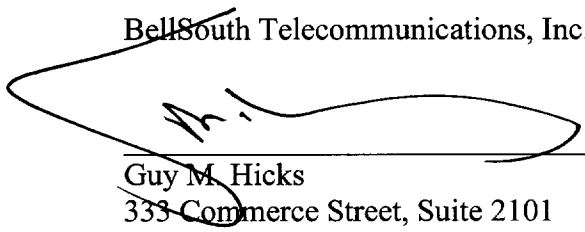
elements set forth in Rule 51.319. "ILECs Worry Court Ruling Could Lead To Wide FCC Preemption," *Telecommunications Reports*, at 9 (Feb. 10, 1999). According to Mr. Gonzales, because competition has developed significantly since the FCC originally developed its list in 1996, a "legitimate question to ask" is whether switching should be listed as an unbundled network element. *Id.*[2]

In short, BellSouth cannot be ordered to provide a combination of network elements that have yet to be identified. Prior to the completion of the FCC remand proceeding, any requirement that BellSouth provide a particular combination such as a combined loop and port – which, as the Supreme Court explicitly acknowledged, depends on these components being properly classified as unbundled network elements under the 1996 Act – would be unlawful. Accordingly, MCI WorldCom's Petition for Reconsideration and its demand for immediate access to IDLC should be denied.

[2] The same is true for transport and operator services. A large percentage of BellSouth's access lines are served from wire centers that are either served by or are nearby the fiber transport facilities of CLECs, competitive access providers, or interexchange carriers such as MCI WorldCom. These facilities are just as suitable for the interoffice transport of calls as BellSouth's own facilities are. Likewise, operator services are available nationwide from a variety of providers – some of whom already provide services to CLECs. The FCC may very well conclude that these constituent parts also are not necessary and their absence would not impair a CLEC from providing local exchange service in Tennessee.

Respectfully submitted,

BellSouth Telecommunications, Inc.



Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
Bennett L. Ross
675 W. Peachtree St., NE., Suite 4300
Atlanta, GA 30375

151804

ALTS

Association for Local Telecommunications Services

February 10, 1999

Mr. Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
Washington, DC 20554

Re: **REQUEST FOR IMMEDIATE ACTION** - To Remove Regulatory Uncertainty in light of the Supreme Court's Decision in AT&T v. Iowa Utilities Board

Dear Mr. Strickling:

The Association for Local Telecommunications Services ("ALTS") has learned that several incumbent local exchange carriers ("ILECs") are using the recent Supreme Court decision in AT&T Corp. v. Iowa Utilities Board[1] to forestall local telephone competition. While we are heartened that Chairman Kennard has obtained agreements from the major ILECs to comply with their signed agreements, some ILECs have claimed that they are now under no legal obligation to provide unbundled network elements to new entrants, or are refusing to negotiate new agreements, refusing to allow competitive local exchange carriers ("CLECs") to add additional UNEs to their current contracts, or refusing to allow new entrants to "opt" into agreements that are more than one year old. Nothing in the Supreme Court decision warrants such positions and they clearly undermine the ability of CLECs to provide and expand their services and the ability of consumers to have the choices that Congress clearly intended them to have.

For these reasons ALTS urges the Commission to act as expeditiously as possible to remove the regulatory uncertainty arising from the Supreme Court decision. The Commission should take two actions immediately. First, it should issue a public notice no later than February 12th, stating that it expects the ILECs to comply with all federal and state statutory and regulatory requirements, their signed contracts and tariffs, and negotiate in good faith with respect to any new or renewal request. In addition, the Commission should reaffirm its initial conclusion that ILECs must allow new entrants to opt into any existing agreements, or portions thereof, unless the ILEC can demonstrate that technical requirements or network configurations have changed. See Local Competition Order at para. 1319. Finally, the Commission should declare unequivocally that it will not tolerate efforts by the ILECs to use the Supreme Court decision to

[1] No. 97-826 (decided Jan. 25, 1999).

888 17th Street, NW • Suite 900 • Washington, DC 20006 • 202.969.ALTS • Fax: 202.

undermine progress in promoting local competition and that it will take all actions necessary to ensure that competitors and their customers continue to obtain all network elements necessary to provide or obtain any local exchange service, including broadband services.

Second, the Commission should initiate and complete a proceeding as quickly as possible to issue a new rule concerning the list of unbundled network elements that the ILECs must provide. The Commission should set forth a short comment period with the goal of issuing a final decision in three months.

In initiating this rulemaking the Commission should be guided by the following principles. First, the Commission should take into account the purposes and structure of the Act. The primary purpose of the Act is the promotion of competition in the local telecommunications services markets throughout the nation on an accelerated basis.[2] And Congress clearly intended that new entrants would have several options for entering local markets, including the use of UNEs. In promulgating a rule to govern the availability of network elements, the Commission should avoid interpretations of the "necessary" and "impair" standards that are so limiting as to preclude opportunities for meaningful competitive entry. This principle mandates that the burden of proof that a UNE not be made available pursuant to the "necessary" or "impair" standards should be on the ILECs seeking to deny access to any UNEs.

The Commission should also consider the evidence produced in the three years since the passage of the Telecommunications Act of 1996 relating to UNE purchases by new entrants as strong evidence of what elements would pass the "necessary" and "impair" tests. While ALTS has not made a thorough review of the UNEs that its members have ordered, it is clear that few have provisioned their own local loops, while hundreds of switches have been deployed. Evidence of this type should be probative of the needs of the new entrants.

Third, the determination of what UNEs must be made available should not require CLECs to make market-specific analyses. Case-by-case determinations would be prohibitively costly and time-consuming for new carriers and for state commissions and would result in delay of competitive choices for consumers. The imperative to avoid delay is one of the reasons that the FCC sought to establish national standards in the first place. The Supreme Court's vacation of Rule 51.319 does not undercut the rationale supporting national rules. In addition, the presence or absence of alternatives to UNEs should not, in general, vary significantly from location to location or from carrier to carrier.[3]

---

2 H. Conf. Rep. No. 104-458 at 1 (1996), S. Rpt. No. 104-23 at 16-17 (1995).

3 ALTS recognizes that as facilities-based competition grows and alternatives to use of ILEC facilities increase, the number of UNEs to which the ILEC must provide access will probably decrease. Therefore, it may be that initially, the Commission should adopt a nationwide rule for a number of elements, but as competition develops it

Fourth, the Commission, to the extent possible, should craft a test for "necessary' and "impair" that can be used on a going forward basis. Future technological changes and the continued deployment of new facilities by CLECs will in all likelihood mean that fewer ILEC elements will need to be made available under Section 251 in the future. Nonetheless, it is also clear that advances in technology may result in some additional elements becoming necessary for the provision of competitive services in the future. Along these same lines, the Commission should not limit its proceeding mandated by the Supreme Court ruling to those elements specifically mentioned in the vacated rule. There are a number of additional UNEs that have been requested by new entrants since the initial adoption of Section 51.319. To the extent that the Commission has not ruled on those requests, they should be considered in the new proceeding.[4]

ALTS stands ready to help the Commission in any way it can to further the process of expeditiously complying with the Supreme Court directives.

Very truly yours,

John Windhausen, Jr.

John Windhausen, Jr.
President

cc: Chairman Kennard
Commissioner Ness
Commissioner Powell
Commissioner Tristani
Commissioner Furchtgott-Roth
Secretary Salas

---

should consider altering its nationwide rules on periodic bases, or develop another procedure to accommodate the evolution of facilities-based competition.

[4] For example, the Commission has pending a petition for reconsideration of its initial Report and Order in CC Dkt 96-98 that seeks to have ILEC-owned inside wire declared to be a UNE that must be provided to new entrants pursuant to Section 251. In addition in CC Dkt 98-147, ALTS and other commenters have identified additional UNEs, including extended links, that are necessary to the provision of broadband services.

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 1999, a copy of the foregoing document was served on the parties of record via facsimile, overnight, or US Mail, postage prepaid:

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
Nashville, TN 39219-8062

Dana Shaffer, Esquire
NEXTLINK
105 Malloy Street, #300
Nashville, TN 37201

Erick Soriano
Kelley, Drye & Warren
1200 19th St., NW, #500
Washington, DC 20036

Carolyn Tatum-Roddy, Esquire
Sprint Communications Co., LP
3100 Cumberland Circle
Atlanta, GA 30339

Jon Hastings, Esquire
Boult, Cummings, et al.
414 Union St., #1600
Nashville, TN 37219

Val Sanford, Esquire
Gullett, Sanford, Robinson & Martin
230 Fourth Ave., N., 3d Fl.
Nashville, TN 37219-8888

Vincent Williams, Esquire
Office of the Attorney General
Consumer Advocate Division
426 Fifth Ave., N., 2nd Fl.
Nashville, TN 37243-0500

Don Baltimore, Esquire
Farrar & Bates
211 Seventh Ave., N., #320
Nashville, TN 37219-1823

Charles B. Welch, Esquire
Farris, Mathews, et al.
511 Union St., #2400
Nashville, TN 37219

Kenneth Bryant, Esquire
Trabue, Sturdivant & DeWitt
511 Union St., #2500
Nashville, TN 37219-1738

James Wright, Esquire
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

William C. Carriger, Esquire
Strang, Fletcher, et al.
One Union Square, #400
Chattanooga, TN 37402

James P. Lamoureux
AT&T
1200 Peachtree St., NE, #4068
Atlanta, GA 30367