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REC'D TN REGULATORY AUTH. '99 FEB 29 AM 11 14 OFFICE OF THE EXECUTIVE SECRETARY

March 1, 1999

VIA HAND DELIVERY

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

Re: *Petition to Convene a Contested Case Proceeding to Establish "Permanent Prices" 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 Reply Memorandum in Support of Petition for Reconsideration and Clarification. It has come to our attention that, due to an inadvertent copier malfunction, the documents provided on Friday did not include pages 10 and 19. Corrected copies are also being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

REC'D TN REGULATORY AUTH. '99 MAR 1 PM 3 14 OFFICE OF THE EXECUTIVE SECRETARY

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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 REPLY MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this reply memorandum in support of its petition that the Tennessee Regulatory Authority ("Authority") reconsider and clarify certain aspects of the Authority's January 25, 1999 Interim Order ("Interim Order"). Although opposed by AT&T Communications of the South Central States, Inc. ("AT&T"), MCI Telecommunications Corporation and WorldCom Technologies, Inc. ("MCI WorldCom"), the Consumer Advocate Division ("CAD"), and e.spire Communications, Inc. ("e.spire"), BellSouth's petition establishes legal and factual errors in the Authority's Interim Order that require reconsideration or, at the very least, clarification.

II. DISCUSSION

A. Fill Factors and Utilization Factors

AT&T attempts to bolster the Authority's decision to adopt Dr. Kahn's recommended fill factors by claiming that they are supported "by detailed analysis and supporting evidence" from AT&T and MCI's witnesses. AT&T Response at 7. However, the Authority did not adopt such "analysis and supporting evidence," nor is it mentioned anywhere in the Authority's Interim Order. Furthermore, AT&T's claim that its proposed fill factors "did not represent fill at relief or eliminate spare capacity" cannot be squared with the facts. *See* Order No. PSC-98-0604-FOF-TP, *In re: Petition by Metropolitan Fiber Systems of Florida, Inc. for Arbitration with BellSouth Telecommunications, Inc., et al.,* Docket No. 960757-TP (Fla. Pub. Serv. Comm'n April 29, 1998) ("We cannot agree with AT&T/MCI's contention that all spare capacity for future growth should be excluded from the calculation of fill factors"). That AT&T's proposed fill factors were "higher" than those proposed by Dr. Kahn does not make Dr. Kahn's proposals reasonable or correct.

BellSouth does not dispute that Dr. Kahn explained how he developed his proposed fill factors. e.spire response at 2. However, this explanation basically involved Dr. Kahn calculating utilization of a loop by averaging initial utilization and projected end-of-life utilization – an approach that makes little sense when the network is comprised of many loops at varying stages of utilization. (11/18/97 Tr., Caldwell at 60-71). Furthermore, Dr. Kahn's proposed fill factors are premised upon his opinion that in a competitive marketplace "higher utilization rates should be expected." (2/23/98 Tr., Kahn at 278-51). Dr. Kahn offered no studies or any empirical evidence to support this opinion. *See, e.g., Parker v. South Carolina Public Service Comm'n*, 281 S.C. 215, 314 S.E.2d 597, 599 (1984) (opinion testimony was of "no probative value in view of the fact that there is no evidentiary showing of the facts upon which the opinion is predicated"). Nor is the correctness of Dr. Kahn's opinion self evident since in a competitive marketplace occupied by numerous facilities-based carriers, BellSouth's utilization rates may not increase at all. (11/20/97 Tr., Gray at 258-10).

In order to give meaning to the FCC's direction that fill and utilization factors should be based on "a reasonable projection of *actual total usage,*" there must be some evidence that the fill and utilization factors adopted by the Authority have been "actually" achieved by some provider operating in a competitive marketplace somewhere. There is no such evidence in this record.[1]

B. Depreciation

AT&T, MCI, e.spire, and the CAD continue to contend that depreciation lives prescribed for BellSouth in 1993 should be used in the cost models, even though these lives were established in a different time and under a different regulatory scheme. This contention obscures the fact that BellSouth was the only party to this proceeding to present *any* analysis or study to demonstrate appropriate asset lives. The Intervenors simply relied upon the lives prescribed years earlier in 1993, without regard to whether these lives are still appropriate, particularly in a "forward-looking" cost study.

As MCI correctly points out, companies operating in competitive markets are not assured the recovery of capital that is "enjoyed by a company operating pursuant to rate of return regulation." MCI Response at 4. However, MCI conveniently ignores that BellSouth's 1993 prescribed lives were established in a rate of return environment in which such recovery was assured, but lives were set artificially long to make annual recovery smaller. (2/23/98 Tr., Cunningham at 312-3). The marketplace today is not likely to allow recovery of investment

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[1] e.spire claims that Dr. Kahn's proposed fill factors are reasonable because they eliminate alleged "excess capacity" attributable to "high-speed data and video services," which, according to Dr. Kahn, should not be considered in calculating the cost of unbundled network elements. e.spire response at 2 (quoting Dr. Kahn's prefiled direct testimony at 46 & 52). However, in its recent petition for arbitration, e.spire is seeking access to the very facilities used to provide these services. *See In re: Petition by e.spire Communications Inc., and American Communication Services of Nashville, Inc., for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket 98-00834, at 8 (seeking access to DS-3, OC3, OC12, and OC48 unbundled loops "at pre-established TELRIC-based rates where present in its own network"). So, while e.spire is seeking in another proceeding access to the capacity in BellSouth's network necessary to provide high-speed data services, its witness in this proceeding is proposing fill rates that would prevent BellSouth from recovering the costs of such capacity.

based on lives that are inappropriately long. Today's competitive environment and rapid changes in technology produce asset lives significantly shorter than those prescribed in the old regulatory pradigm in 1993. Appropriate economic lives place BellSouth on more equitable grounds with its competitors (such as MCI), that is, with the opportunity to recover investment based on competitive market conditions rather than regulatory prescriptions.

In attempting to justify the use of 1993 prescribed lives in "forward-looking" cost studies, AT&T compares the FCC-prescribed depreciation rates for embedded investment to the rate at which BellSouth has been retiring its embedded investment. There are two specific problems with this approach. First, the forward-looking cost methodology the Authority has embraced looks at assets newly placed in service, not BellSouth's embedded investment. Second, it makes no economic, financial, or logical sense to look to the past to find forward-looking economic lives for assets that are sensitive to rapid changes in technology. The impact on economic lives of today's rapid changes in technology cannot be determined by simply looking in the rearview mirror, as AT&T attempts to do.

Both AT&T and the CAD fault BellSouth for not providing the supporting material for its asset lives to the Authority for review before this proceeding. AT&T Response at 9; CAD Response at 7-8. However, there was no requirement that BellSouth do so. Furthermore, BellSouth's Depreciation Studies were filed in October 1997, a full month before these hearings were held, and more than a year before the Interim Order was issued. The Authority had ample time to review and consider these studies.

Although AT&T continues to cling to the myth that BellSouth's lives are inappropriate due to "GAAP conservatism" and that BellSouth attempts "to err on the side of shorter lives" to avoid overstatement of asset value to stockholders, AT&T Response at 9, Mr. Cunningham's testimony clearly debunked this myth. Mr. Cunningham explained in detail how BellSouth's lives are determined, that is, by an analysis of Company plans, mortality data, and technological substitution, and BellSouth's Depreciation Studies detail this information. No perceived "conservatism" impacts this analysis. (2/23/98 Cunningham, Tr. at 312-3 – 15). Likewise, AT&T's argument that shorter lives for unbundled network elements would "recover capital investment costs sooner than the elements' remaining revenue producing lives justify" ignores that the issue here is not the *remaining lives of embedded investment*. Rather, these cost studies use economic lives of *assets newly placed in service*.

There can be no serious question that depreciation lives prescribed in 1993 bear little resemblance to the economic lives of assets placed in service today or that will be placed in the future. The FCC made this point clear in its Notice of Proposed Rulemaking, *In re: 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers,* CC Docket 98-137 (Oct. 14, 1998). In a fully competitive marketplace, which the forward-looking cost methodology adopted by the Authority is supposed to emulate, both incumbent local exchange carriers "and their competitors should charge prices that are at or near their costs, including depreciation, in order to attract customers and maximize their profits. In such a market, a carrier's ability to raise its depreciation rates would be constrained by its need to compete against other carriers, rather than by government regulatory constraints." *Id.* at ¶ 7. Here, by adopting 1993 prescribed lives, the Authority has disregarded BellSouth's actual depreciation costs in favor of those established "by government regulatory constraints."

The CAD's reliance upon the FCC's Notice of Proposed Rulemaking in an attempt to bolster the use of 1993 prescribed lives is misguided. Although, as the CAD correctly notes, the 17-year life prescribed by the FCC for Tennessee in 1993 is still within the FCC range for digital switching, that does not make it appropriate for use in a forward-looking cost study. As Mr. Cunningham testified, even the FCC would calculate a shorter life for Tennessee digital switching (14.5 years at that time) using its own life span methodology, which raises the obvious question why the Authority should use a 17-year life for this account. (11/24/97 Tr, Cunningham at 44). Furthermore, the CAD simply cannot dispute that the FCC's Notice of Proposed Rulemaking only underscores the inappropriateness of adopting lives prescribed years ago pursuant to practices that are currently being reevaluated.[2]

The CAD states that "[p]roper depreciation rates are those that allow an enterprise to recover its cost of the assets while they are [in] use. Thus, rates are to be designed to match the cost recovery period with the actual use of the asset." CAD Response at 4. The lives proposed by BellSouth are used to develop depreciation rates that do just that. These rates represent a systematic and rational allocation of the cost of assets over their economic life. The same cannot be said for depreciation lives prescribed in 1993.

C. Network Maintenance Expense

The attempts by AT&T and MCI to salvage the Authority's treatment of BellSouth's plant specific expense are unpersuasive. No party disputes that AT&T witness Lerma did not testify that "plant specific expense will decline by 7% each year for five (5) years, resulting in a proposed 50% reduction in 1996 plant specific expense," as the Authority found. Although MCI

[2] AT&T objects to the Authority considering the FCC's Notice of Proposed Rulemaking, claiming that it "is not sufficient to compel the TRA to re-open the record in this case." AT&T Response at 10. However, nothing prevents the Authority from considering an agency order without re-opening anything. Furthermore, Mr. Cunningham testified that the FCC had stated on several occasions its intent to initiate a separate proceeding to undertake a comprehensive review of its depreciation rules, and the FCC's Notice of Proposed Rulemaking simply confirms Mr. Cunningham's testimony on this point.

claims that the Authority's findings are supported by "the totality of the evidence presented," MCI Response at 5, the Interim Order makes no mention of any other "evidence."

Indeed, even AT&T acknowledges that it did not recommend that plant specific expenses be reduced by 50%, correctly pointing out that its recommendation for a 50% expense reduction related to *Network Operations Expense* (Account Nos. 6512, 6531, 6532, 6533, 6534, and 6535). AT&T Response at 11 (citing prefiled Rebuttal Testimony of Art Lerma). Although AT&T suggests that the Authority "apparently found that the same expectation would be true for the other plant specific expenses," AT&T Response at 12, it is difficult to see how that could be true, given that Mr. Lerma had no such "expectation." Mr. Lerma's recommendations drew a clear distinction between Network Operations Expense and plant specific expense, notwithstanding MCI's claim that no such distinction exists. MCI Response at 5-6. While recommending a 50% reduction in Network Operations Expense, Mr. Lerma did not make a similar recommendation for plant specific expense. As Mr. Lerma explained:

> Q: Have you adjusted the calculation of the plant specific factor?
>
> A: Yes, I adjusted the BST calculation of the 1997-99 amounts to remove the inflation/growth factors, as shown on Attachment ALR-6. Although these accounts will experience negative growth, I did not have sufficient data to estimate the amount of that negative growth. Therefore, to be conservative, the adjustments that I propose merely remove BST's inflation factors.

(2/27/98 Tr., Lerma at 158-41). Because Mr. Lerma "did not have sufficient data" to estimate any specific reduction in plant specific expense, neither Mr. Lerma's testimony nor any other evidence in the record supports extrapolating a proposed 50% reduction in Network Operations Expense accounts to the plant specific expense category, as AT&T now proposes.[3]

D. Switching Issues

While both AT&T and MCI support the Authority's decision to require that the Switching Cost Information System ("SCIS") be run in the marginal mode, they seriously misconstrue the record evidence in the process. Although accusing BellSouth of demonstrating "a fundamental misunderstanding of the term 'marginal' as it describes the mode of running SCIS," AT&T Response at 12, AT&T conveniently overlooks Mr. Garfield's clear and unequivocal testimony that the marginal mode of SCIS is "designed to determine the cost of the next unit of demand for different types of demand." (11/20/97 Tr., Garfield at 108-109). Mr. Garfield's testimony is unrefuted in this record and belies AT&T's assertion that the marginal mode does not identify "only the cost of the incremental unit of demand." AT&T Response at 13.

Mr. Garfield's testimony also repudiates MCI's claim that "selecting the 'marginal' mode when running SCIS does not produce 'marginal' costs, as economists use the term." MCI Response at 6-7. According to Mr. Garfield, the marginal mode of SCIS determines "the cost of the next unit of demand." As Dr. Kahn testified, the cost involved in serving the next unit of

[3] Although e.spire contends without explanation that the Authority's treatment of plant specific expense is "supported by Dr. Kahn's testimony," e.spire response at 3, Dr. Kahn did not propose a 50% reduction in plant specific expense. Rather, Dr. Kahn proposed "a 10 percent adjustment to capture the impact of technological advance," a proposal for which he offered absolutely no support. (11/18/97 Tr., Caldwell at 60-73). He also recommended a 12.5% productivity offset adjustment, even though the plant specific expense factors used by BellSouth included network operations productivity offsets of –2.9% annually as well as reductions related to downsizing, which also are reflections of productivity gains. (11/18/97 Tr., Caldwell at 60-74). Thus, the plant specific expense adjustments proposed by Dr. Kahn are completely arbitrary, which the Authority apparently recognized in declining to adopt them.

demand is "marginal cost." (2/23/98 Tr., Dr. Kahn at 309). So at least as far as one economist uses the term, running SCIS is the marginal mode does in fact produce "marginal costs."

Neither AT&T nor MCI disputes that the vendor discounts proposed by Ms. Petzinger and adopted by the Authority only reflect the initial placement of a switch and do not take into account any costs associated with growth of the switch. (2/27/98 Tr., Petzinger at 121-125). Nor do AT&T and MCI dispute that these vendor discounts are inapplicable if the costs of growing a switch are taken into account in assessing the economic cost of switching.

Instead, ignoring the testimony of its own expert, AT&T argues that the Authority should disregard the costs associated with growing a switch – costs that BellSouth will undisputedly incur on a going-forward basis – because, according to AT&T, "[t]he proper TELRIC approach is to assume the purchase, on a forward looking basis, of switches to serve current demand." AT&T Response at 14. AT&T makes no attempt to reconcile this argument with Dr. Beard's testimony that it is not appropriate under TELRIC to consider only the cost of the initial switch placement. (2/25/98 Tr., Dr. Beard at 52-53). Because growth costs must be taken into account, the Authority cannot properly adopt vendor discounts that disregard such costs.[4]

AT&T incorrectly argues that "there are no additional costs to be added for vertical features, precisely because the cost studies already capture all costs associated with such vertical features." AT&T Response at 15. First, AT&T does not and cannot point to any evidence in the record which establishes that the costs associated with vertical features, such as right to use fees

[4] AT&T's claim that BellSouth's switch discounts "focus only on growth only costs" is simply untrue. AT&T Response at 14. As Ms. Petzinger acknowledged on cross-examination, BellSouth used a weighted average to reflect the costs associated with both the initial placement and growth of its switches. (2/27/98 Tr., Petzinger at 123-124). This approach is completely consistent with the TELRIC methodology advocated by AT&T's economist, which cannot be said for the discounts proposed by Ms. Petzinger and adopted by the Authority.

and special equipment, were included in BellSouth's studies used to calculate the cost of the port. BellSouth's cost studies calculated separately the costs associated with the basic switch port as compared with those associated with vertical features.

Second, AT&T does not and cannot point to any evidence in the record which establishes that the costs associated with vertical features, such as right to use fees and special equipment, were included in the Hatfield Model's calculation of the cost of the port. AT&T simply claims that these costs were purportedly "included in BellSouth's contracts." However, these were the same contracts from which Ms. Petzinger derived her proposed discounts and which only reflect the costs associated with the initial placement of a switch. (2/27/98 Tr., Petzinger at 145). There is no dispute that the Hatfield Model completely ignores all the costs of vertical features associated with the growth of a switch. Ignoring such costs is consistent with AT&T's view that growth is irrelevant under TELRIC, but inconsistent with the views of AT&T's own economist.

BellSouth does not object to including vertical feature costs in the cost of a switch line port, as MCI suggests. MCI Response at 7. BellSouth does object to establishing a cost for a switch line port that does not reflect all the costs associated with vertical features – costs that BellSouth will incur on a going-forward basis and that, as Ms. Petzinger acknowledged, should be included in any cost study. (2/27/98 Tr., Petzinger at 146).

E. <u>Physical Collocation</u>

While seeking to defend the Authority's decision to adopt the AT&T and MCI Collocation Model, none of the Intervenors makes any attempt to reconcile that decision with the Authority's view that rates should "be determined by the actual cost of providing service to a new entrant, using the network that the incumbent actually owns." Brief of Tennessee Regulatory Authority, *BellSouth Telecommunications, Inc. v. Tennessee Regulatory Authority,* Nos. 3-97-0523 & 3-97-0616, at 19. The AT&T and MCI Collocation Model makes no attempt to determine BellSouth's actual cost of providing collocation – a point neither AT&T nor MCI disputes. MCI Response at 8 (that the AT&T and MCI Collocation Model "is based upon a 'hypothetical space that does not reflect the specific space, design, or layout of any BellSouth central office in Tennessee' is irrelevant …").[5]

The FCC's pricing rules do not compel a different result. AT&T Response at 19-20. First, notwithstanding AT&T's claims to the contrary, the FCC's pricing rules are not currently in effect. Although the Supreme Court reversed the Eighth Circuit's ruling that the FCC lacked jurisdiction to adopt its rules, *AT&T Corp. v. Iowa Utilities Board,* __ U.S. __, 1999 WL 24568 (Jan. 25, 1999), the Eighth Circuit must issue a mandate reinstating those rules. On February 17, 1999, a number of local exchange carriers filed a motion with the Eighth Circuit requesting that the appellate court withhold issuance of the mandate pending a decision on merits of the FCC's rules (copy attached). Because the Eighth Circuit did not reach the merits of the rules in its original decision, *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 800, 803, 806 n.26 (8th Cir. 1997), and the Supreme Court acknowledged that the merits of these rules were not before it, *see, e.g.*, 1999 WL 24568, at *4, n.3, the substantive challenges to the FCC's rules still must be resolved.

[5] While claiming that the Florida Commission "used" the AT&T and MCI Collocation model to set some collocation rates, AT&T Response at 18, n.5, AT&T fails to mention that the Florida Commission certainly did not adopt the model, and in fact expressly rejected some of the assumptions upon which the model is based. *See* Order No. PSC-98-0604-FOF-TP, *In re: Petition by Metropolitan Fiber Systems of Florida, Inc. for Arbitration with BellSouth Telecommunications, Inc., et al.,* Docket No. 960757-TP, at 123 (Fla. Pub. Serv. Comm'n April 29, 1998) (approving an "individual case basis" charge for space preparation because "while we agree that a forward-looking approach is appropriate, we do not agree with AT&T/MCI's 'new CO' approach, because BellSouth will not be constructing a new CO to house collocators").

Second, even if the Eighth Circuit issued its mandate reinstating the FCC's pricing rules, the FCC has indicated that it intends to revisit those rules. For example, the FCC is considering extending the time within which geographic deaveraging must be implemented, even though the FCC rules currently do not contain such an extension. *See* "Kennard Says FCC Plans Deaveraging But Will Give States Time," *Communications Daily* (Feb. 24, 1999) (copy attached). According to Chairman Kennard, the FCC intends to issue "interim guidance to the industry," and he urged that "people will take a deep breath and wait." Schiesel, "High Court Says Local Phone Giants Don't Have To Sell Access," *The New York Times* (Jan. 26, 1999) (copy attached). Under the circumstances, the Authority should decline AT&T's invitation to apply rules that are not yet in effect and which the FCC has indicated it may revise.

F. Operational Support System Costs

Although the Intervenors urge that the Authority reaffirm its decision that OSS costs should be recovered from all carriers, they provide no law or evidence to support that decision. While e.spire points to Dr. Kahn's testimony concerning nonrecurring rates (ACSI Response at 3), this testimony makes no mention of OSS costs. Likewise, while AT&T relies upon Mr. Ellison's recommendation that the Authority should reject BellSouth proposed method of recovering OSS costs, nothing in Mr. Ellison's testimony supports the Authority's finding that "all carriers' customers" benefit from the electronic interfaces developed solely for use by CLECs.[6]

[6] Mr. Ellison referred to a recommended decision by an administrative law judge in New York which found a "fair case" for spreading OSS development costs over the entire industry, incumbent carriers included. (2/26/98 Tr., Ellison at 154-134). However, the administrative law judge did not decide that issue, nor has the New York Public Service Commission. *See Joint Complaint of AT&T Communications of New York, Inc., et al.*, Case No. 95-C-0657, 1997 N.Y. PUC LEXIS 709, *45 (N.Y. Pub. Serv. Comm'n Dec. 22, 1997) ("Our decision to disallow cost

None of the Intervenors makes any attempt to justify treating OSS costs differently from other unbundled network elements, the costs of which admittedly are not borne by BellSouth's retail customers. Nor do any of the Intervenors make any attempt to square the Authority's decision to require that OSS costs be shared by both BellSouth's customers and CLEC customers with the pricing standards in Section 252(d)(1).

The pricing standards for unbundled network elements in Section 252(d)(1), which ostensibly include OSS, stand in stark contrast to the pricing standards for number portability set forth in Section 251(e)(2). Section 251(e)(2) requires that the cost of number portability "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." 47 U.S.C. § 251(e)(2). The FCC has interpreted this language to mean "that the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace." First Report and Order, CC Docket No. 95-116 ¶ 131 (July 2, 1996). However, as the FCC noted:

> *Ordinarily the Commission follows cost causation principles, under which the purchaser of a service would be required to pay at least the incremental cost incurred in providing that service. With respect to number portability, Congress has directed that we depart from cost causation principles if necessary in order to adopt a 'competitively neutral' standard,* because number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer. Depending on the technology used, to price number portability on a cost causative basis could defeat the purpose for which it was mandated. *We emphasize, however, that this statutory mandate constitute a rare exception to the general principle, long recognized by the Commission, that the cost-causer should pay for the cost that he or she incurs.*

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recovery for now obviates a decision here on the rate structure question"). Furthermore, the facts of that case are unique in that it involved the Bell Atlantic/NYNEX merger, one of the conditions of which precluded "any allowance now for OSS development costs." *Id.* at *18. According to the New York Public Service Commission, the merger conditions "must be met before recovery of these [OSS] costs can be allowed …." *Id.* at *26.

Id. (emphasis added).

In this case, there is no "statutory mandate" that would create an exception to the principle that the cost causer should pay for the costs that he or she incurs. For the electronic interfaces developed solely for use by the CLECs, the CLECs caused those costs to be incurred. *See* MCI Response at 9-10 ("Effective OSS systems will directly benefit those customers who choose to receive service from a provider other that BST"). Accordingly, consistent with general principles of cost causation, CLECs, and not BellSouth, should pay these OSS costs.[7]

G. Nonrecurring Prices

The real issue on the work activities included in developing nonrecurring prices is simply a mathematical one. Did the Authority intend the 3 minutes of work activity to reflect the amount of time required to handle an order that falls out for manual processing, or did the Authority intend for the 3 minutes of work activity to be used in calculating an "average" work time, as MCI contends? MCI Response at 11. While BellSouth has MCI's views on the subject, BellSouth is more interested in hearing from the Authority, which is the reason BellSouth has requested clarification on this issue.

[7] e.spire's claim that BellSouth is seeking to recover the costs associated with "duplicative, electronic interfaces," which could have been avoided had BellSouth "allowed CLECs to use Bell's existing OSS systems," represents a fundamental misunderstanding of the costs at issue. As the FCC has made clear, an incumbent must do more than simply make its legacy systems available to a CLEC. Rather, an incumbent's "provision of access to OSS functions necessarily include several components, beginning with a point of interface (or "gateway") for the competiting carriers' own internal operations support systems to interconnect with the BOC...." *In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in Michigan,* cc Docket 97-137, ¶ 134 (August 19, 1997). The OSS costs that BellSouth seeks to recover here are the costs of developing the electronic interfaces and the costs associated with enhancements to BellSouth's legacy systems necessary to make those interfaces function correctly. (11/18/97 Tr., Caldwell at 60-74).

H. Disconnect Costs

BellSouth has sought clarification of the Authority's decision that the cost associated with physically disconnecting a line should be removed from the cost study "in a soft dialtone environment ...." Although both MCI and AT&T address disconnect costs in passing, neither makes any attempt to explain their understanding of what the Authority intended.

AT&T claims that it "now understands the TRA's decision on this issue as prohibiting BellSouth from assessing any disconnection costs when a CLEC has purchased a UNE combination to service a customer and then subsequently loses that customer to another LEC – i.e., in those case in which no physical disconnection actually occurs." AT&T Response at 18. However, AT&T does not address the situation covered in BellSouth's petition when a physical disconnection actually occurs, such as when BellSouth provides a facilities-based carrier like NEXTLINK with an unbundled loop. None of the Intervenors points to any evidence in the record to suggest that under such circumstances BellSouth could issue a "software command" "without any physical disconnection of any sort ...." Since the purpose of this proceeding is to establish the cost of "unbundled loops," the Authority should clarify what cost it is directing BellSouth to remove from its studies.

I. Integrated Digital Loop Carrier

AT&T devotes nearly one-third of its 29-page response to the issue of Integrated Digital Loop Carrier ("IDLC"). In the process, AT&T misconstrues the Supreme Court's holding in *Iowa Utilities Board*, ignores the impact of that decision on existing and since vacated FCC's rules, and fails to come to grips with BellSouth's reasons for seeking reconsideration or clarification of this aspect of the Authority's Interim Order.

AT&T continues to criticize BellSouth for failing to incorporate IDLC in its cost studies. AT&T Response at 21. However, AT&T does not dispute that the purpose of this proceeding is to establish the costs of "unbundled network elements," Interim Order at 1, including unbundled loops and unbundled ports. A facilities-based carrier such as NEXTLINK which has invested substantial sums to buy its own switch presumably is not interested in the cost "of a loop physically integrated with the switch," which, as AT&T readily acknowledges, is what comprises IDLC. AT&T Response at 21. Thus, whether AT&T may someday be entitled to purchase a combined loop and port, or the so-called "UNE Platform," is irrelevant to the Authority's task of establishing prices for unbundled network elements.[8]

While insisting that "no ambiguity" exists in the Authority's directions concerning the IDLC offering BellSouth must make available, AT&T does nothing more than repeat the language from the Authority's Interim Order, without bothering to explain its understanding of what this language means. AT&T Response at 22. AT&T's insistence that "it is up to BellSouth to figure out how it can accomplish what the TRA has ordered" ignores that BellSouth is not clear what the Authority has ordered. This is the reason BellSouth has sought reconsideration and clarification.

Focusing on the Supreme Court's decision to uphold the FCC's rule (51.315(b)) that precluded incumbents from separating unbundled network elements that are already combined

[8] It is worth noting that, with the adjustments ordered by the Authority, the recurring cost of a 2-wire analog loop under BellSouth's cost studies is $14.14, while the corresponding state-wide average generated by the Hatfield Model is $16.32. Thus, while criticizing BellSouth's cost studies for allegedly using an "inferior" and "more expensive" technology, the loop costs developed by Hatfield as adjusted by the Authority are higher than those generated by BellSouth's cost studies. Such disparity only underscores the need for the Authority to reconsider its proposed adjustments.

before leasing them to new entrants, AT&T neglects to mention that the Supreme Court did not disturb the Eighth Circuit's invalidation of the FCC rules that purported to require incumbents to combine network elements on behalf of a competing carrier. Although the FCC previously imposed such a requirement in Rule 315(c), that rule was vacated by the Eighth Circuit and not reinstated by the Supreme Court. Similarly, Rule 315(d), requiring an incumbent to combine network elements with another carrier's elements in any technically feasible manner, was also vacated by the Court of Appeals and not reinstated. With these rules vacated, AT&T's demand that BellSouth "must provide any and all combinations of UNEs," even when the elements are not currently combined in BellSouth's network, must be rejected as unlawful. AT&T Response at 25.

AT&T's attempt to downplay the significance of the Supreme Court's decision to vacate the FCC's rule (Rule 51.319) dictating which facilities qualify as network elements that must be unbundled is unpersuasive. The aftereffect of the Supreme Court's decision is that, at the moment, no one knows *what* network elements must be made available to competing carriers. Even assuming the Eighth Circuit reinstates Rule 51.315(b) and an incumbent is prohibited from separating already-combined network elements before leasing them to competitors, that rule has no meaning absent a determination of what elements meet the "necessary" and "impair" standards under the vacated Rule 51.319. In short, there is no point to a proceeding to discuss combinations of network elements unless and until it is clear what those elements are.

In striking down Rule 51.319 and the FCC's underlying standard, the Supreme Court categorically rejected the FCC's notion of when an incumbent must provide unbundled network elements to CLECs under the FCC's "necessary" and "impair" requirements. In interpreting those statutory terms, the Court stated that the definition of an unbundled network element "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." The Court also observed that the "assumption 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 that 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." This means that "elements" that are available from other sources, including elements that competitors can (and often do) provide themselves do not have to be provided as unbundled network elements under the 1996 Act.

Thus, there can be no requirement for BellSouth to provide any combinations of a type or in a locality where there are ready alternatives to any of the constituent network elements even where those alternatives may be somewhat more costly for the CLEC to obtain from another supplier or by providing them for itself. The Supreme Court anticipated precisely this kind of limitation on the availability of access to network elements. As the Court observed, "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." And in reacting to incumbent concerns that the reinstatement of Rule 315(b) could obliterate the distinction between unbundled network elements and resale, 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."

It will be necessary for the FCC to hold further proceedings to determine what network elements must be unbundled, in accordance with the test established by the Court. In the interim, it would be inappropriate to assume that the FCC will merely reissue the list contained in Rule

51.319. Determining what elements are essential will involve FCC proceedings of some complexity. FCC Chairman William E. Kennard acknowledged as much when he predicted, "We'll have to go back to the drawing board." *High Court Says Local Phone Giants Don't Have to Sell Access*, New York Times, 1/26/99 at C4 (copy attached).[9]

AT&T argues that the Supreme Court's decision to vacate Rule 51.319 "has no impact on the TRA's Interim Order." AT&T Response at 25. While BellSouth agrees that the Authority should continue with this proceeding and establish rates for the various network elements at issue during the pendency of the FCC proceedings on remand, BellSouth strongly disagrees with AT&T's reasoning. First, the Authority's arbitration decision cannot be read in a vacuum without regard to the FCC's unbundling rules, as AT&T attempts to do, particularly when AT&T's interconnection agreement must be renegotiated "[i]n the event that any final and nonappealable legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement ...." Agreement ¶ 9.3.

Second, AT&T's reliance upon the requirements of Section 271 of the 1996 Act is misplaced. While Section 271 enumerates certain network facilities that Bell operating companies must provide in order to satisfy the competitive checklist, these enumerated facilities

[9] As pointed out in BellSouth's response to MCI's Petition for Reconsideration, the industry does not share AT&T's view that "loops and ports clearly are now and will continue to be elements BellSouth must provide to CLECs ...." AT&T Response at 28. *See* Letter from John Windhausen, President, Association for Local Telecommunications Services to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission; "ILECs Worry Court Ruling Could Lead To Wide FCC Preemption," *Telecommunications Reports*, at 9 (Feb. 10, 1999) (Daniel Gonzales, Directory-Regulatory Affairs for NEXTLINK Communications, Inc., quoted as saying that, 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).

must be provided on an unbundled basis. For example, item 4 of the checklist requires that a BellSouth operating company provide "[l]ocal loop transmission from the central office to the customer's premises, *unbundled* from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv) (emphasis added). The checklist does not require BellSouth to provide a combined loop and switch port, nor does it require that the identified network facilities be provided at cost-based rates.

AT&T's suggestion that the Authority has independent state power to require BellSouth to provide unbundled network elements overlooks the Supreme Court's decision in *Iowa Utilities Board.* The Supreme Court made clear that the Telecommunications Act vests authority solely in the FCC to determine matters that fall within the broad scope of the Act's reach. Rejecting arguments that the rulemaking authority granted to the FCC under Section 201(b) of the Act is limited to interstate matters, the Court stated: "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996."

The Authority has no ability under state law to determine BellSouth's responsibilities with respect to matters falling within the scope of Section 251(c)(3) of the Act. The Supreme Court made this point clear, in reversing the Eighth Circuit's holding that the 1996 Act did not grant general jurisdiction to the FCC to issue regulations implementing the Act:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the new *federal* regime is to be guided by federal-agency regulations. If there is any presumption applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange .... This is, at bottom, a debate not about whether the States will be allowed to do their own

thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.

Thus, any notion that the Authority has independent power under state law to require the provision of combinations simply does not survive the Supreme Court's decision in *Iowa Utilities.*

The Authority presumably will have, and should have a role in implementing the "necessary" and "impair" standards. However, the Authority's decisions must as a practical matter await the FCC's definition of those standards.[10] Furthermore, even if the Authority eventually is given the power to decide which elements must remain combined as a matter of implementing federal policy in specific cases, there has been no determination by the FCC which elements these are. In other words, there currently exists no requirement regarding combinations of elements that the Authority can implement.

Any Authority decision along the lines proposed by AT&T would necessarily be premature. The Supreme Court's vacatur of Rule 51.319 has as a practical matter made the question of what elements must be combined moot, for there are no current rules setting out what elements must be made available on an unbundled basis. For the Authority to use this cost proceeding to engage in a lengthy and complicated process of examining the factual and policy issues associated with the combinations of elements, which themselves may not have to be made

[10] This is completely consistent with the views expressed by BellSouth in its *ex parte* presentation to the FCC on February 11, 1999, which is referenced, albeit misleadingly, in AT&T's response. AT&T Response at 28, n.8. In this presentation, BellSouth urged that the FCC "specify a series of tests that a state commission can follow in determining … whether a proposed or requested unbundled network element (UNE) meets the Act's 'necessary and impair" requirement." BellSouth never "agreed" that state commissions have "additional authority to determine unbundled network elements" without regard to the standards to be established by the FCC, as suggested by AT&T.

available to BellSouth's competitors, would not be a productive use of the Authority's or parties' time.[11]

III. CONCLUSION

For the foregoing reasons, the Authority should grant BellSouth's Petition for Reconsideration and Clarification.

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[11] AT&T's attempt to impermissibly expand the scope of this proceeding is evident from its request that the Authority prohibit BellSouth from requiring collocation "as a precondition to obtaining access to any UNE or UNE combination." AT&T Response at 25. Other than price, the terms and conditions of collocation are not issues presently before the Authority in this proceeding, and AT&T's attempt to add these issues under the guise of reconsideration is improper.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IOWA UTILITIES BOARD, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 96-3321 and Consolidated Cases

MOTION OF THE LOCAL EXCHANGE CARRIERS REGARDING FURTHER PROCEEDINGS ON REMAND

On January 25, 1999, the Supreme Court reversed in part and affirmed in part this Court's judgment in the above-captioned case and remanded "for proceedings consistent with this opinion." *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 (and consolidated cases), 1999 WL 24568, at *15 (U.S. Jan. 25, 1999). The local exchange carrier parties ("LECs")[1] respectfully move that this Court establish a schedule for further briefing and oral argument concerning issues that are now before the Court for consideration on the merits. In addition, the LECs

[1] For purposes of this motion, the LECs include the following parties: Ameritech Corporation, Bell Atlantic Corporation, the GTE Entities, SBC Communications Inc., U S WEST, Inc., Cincinnati Bell Telephone Company, and the members of the United States Telephone Association and the Rural Telephone Coalition.

request that this Court revise its mandate to the FCC in a manner consistent with the Supreme Court's decision.

I. FCC RULES THAT ARE NOW RIPE FOR CONSIDERATION ON THE MERITS

A. *The Need for Further Briefing*

The Supreme Court reversed this Court's ruling that the FCC lacked jurisdiction to issue its rules governing pricing, preexisting agreements, and suspension/exemption determinations for rural and small LECs. *See* 1999 WL 24568, at *6-*9. Petitioners originally challenged those rules, however, not only on jurisdictional grounds but also on the ground that they violate the law as a substantive matter. Because this Court did not reach the merits of the rules in its original decision, *see Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 803, 806 n.26 (8th Cir. 1997), and the Supreme Court acknowledged that the merits of these rules were not before it, *see, e.g.*, 1999 WL 24568, at *4 n.3, petitioners' challenges to the rules will now be before the Court for consideration on remand.[2]

[2] The following rules are at issue on remand: §§ 51.501-.515 (pricing of unbundled network elements); §§ 51.601-.611 (pricing of resale); §§ 51.701-.717 (pricing of transport and termination); § 51.303 (preexisting agreements); and § 51.405 (evidentiary standards governing exemptions and suspensions for rural and small LECs). With respect to the rules purporting to establish "proxy prices" — §§ 51.513, 51.611, and 51.707 — the FCC has conceded that they no longer have any relevance. *See* Respondents' Reply Br. at 7 n.5, No. 97-826 (U.S. June 17, 1998). Therefore, as explained below, the FCC's default proxy rules need not be addressed on the merits, because they must remain vacated as moot.

With respect to these rules and regulations, we respectfully request an opportunity for further briefing and oral argument. We believe that the Court will benefit significantly from further briefing by all parties in light of the changes in the legal landscape since Fall 1996 when the original briefs were filed. The most obvious development, of course, is the Supreme Court's decision itself, which casts additional light on the underlying merits of the pricing rules and which the parties should be afforded an opportunity to address in their briefs.

Furthermore, in the intervening years, the parties have had extensive experience negotiating and arbitrating interconnection agreements and in carrying out their resulting responsibilities under those agreements. As a consequence, the parties have a more seasoned view of the issues and arguments concerning the pricing rules. Among other things, some aspects of the FCC rules that the LECs originally challenged may no longer bear the same significance from a business perspective. We anticipate, therefore, that the merits discussion will likely be more narrowly focused than in the original briefs.

Finally, the Court should not have to wade through the lengthy and numerous briefs filed in the original appeal to find the merits challenges interspersed here and there among the various jurisdictional and other arguments. The Court would be far better served if the parties were to provide fresh briefs containing a more streamlined, up-to-date presentation of the issues that currently warrant this Court's attention.

Given the importance and novelty of the issues, we also believe that the Court would benefit from oral argument concerning these issues. To ensure a reasonably expeditious resolution of the merits challenges, we respectfully request that the Court schedule oral argument, if possible, for a date prior to the summer recess.

B. *A Proposed Briefing Schedule*

We respectfully request that the Court issue a schedule for further briefing on an expedited basis. We set forth our proposal below:

Petitioners' and Supporting Intervenors' Briefs (not to exceed a total of 28,000 words to be divided among them)	To be filed within 30 days after the Court's Scheduling Order
Respondents' Brief (not to exceed 28,000 words)	To be filed within 25 days after the filing of Petitioners' and Supporting Intervenors' Briefs
Intervenors' Briefs Supporting Respondents (not to exceed a total of 14,000 words to be divided among them)	To be filed at the same time as Respondents' Brief

Petitioners' and Supporting Intervenors' Reply Briefs (not to exceed a total of 14,000 words to be divided among them)	To be filed within 14 days after the filing of Respondents' and Supporting Intervenors' Briefs
Oral Argument	At the Court's earliest convenience prior to the summer recess

C. *The Need to Withhold Issuance of the Mandate*

In light of the fact that this Court will be considering the merits-based challenges to these rules, possibly on an expedited basis, it makes little sense for the Court now to recall its prior mandate with respect to these rules. For the past two-and-a-half years, the industry has been operating under state-prescribed rules governing pricing and other issues. The requirements of these rules are now reflected in hundreds of interconnection agreements, under the terms of which competitive local exchange service is being provided throughout the country.

Deferring the Court's recall of its prior mandate relating to these rules would not harm the public and would minimize disruption to the industry. The various state pricing rules are generally similar in substance to those adopted by the FCC, and many States have adopted rules that are completely in accord with the FCC's TELRIC requirements. As the FCC itself declared nearly two years ago, "virtually every state in the union has adopted [the FCC's pricing] policies."

See Reed Hundt, Chairman, Federal Communications Commission, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery). But some other state regimes differ in numerous minor respects from the particularized TELRIC principles laid down by the FCC. If the FCC's rules were now to spring into effect, they would immediately call into question the continuing validity of a large number of interconnection agreements, requiring renegotiation of many of their terms. Should the Court subsequently vacate some or all of the FCC's rules on their merits, the parties would be forced to renegotiate these agreements yet again, in many cases restoring what they had just finished undoing. The Court can avoid the resulting disruption — without affecting the basic prices paid by new entrants — by simply withholding the recall of its mandate with respect to the rules at issue pending completion of its expedited review of the merits.

In no event, however, should the Court alter its prior mandate with respect to §§ 51.513, 51.611, and 51.707, which established default proxies for unbundled network element rates, wholesale rates, and transport and termination rates respectively. As the FCC conceded before the Supreme Court, these "temporary and optional 'default proxies' . . . were designed for a past period in which no cost studies could have been made available to the state commissions."[3] These proxy prices therefore "have no [current] relevance to this case."[4] Because the FCC acknowledges that the proxy prices no longer apply, §§ 51.513, 51.611, and 51.707 should remain vacated as moot.

II. THE RULES NOW VACATED AS TO WHICH NO FURTHER PROCEEDINGS ARE REQUIRED

Any regulation that was vacated by this Court in a ruling that was not challenged in the Supreme Court remains vacated. This Court's judgment vacating the rules identified below was not challenged in the petitions for certiorari. None of these rules was mentioned by the Supreme Court in its opinion; and nothing in that opinion calls into question this Court's decision to vacate them. Specifically, the following rules fall into this category:

- § 51.305(a)(4) (requiring interconnection superior in quality);
- § 51.311(c) (requiring provision of unbundled network elements superior in quality);
- § 51.315(c) (requiring incumbent to combine unbundled network elements in any technically feasible manner that would not impair others);
- § 51.315(d) (requiring incumbent to combine unbundled network elements with elements possessed by requesting carrier);

[3] Respondents' Reply Br. at 7 n.5, No. 97-826 (U.S. June 17, 1998).

[4] *Id.*

• § 51.315(e) (imposing on incumbent the burden to show that requested combination is not technically feasible); and

• § 51.315(f) (imposing on incumbent the burden to show that requested combination would impair others).

The Court's original mandate vacating these rules is entirely unaffected by the Supreme Court's ruling.

III. THE RULES NOW VACATED AS TO WHICH FURTHER FCC PROCEEDINGS ARE REQUIRED

The Supreme Court invalidated two regulations that this Court had originally upheld either in whole, 47 C.F.R. § 51.319 (listing specific network elements to be unbundled), or in part, *id.* § 51.317 (governing standards for identifying additional unbundled network elements to be made available by States).

This Court originally vacated § 51.317 "only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so." *Iowa Utils. Bd.*, 120 F.3d at 819 n.39. This conclusion was never challenged in the Supreme Court, and it is therefore unaffected by the Supreme Court's decision. But that rule also purported to allow States to require unbundling of elements beyond those identified in § 51.319 if a State concluded that such unbundling was appropriate after applying the same "necessary" and "impair" analysis that the FCC itself had applied under 47 U.S.C.

§ 251(d)(2). In their cross-petitions for certiorari and briefs before the Supreme Court, the LECs broadly challenged the FCC's application of the "necessary" and "impair" standards in the Act. By holding that § 51.319 was invalid because the FCC had improperly interpreted those statutory standards, *see* 1999 WL 24568, at *10, *11, the Supreme Court necessarily also invalidated that portion of § 51.317 that this Court had originally left undisturbed. Therefore, to modify its mandate to be consistent with the Supreme Court's opinion, this Court must now vacate all of § 51.317 along with § 51.319.

The Supreme Court specifically ordered the FCC on remand to apply some limiting standard to the unbundling requirement — the Act "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." 1999 WL 24568, at *11 (emphasis in original). This Court should, therefore, immediately issue a mandate vacating these rules and remanding this matter to the FCC for further proceedings consistent with the Supreme Court's opinion.

IV. THE RULES AS TO WHICH THE SUPREME COURT REVERSED THIS COURT'S DECISION TO VACATE

The Supreme Court also upheld two FCC rules that this Court had originally invalidated: 47 C.F.R. §§ 51.315(b) (prohibiting incumbent from separating elements already combined in incumbent's network) and 51.809 (the "pick-and-choose" rule). With respect to § 51.809, this Court should recall its prior mandate and issue a new mandate consistent with the Supreme Court's decision.

Section 51.315(b), however, presents a more complicated question. That section concerns the LECs' obligation to provide combinations of elements designated in § 51.319, which, as noted, the Supreme Court has invalidated. Section 51.315(b), therefore, lacks any real content; indeed, the Supreme Court recognized that the LECs' concerns about this rule may well be rendered "academic" in light of the remand of § 51.319. *See* 1999 WL 24568, at *12. With respect to § 51.315(b), therefore, the Court should recall its mandate and remand to the FCC for further proceedings consistent with the Supreme Court's opinion. If the FCC were to attempt on remand to require premature implementation of § 51.315(b), the LECs would be free to seek appropriate relief at that time.

CONCLUSION

With respect to those rules that have been challenged on the merits, the LEC petitioners respectfully request that the Court establish a schedule to permit the parties, on an expedited basis, to brief and argue the issues in light of the legal developments that have taken place since the filing of the original briefs. The Court should withhold issuing its mandate with respect to these rules to avoid unnecessary disruption while the underlying merits of these rules are under review. This Court need not consider the merits of the FCC's proxy prices in §§ 51.513, 51.611, and 51.707, for the FCC has conceded that they no longer have any relevance. Those rules should therefore remain vacated as moot.

With respect to those rules that were vacated by this Court in a ruling of which review was never sought in the Supreme Court, the Court need not modify its original mandate vacating these rules.

With respect to those rules that were originally upheld by this Court and that have now been vacated by the Supreme Court, this Court should immediately issue a mandate vacating these rules and remanding the case to the FCC for further proceedings consistent with the Supreme Court's opinion.

Finally, with respect to § 51.809, this Court should recall its prior mandate and issue a new mandate consistent with the Supreme Court's opinion. With respect to § 51.315(b), this Court should recall its prior mandate and issue a new mandate remanding the case to the FCC for further proceedings consistent with the Supreme Court's opinion.

February 17, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Motion of the Local Exchange Carriers Regarding Further Proceedings on Remand was sent via first-class mail, postage prepaid, this 17th day of February, 1999, to counsel of record in this case. Due to the length of the service list, a Certificate of Service containing the names of the counsel of record who have received the Motion is being separately filed.

Jordan B. Cherrick

5TH ARTICLE of Level 1 printed in FULL format.

Communications Daily

February 24, 1999, Wednesday

SECTION: TODAY'S NEWS

LENGTH: 508 words

HEADLINE: KENNARD SAYS FCC PLANS DEAVERAGING BUT WILL GIVE STATES TIME

BODY:

FCC Chmn. Kennard assured state regulators that Commission will allow "reasonable" transition period for implementing local rate deaveraging under Telecom Act but won't back off from requiring deaveraging. Speaking Tues. at NARUC meeting in Washington, he noted states' concerns that FCC might choose flash-cut implementation of rules requiring minimum of 3 rate zones: "Your request for time is reasonable, and we will establish a reasonable time frame for the transition to deaveraged rates. But we won't back away from deaveraging because it is essential to development of local competition."

Kennard said recent U.S. Supreme Court decision affirming FCC jurisdiction over pricing and other Telecom Act implementation issues "is an opportunity for us to link arms once again and reaffirm our commitment to our common goals" of competition and universal service. He said he hopes Court's remand of FCC's unbundled network element (UNE) list "will just be a bump in the road" that doesn't materially slow competition. He said most companies have agreed to be guided by old UNE list while FCC revisits issue, but said few incumbents have sought to use UNE confusion to disadvantage competitors: "We cannot allow any incumbent to unfairly shut competitors out of the marketplace."

FCC has "a huge agenda" before it this year, Kennard said, including pricing, Section 706 and 271 decisions, consumer protection and billing issues, access for disabled, Y2K bug. "We need your input on all of these matters," he said. "We can accomplish much more as allies rather than adversaries." Answering audience question on states' role in numbering, he said agency is striving to "give maximum deference to the states" on area code relief and number conservation

To another questioner, Kennard said biggest future challenge facing regulators is mass deployment of high-speed data access. Internet, he said, "is the biggest force for change since Gutenberg. Our role is to assure everybody has high-speed access to Internet links."

NARUC Notebook...

NARUC Communications Committee adopted policy resolution Tues. calling for creation of federal-state advisory forum for promotion of access to advanced telecom capabilities (CD Feb 23 p2). Final action deleted all references to universal service funds and other specific vehicles for promoting advanced service deployment that had caused several states to oppose original version. Also deleted was language calling for residential advanced service development, but NARUC panel kept language saying intervention may be needed to introduce advanced services to rural, low-income and disabled populations. Resolution said joint conference should be chartered to develop proposals for mechanisms, policies and resource allocations to promote maximum level of competition while encouraging expeditious deployment of advanced telecom services to all Americans.

LANGUAGE: ENGLISH

LOAD-DATE: February 23, 1999

3RD STORY of Level 1 printed in FULL format.

The New York Times

January 26, 1999, Tuesday, Late Edition - Final

SECTION: Section C; Page 1; Column 2; Business/Financial Desk

LENGTH: 959 words

HEADLINE: High Court Says Local Phone Giants Don't Have to Sell Access

BYLINE: By SETH SCHIESEL

BODY:

The Supreme Court yesterday issued a ruling that could delay efforts to open the $100 billion local telephone business to competition.

The Court overturned a Federal Communications Commission rule that had forced the Baby Bells and other local phone giants to sell access to almost all parts of their networks, such as copper wires and switching computers, to competitors.

Yesterday's decision could make it harder for new local phone companies to link to incumbents' systems, especially those that deliver advanced services like high-speed Internet access. That could put off the day when more than a handful of United States consumers have a choice of local phone company.

The Court also, however, handed the F.C.C. a big victory by ruling that the Telecommunications Act of 1996 gives the commission, not the states, general authority to set rules meant to enhance competition. The Court also upheld a handful of the commission's other regulations aimed at stimulating competition.

The rulings wrapped up a three-year legal battle among the Bell companies, the long-distance titans, the F.C.C. and the states over the jurisdiction and substance of local-telephone regulation.

"I woke up today with a bad case of the flu and was lying in bed and the news of the decision was an elixir," William E. Kennard, the commission's chairman, said. "It had a healing effect on my whole body."

"This should accelerate the pace of local competition because it will bring certainty to the implementation of the act," he added.

But in requiring the local phone incumbents to sell access to almost every part of their networks, the commission went too fast, the Court ruled. Network parts consist of hundreds of components, ranging from electronic boxes on the sides of homes to call-waiting software.

The commission violated the act by failing to consider whether forcing the local incumbents to provide access to each network part was "necessary" to promote competition and whether new entrants would be "impaired" by having to get the network part on their own, the Court said.

The commission must now develop a new set of rules to determine which parts of their networks the local phone giants must resell to competitors, using the "necessary and impair" standard. That process that could take months. And after the new rules are made, it is unlikely that the list of network parts the local phone incumbents are required to provide will be as long as it was before.

Daniel P. Reingold, head telecommunications analyst at Merrill Lynch, said the ruling could force new local companies to invest more on their own because they cannot rent access to the incumbents' systems.

Michael Salsbury, MCI Worldcom Inc.'s general counsel, and Mark C. Rosenblum, the AT&T Corporation's vice president for law and public policy, each ventured that the commission could legitimately keep all of the same network parts on the list.

But Mr. Kennard seemed to imply that was unlikely.

"We'll have to go back to the drawing board," he said. "There may be some skirmishes around the edges, but when the dust settles we know that the competitors will get access to that core of services which are necessary."

People close to the commission said it could become especially difficult to require the local incumbents to sell access to new technologies because it would be hard to define them as necessary to a new entrant. A person close to the commission said that an order on how the local phone giants must sell access to their high-speed Internet systems, which was set to be released as soon as Thursday, would have to be redrafted in light of yesterday's ruling.

"On the must-win defensive issue, the Bells won convincingly," said Scott Cleland, an analyst for the Legg Mason Precursor Group. "They essentially completely prevented a disaster."

One senior Bell company executive said yesterday that his company would use wrangling over the "necessary and impair" standard to advance his company's long-distance aspirations.

Another complication is that the local incumbents could potentially challenge many of the hundreds of deals they have made to connect their networks to those of their competitors, many of which were based on the assumption that the incumbents had to sell access to all of their systems.

"They are all potentially subject to challenge," said William P. Barr, chief counsel for the GTE Corporation.

One question is whether either new entrants or incumbents will be willing to negotiate during a time of regulatory uncertainty.

"We've got to come up with some interim guidance to the industry and we're going to be digging into that in the next several days," Mr. Kennard said. "We hope that people will take a deep breath and wait."

Meanwhile, the Court's upholding of some of the F.C.C.'s other regulations for local phone competition -- such as a rule forbidding incumbents to break up network parts they generally provide in a package -- will advance the commission's plans. And the ruling giving the F.C.C., not the states, general authority to make the rules for local telephone competition will surely resonate in Washington. Since the act's passage, the commission has come in for blistering criticism from some members of Congress for its aggressive approach to regulation.

"I feel totally vindicated," said Reed E. Hundt, Mr. Kennard's predecessor, who was vilified by many politicians and local phone executives before and after retiring in 1997. "For three years I and then Chairman Kennard were told that we were running a rogue agency and that we needed to learn how to read. And it turned out we were right."

He added, "This means that Bill Kennard is the man and that I'm going to Disneyland."

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