BELLSOUTH

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Guy M. Hicks
General Counsel

September 23, 1999

VIA HAND DELIVERY

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

Re: *Petition by ICG Telecom Group, Inc.. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00377

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Exceptions to Report and Initial Order of Pre-Arbitration Officer. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: ***Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996***

Docket No. 99-00377

BELLSOUTH TELECOMMUNICATIONS, INC.'S EXCEPTIONS TO REPORT AND INITIAL ORDER OF PRE-ARBITRATION OFFICER

On September 13, 1999, the Pre-Arbitration Officer in the above-captioned proceeding issued a "Report and Initial Order of Pre-Arbitration Officer" (hereinafter the "Report") in this docket. In the Report, the Pre-Arbitration Officer stated that the Report may be appealed to the Arbitrators within ten (10) days from its entry. Pursuant to the Report and T.C.A. §§ 65-2-111 and 4-5-315(b), BellSouth Telecommunications, Inc. ("BellSouth") respectfully files the following exceptions to the Report:[1]

Packet Switching

(1) Issue 3, relating to whether packet switching must be made available as an unbundled network element ("UNE") was definitively addressed by the FCC on September 15, 1999. In a press release and summary (Report No. 99-41) of its forthcoming Order in CC Docket No. 96-98, Implementation of the Local

[1]T.C.A. § 65-2-111 requires a party "adversely affected" by a proposed order of a hearing officer to file "exceptions" to that order with the TRA, while T.C.A. § 4-5-315(b) requires a party seeking review of an initial order to file a "petition for appeal." BellSouth respectfully requests that this pleading be treated as sufficient to bring to the TRA's attention to BellSouth's objections to the Initial Order under either statutory provision.

Competition Provisions of the Telecommunications Act of 1996, the FCC stated "... the Commission declined to impose an obligation on incumbents to provide unbundled access to packet switching."[2] More specifically, the summary of the Order (attached to the press release) contained the following explanation:

> Packet Switching. Incumbent LECs are not required to unbundle packet switching, except in the limited circumstance in which a requesting carrier is unable to install its Digital Subscriber Line Access Multiplexer (DSLAM) at the incumbent LEC's remote terminal, and the incumbent LEC provides packet switching for its own use. Packet switching involves the routing of individual data message units based on address or other routing information and includes the necessary electronics (e.g., DSLAMs).[3]

Given that this issue appears to have been resolved by the FCC, it is unnecessary for this issue to remain in the above-captioned arbitration.

Performance Measurements and Liquidated Damages

(2) Issue 5 and Issues 19-26, relating to performance measurements and liquidated damages, also should not be arbitrated. Initially, it should be noted that the Pre-Arbitration Officer's Report is unclear on these issues. The Report states: "... performance measures and liquidated damages are appropriate for arbitration, whereas financial incentives and other 'penalties' are not." The Pre-Arbitration Officer offers no rationale for his decision, nor does he define or differentiate the terms "performance measures," "liquidated damages," "financial incentives," and "penalties." Thus, it is unclear which of the subject issues remain arbitrable, and

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[2] FCC Report No. CC 99-41, press release, p. 2, copy attached.

[3] FCC Report No. CC 99-41, Summary, p. 2, copy attached. ICG has not alleged in its Petition for Arbitration that it has been unable to install any DSLAMs at BellSouth's remote terminals.

which do not. Regardless, and consistent with previous determinations made by the Tennessee Regulatory Authority ("Authority"), BellSouth believes these issues should not arbitrated.

First, there is no requirement under the 1996 Act or FCC regulations for the supplemental enforcement scheme proposed by ICG. The only remedies that should be included in the BellSouth/ICG interconnection agreement are those that are mutually agreed upon by the parties. As the FCC itself has recognized, ICG has available to it the full array of contractual and administrative remedies should BellSouth breach its agreement. *See* First Report and Order, 11 FCC Rcd at 15565, ¶ 129 (emphasizing the existence of common law and administrative remedies in this context). ICG is certainly not the first company to enter into an agreement with a company that also competes with it, and there is no reason that the standard legal remedies—the remedies that parties to commercial agreements have pursued for centuries—are somehow uniquely inadequate here.

The Florida Public Service Commission has reached the same conclusion with respect to the issue of liquidated damages as the Authority reached in connection with the MCI arbitration (Docket No. 96-01271). In a recent arbitration case between BellSouth and MediaOne Florida Telecommunications, Inc.[4], the Florida Public Service Commission issued a Prehearing Order, which among other matters, addressed whether the issue of liquidated damages should be included in an arbitration. The Prehearing Officer stated as follows:

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[4]Florida Public Service Commission Docket No. 990149-TP.

> B. Issue 13, filed by MediaOne, raised the following issue: Should the Florida Public Service Commission arbitrate performance incentive payments and/or liquidated damages for purposes of the MediaOne/BellSouth Interconnection Agreement? If so, what performance incentive payments and/or liquidated damage amounts are appropriate, and in what circumstances?
>
> The issue regarding the award of liquidated damages has been raised and denied in other dockets that have been arbitrated by this Commission. Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, Order No. PSC-99-01715-PHO-TP (April 15, 1999). Based on the prior rulings in those dockets, I find that the Commission is without jurisdiction to arbitrate issues on damages. Thus, Issue 13 shall not be arbitrated in this proceeding.[5]

Based on this precedent, on September 21, 1999, the pre-hearing officer in the BellSouth/ICG arbitration in Florida struck these very issues from the arbitration. (Docket No. 990691-TP).

Many other state commissions that have considered the issue of liquidated damages concur in the same conclusion reached by the Authority on this issue.[6]

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[5]Prehearing Order No. PSC-99-1309-PHO-TP of Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, Dated July 8, 1999, in Docket 990149-TP.

[6]*See, e.g., In re Petition by Sprint Comm. Co. Limited Partnership for Arbitration with BellSouth Telecomm., Inc.*, No. 961150-TP, at 5 (Fla. PSC Feb. 3, 1997)(refusing to "arbitrate issues regarding liquidated damages or other indemnification provisions"); Petition of TCG Pittsburgh for Arbitration to Establish an Interconnection Agreement with Bell Atlantic – PA, Inc., No. A-310213F0002, at 19 (Pa. PUC Nov. 1, 1996)("the need for explicit penalties is obviated by the plethora of other remedies available"); *In re Petition by Brooks Fiber Comm. Of New Mexico, Inc. for Arbitration with US WEST Comm., Inc.,* No. 96-337TC, at 33 (N.M. SCC Dec. 27, 1996) ("it is unnecessary to include the liquidated damages clause"); *In re Petitions for Approval of Arbitration of Unresolved Issues,* No. 8731, at 35 (Md. PSC Nov. 8, 1996) ("existing procedures and remedies are sufficient" and the Commission does "not see the necessity for any further ... penalties"); *In re Interconnection Agreement Negotiations Between AT&T and BellSouth*, No. 96-AD-0559, at 9 (Miss. PSC 1997) ("AT&T already has appropriate recourse if BellSouth fails to satisfy the terms of the final Interconnection Agreement ... there is no need for additional provisions.")

Second, the subject matter is not appropriate for a two-party arbitration. The issue of liquidated damages and performance measurements is not a topic addressed in any of the local competition provisions of the Act, and is thus beyond the scope of this arbitration. With respect to ICG's proposed performance measurements, i.e., those recently adopted by the Texas Commission, BellSouth believes that performance standards and similar type provisions are inappropriate for two-party arbitrations.[7] If at all, these types of provisions are better considered in a proceeding where all interested parties may participate. The performance measurements advocated by ICG were the product of an industry-wide workshop in Texas. Indeed, ICG recommends that the Authority ultimately convene a "workshop-type proceeding to develop a Tennessee specific plan." (See ICG's letter to the Authority dated September 9, 1999.) Therefore, if the Authority were to decide that it is appropriate to further investigate performance standards, it should do so by means of a generic type proceeding in which all interested parties may participate. Otherwise, the Authority faces the very real danger of addressing this issue on a piecemeal basis, which would be inefficient and would most likely produce disparate results.

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[7]Interestingly, in a recent arbitration involving ICG and BellSouth, ICG's witness testified that the "issue of performance standards and enforcement mechanisms is one of industry-wide importance. A generic proceeding aimed at a single set of performance standards and enforcement mechanisms is the only practical approach." See Pre-filed Rebuttal Testimony of Karen Notsund for ICG Telecom Group, Inc., North Carolina Utilities Commission Docket No. P-582, Sub 6, pp. 8-9. ICG withdrew these issues in their entirety in the Alabama arbitration proceeding.

Third, the Authority has already addressed this issue (AT&T/BellSouth arbitration, Docket No. 96-01152; MCI/BellSouth arbitration, Docket No. 96-01271; and Nextlink/BellSouth arbitration, Docket No. 98-00123). The Authority settled this issue in the AT&T and MCI consolidated arbitration and in the Nextlink arbitration, wherein it expressly declined to adopt the proposals of MCI and Nextlink for a system of penalties and credits that would have applied in the event BellSouth failed to meet certain performance measures. As the Authority has since noted in opposing MCI's challenge to its decision on this issue, "MCI's proposed system of non-performance credits and penalties is wholly unnecessary, redundant, and not required by law." Brief of the Tennessee Regulatory Authority, Case No. 3-97-0616, at 25 (filed April 13, 1998). According to the Authority, there is no legal requirement mandating the creation of a supplemental enforcement scheme for arbitrated interconnection agreements and, in view of the reasonableness and adequacy of remedies available in the event of a breach of such agreement, "the TRA's refusal to require a system of penalties and credits, as required by MCI, was eminently reasonable and should be upheld ..." (*Id.* at 26). The Authority's reasoning applies equally here. Nothing has changed since those cases were decided which warrants hearing these issues yet again.

Finally, at the June 29, 1999, Directors Conference, in determining how to move forward with this arbitration, Director Greer stated, in pertinent part, as follows:

> DIRECTOR GREER: Mr. Chairman, I'm prepared to move forward with arbitration on this issue. But I've got a couple of

comments I would like to make. In reviewing the arbitration issues, it seems to me this Agency has addressed a number of these issues in different hearings and in different form and in different arbitration. And I'm of the opinion that some of these issues should be settled among the parties. I think that some of these issues are probably not issues that we need to rearbitrate among two other parties when we have arbitrated some of these issues before.

And I think that this Agency has been extremely consistent in the way we have settled issues in our three years here. And once we've made a decision, unless we have reconsidered it, we have been pretty consistent in how we have done these.

I believe in Mr. Walker's filing, I think they're on page 4 and 5, when I look at the issues, I don't think there are many issues on that list that we have not previously addressed. (emphasis added).

(See Transcript from Director's Conference of June 29, 1999 at pages 3-4, emphasis added).

For the above-stated reasons, these issues should be removed from this arbitration.

Mandated Volume & Term Discounts and Binding Forecasts

(3) According to the Report, Issue 6 is appropriate for arbitration because "... although volume and term discount pricing is not required by the Act, neither is it precluded by the Act and so it is appropriate for arbitration." Similarly, the Report states with regard to Issue 11 that "... merely because the Act or the FCC rules do not require the commitment to a binding forecast, neither do they preclude it from arbitration." (See page 7 of Report.). This is the only basis in the Report for arbitrating these requests. BellSouth respectfully asserts that this is not the correct standard under the Act for determining what issues are arbitrable. Using the standard relied upon in the Report, a petitioner, for example, could demand

arbitration regarding the color of the carpet in a central office. Indeed, under this standard, there would simply be no limit to the number of possible "arbitrable issues."

Section 251 of the Act sets forth a specific series of matters regarding which incumbents must negotiate. If the duty the CLEC attempts to impose on the incumbent is not set forth in § 251, a § 252 arbitration is not appropriate. In particular, § 251(c)(1) places on incumbents the obligation "to negotiate in good faith in accordance with § 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section." 47 U.S.C. § 251(c)(1). If those negotiations do not result in an agreement, the State commission that arbitrates the matter must ensure that its resolution of the remaining "open issues" "meet[s] the requirements of Section 251"—that is, that the incumbent has fulfilled the duties enumerated in §§ 251(b) and (c). 47 U.S.C. § 252(c)(1).

Neither volume and term discounts for UNEs, nor binding forecasts, are mentioned in § 251, much less required by it. Therefore, these issues are not appropriate for arbitration.

For the foregoing reasons, the Authority should review the Pre-Arbitration Officer's Report, and grant BellSouth relief as requested above.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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FOR IMMEDIATE RELEASE
September 15, 1999

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Report No. CC 99-41

FCC PROMOTES LOCAL TELECOMMUNICATIONS COMPETITION

Adopts Rules on Unbundling of Network Elements

Washington, D.C. -- The Federal Communications Commission (FCC) adopted rules today that specify the portions of the nation's local telephone networks that incumbent local telephone companies must make available to competitors seeking to provide competitive local telephone service. This FCC decision removes a major uncertainty surrounding the unbundling obligations of the Telecommunications Act of 1996 and is expected to accelerate the development of competitive choices in local services for consumers. Unbundling allows competitors to lease portions of the incumbent's network to provide telecommunications services.

Today's order responds to a U.S. Supreme Court decision which generally affirmed the FCC's implementation of the pro-competition goals of the Telecommunications Act, but which required the Commission to re-evaluate the standard it uses to determine which network elements the incumbent local phone companies must unbundle.

Today's order adopts a standard for determining whether incumbents must unbundle a network element. Applying the revised standard, the Commission reaffirmed that incumbents must provide unbundled access to six of the original seven network elements that it required to be unbundled in the original order in 1996:

(1) loops, including loops used to provide high-capacity and advanced telecommunications services;

(2) network interface devices;

(3) local circuit switching (except for larger customers in major urban markets);

(4) dedicated and shared transport;

(5) signaling and call-related databases; and,

(6) operations support systems.

The Commission determined that it is generally no longer necessary for incumbent LECs to provide competitive carriers with the seventh element of the original list -- access to their operator and directory assistance services. The Commission concluded that the market has developed since 1996 to where competitors can and do self-provision these services, or acquire them from alternative sources.

The Commission also concluded, in light of competitive deployment of switches in the major urban areas, that, subject to certain conditions, incumbent LECs need not provide access to unbundled local circuit switching for customers with four or more lines that are located in the densest parts of the top 50 Metropolitan Statistical Areas (MSAs).

The Commission also addressed the unbundling obligations for network elements that were not on the original list in 1996. The Commission required incumbents to provide unbundled access to subloops, or portions of loops, and dark fiber optic loops and transport. In addition, the Commission declined, except in limited circumstances, to require incumbent LECs to unbundle the facilities used to provide high-speed Internet access and other data services, specifically, packet switches and digital subscriber line access multiplexers (DSLAMs). Given the nascent nature of this market and the desire of the Commission to do nothing to discourage the rapid deployment of advanced services, the Commission declined to impose an obligation on incumbents to provide unbundled access to packet switching or DSLAMs at this time. The Commission further noted that competing carriers are aggressively deploying such equipment in order to serve this emerging market sector.

Finally, the Commission also concluded that the record in this proceeding does not address sufficiently issues surrounding the ability of carriers to use certain unbundled network elements as a substitute for the incumbent LECs' special access services. The Commission therefore adopted a Further Notice of Proposed Rule Making (NPRM) seeking comment on these issues.

Action by the Commission. September 15. 1999. by Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (FCC 99-238).

-FCC-

Common Carrier Bureau Contacts:
Carol Mattey , Claudia Fox, Jake Jennings at (202) 418-1580

SUMMARY

Network Elements that Must be Unbundled

- Loops. Incumbent local exchange carriers (LECs) must offer unbundled access to loops, including high-capacity lines, xDSL-capable loops, dark fiber, and inside wire owned by the incumbent LEC. The unbundling of the high frequency portion of the loop is being considered in another proceeding.

- Subloops. Incumbent LECs must offer unbundled access to subloops, or portions of the loop, at any accessible point. Such points include, for example, a pole or pedestal, the network interface device, the minimum point of entry to the customer premises, and the feeder distribution interface located in, for example, a utility room, a remote terminal, or a controlled environment vault. If parties are unable to reach an agreement pursuant to voluntary negotiations about the technical feasibility of unbundling the loop at a specific point, the incumbent LEC will have the burden to demonstrate to the state that it is not technically feasible to unbundle the subloop at these points.

- Network Interface Device (NID). Incumbent LECs must offer unbundled access to NIDs throughout their service territory. The NID is a device used to connect loop facilities to inside wiring.

- Circuit Switching. Incumbent LECs must offer unbundled access to local circuit switching, except for switching used to serve end users with four or more lines in access density zone 1 (the densest areas) in the top 50 Metropolitan Statistical Areas (MSAs), provided that the incumbent LEC provides non-discriminatory, cost-based access to the enhanced extended link. (An enhanced extended link (EEL) consists of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport. The EEL allows new entrants to serve customers without having to collocate in every central office in the incumbent's territory.)

- Interoffice Transmission Facilities. Incumbent LECs must unbundle dedicated interoffice transmission facilities, or transport, including dark fiber. Incumbent LECs must also unbundle shared transport (or interoffice transmission facilities that are shared by more than one carrier, including the incumbent) where unbundled local circuit switching is provided.

- Signaling and Call-Related Databases. Incumbent LECs must unbundle signaling links and signaling transfer points (STPs) in conjunction with unbundled switching, and on a stand-alone basis. Incumbent LECs must also offer unbundled access to call-related databases, including, but not limited to, the Line Information database (LIDB), Toll Free Calling database, Number Portability database, Calling Name (CNAM) database, Operator Services/Directory Assistance databases, Advanced Intelligent Network (AIN) databases, and the AIN platform and architecture. The Commission found that incumbent LECs need not unbundle certain AIN software.

- Operations Support Systems (OSS). Incumbent LECs must unbundle OSS throughout their service territory. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. The OSS element includes access to all loop qualification information contained in any of the incumbent LEC's databases or other records needed for the provision of advanced services.

Network Elements that Need Not be Unbundled.

- Operator Services and Directory Assistance (OS/DA). Incumbent LECs are not required to unbundle their OS/DA services pursuant to section 251(c)(3), except in the limited circumstance where an incumbent LEC does not provide customized routing to a requesting carrier to allow it to route traffic to alternative OS/DA providers. Operator services are any automatic or live assistance to a consumer to arrange for billing or completion of a telephone call. Directory assistance is a service that allows subscribers to retrieve telephone numbers of other subscribers. Incumbent LECs, however, remain obligated under the non-discrimination requirements of section 251(b)(3) to comply with the reasonable request of a carrier that purchases the incumbents' OS/DA services to rebrand or unbrand those services, and to provide directory assistance listings and updates in daily electronic batch files.

- Packet Switching. Incumbent LECs are not required to unbundle packet switching, except in the limited circumstance in which a requesting carrier is unable to install its Digital Subscriber Line Access Multiplexer (DSLAM) at the incumbent LEC's remote terminal, and the incumbent LEC provides packet switching for its own use. Packet switching involves the routing of individual data message units based on address or other routing information and includes the necessary electronics (*e.g.*, DSLAMs).

Modification of the National List.

- The Order recognizes that rapid changes in technology, competition, and the economic conditions of the telecommunications market will require a reevaluation of the national unbundling rules periodically. In order to encourage a reasonable period of certainty in the market, the Commission expects to reexamine the national list of unbundled network elements in three years.

- The Order permits state commissions to require incumbent LECs to unbundle additional elements as long as the obligations are consistent with the requirements of section 251 and the national policy framework instituted in this Order. The Order further concludes that the goals of the Act will better be served if network elements are not removed from the unbundling obligations of the Act on a state-by-state basis, at this time.

Combinations of Network Elements

- Pursuant to section 51.315(b) of the Commission's rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport if they are currently combined.

- The Order does not address whether an incumbent LEC must combine network elements that are not already combined in the network, because that issue is pending before the Eighth Circuit Court of Appeals.

Further Notice: Use of Unbundled Network Elements to Provide Exchange Access Service

- The Commission sought comment on the legal and policy bases for precluding requesting carriers from substituting dedicated transport for special access entrance facilities.

September 15, 1999

Separate Statement
of
Commissioner Susan Ness

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Local competition is the cornerstone of the Telecommunications Act of 1996 (the Act). Under section 251 of the Act, Congress facilitated the transition from a monopoly to a competitive market for telecommunications services by creating three vehicles for entry: reselling the services of the incumbent local exchange carrier (ILEC) at retail prices less avoided costs; leasing one or more "unbundled network elements" (UNEs) from the ILEC at wholesale discounts; and offering facilities-based competition. Policy makers assumed -- but did not require -- that most new competitors would migrate over time to their own facilities as equipment availability and customer demand warranted. Initially, however, new entrants would need to use piece-parts of the incumbent's network to establish a foothold in a market.

Just over three years ago, in our *Local Competition Order*, I voted to "unbundle" seven network elements under section 251(d)(2) of the Act. In January, the Supreme Court remanded to the Commission that section of our order dealing with unbundled network elements, finding that we had not adequately considered the "necessary and impair" standard when we gave competitors "blanket access" to the incumbents' networks.[1]

In August of 1996, with little local competition on the horizon, we took an expansive view of what new entrants would need to jumpstart competition and a narrow view of the limitations embodied in section 251(d)(2). Today, with three years of experience to guide us, we have crafted a standard that balances the need to jumpstart competition with the need to preserve incumbent incentives to innovate and invest in new facilities. The analytical framework we adopt today facilitates efficient rather than inefficient competition – as Congress intended.

Our new standard reconfigures the national list by paring down some elements and bolstering others. I write separately to elaborate on a few key points.

Advanced Services

I support our decision not to require unbundling of facilities used to provide advanced services, such as packet switches and DSLAMs. Incumbents argue that, if forced to unbundle such facilities, incumbents would have no incentive to deploy these new broadband networks in *rural areas*.[2] In many *urban* markets, we have witnessed competition from cable providers and

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[1] AT&T v. Iowa Utils. Bd., 119 S.Ct. 721 (1999).

[2] *See* Comments of US West, at 60 (arguing that unbundling advanced services elements would have a "dampening effect on the incentives of both CLECs and ILECs to invest and innovate in advanced services technologies, particularly in high-cost areas"); Comments of SBC, at 76-77 (warning that "consumers are harmed when new technologies never enter the market because of disincentives created by a regulatory regime"); Comments of Bell

other new entrants propel local exchange carriers to roll out xDSL service. But I am concerned about the limited availability of advanced services in rural America today. Advanced services are a key to rural economic renaissance, because they enable entrepreneurs to establish new businesses literally anywhere and strengthen the economic viability of established enterprises. If the incumbents are correct that unbundling inhibits investment in these areas, then I expect -- as a result of our action today -- to see a surge in incumbent investment in facilities to provide advanced services to our rural communities.

Unbundled Local Switching

I support the majority's decision to "carve out" an exemption from the general unbundling requirement for switches serving dense, urban markets. Lack of access to unbundled switching should not impair the ability of new entrants to provide service in these markets, especially if those competitors are targeting large and medium size businesses. Indeed, evidence in the record shows that most of the competitive facilities-based deployment has occurred in precisely these high-density zones. Although no fit will ever be perfect, we have given careful consideration to areas where competitors are self-provisioning or where there is a possibility that competitors can purchase from another provider -- two of the key factors that the Supreme Court said we failed to consider in our initial decision.[3]

I also support the majority's decision to require incumbents to make unbundled switching available everywhere for carriers seeking to serve residential consumers. The economics and provisioning obstacles that competitors face when serving the mass market are very different from serving high-volume businesses. As a result, facilities-based residential competition is quite limited.

I have reservations, however, about our decision to require unbundling for small businesses with three lines or less. While I want to ensure that small businesses also have a choice of providers, I am concerned that adding additional unbundling switching requirements in high density areas is not the best way to address the problem. A policy based on the number of telephone lines a customer orders could create consumer confusion and be an administrative nightmare. What happens, for example, if a small business wishes to increase its number of lines? I also am concerned about undercutting those providers that have deployed their own switches and want to serve the small business community.

Operator Services and Directory Assistance (OS/DA)

I am delighted that third-party providers of OS/DA are emerging to fill an increasing need for OS/DA services. However, the Act does not require incumbents to provide these third-

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Atlantic, at 43-44 (arguing that unbundling obligations for advanced services equipment would reduce incentives for incumbents to invest in such equipment); Comments of GTE, at 80 (stating that an unbundling rule for advanced services elements would "result in less innovation and [would] deprive consumers of valuable new services"). *See also* Comments of USTA, at 40-42 (stating that an ILEC would be "unlikely to invest in deployment of new broadband networks and services if it knows that the Commission will [require unbundling]").

[3] *See* 119 S.Ct. at 735.

party providers with nondiscriminatory access to directory databases.[4] This clearly hampers their ability to provide reliable directory assistance to those carriers that will now need to rely on a non-incumbent source for their OS/DA. I recognize that we have raised this issue in the context of another proceeding, which I hope will be resolved shortly.

Combinations of UNEs and Special Access

The order defers decision on whether there should be limited use restrictions for certain combinations of UNEs to avoid an opportunity for arbitrage for special access. While I agree that we should develop a fuller record on this issue, I am hesitant to start down the slippery slope of adopting use restrictions on UNEs. Nevertheless, I will withhold final judgment on these issues until I have reviewed the record developed in response to the Further Notice. I am particularly interested in finding out whether restricted use of UNE combinations might inadvertently lead to inefficient or unreliable network configurations.

Conclusion

We have adopted a workable framework that takes into account variations in the way that competition is developing in different areas of the country. We have reaffirmed the benefit of a national policy that provides competitors with the certainty they need to develop business plans and raise capital, and reduces the opportunity for further protracted litigation. As competition continues to take hold, we intend to scale back our unbundling requirements even further. Now that the new rules are in place, I urge all players to move beyond litigation and to embrace competition.

[4] 47 U.S.C. § 251(b)(3).

September 15, 1999

PRESS STATEMENT OF COMMISSIONER MICHAEL K. POWELL, DISSENTING IN PART

Re: Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98)

As I have tried to impress on many occasions,[1] the Supreme Court gave us a tall order in *AT&T Corp. v. Iowa Utilities Bd.*[2] The Court rejected the previous Commission's decision to provide competitive carriers with unbridled access to every element of the incumbent's network at steeply discounted, cost-based prices. In particular, the Court rejected the previous Commission's presumption in favor of unbundling the entire incumbent network, subject to potential exclusions that, in any event, never materialized.[3] That approach, the Court admonished, gave no effect to the limiting "necessary" and "impair" standards of section 251(d)(2). In place of this presumption, the Court ordered the Commission to surmount a high factual hurdle: the burden of demonstrating that each network element is unbundled only to the extent that, without it, competitive local exchange carriers (CLECs) would be impaired from providing service.[4]

I sincerely applaud my colleagues for the steps they have taken to consider the availability of switching outside the incumbent's network, including self-provisioning. It is on the basis of many of these steps that I am able to support much of the decision in this area. For my part, however, I do not believe the Commission has met its burden of showing that failure to unbundle switching would impair CLECs from providing service in the densest areas of the largest markets. Thus, I would have been prepared to leave switching off the unbundling list for the provision of service to all customers in access Zone 1, regardless of their size or type, and regardless of whether the incumbent is providing the "extended link" or EEL.

As the record amply demonstrates, the vast majority of CLEC switches are concentrated in these zones,[5] amounting to multiple companies providing switch-based alternative service in the market. The tele-density in these zones, moreover, suggests that if CLECs truly wish to, they could take advantage of opportunities to serve relatively many

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1 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. Apr. 16, 1999) (statement of Commissioner Powell, dissenting in part).

2 *See AT&T Corp. et al. v. Iowa Utils. Bd. et al.*, 119 S. Ct. 721 (1999).

3 *Id.* at 736 (holding Commission erroneously perceived a general obligation to unbundle that it could soften by "regulatory grace"). As the Supreme Court indicated, the previous Commission provided "blanket access" virtually all significant elements of the incumbent's network. *Id.* at 735.

4 *See cf.* 119 S. Ct. 721, 736 ("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.").

5 *See, e.g.*, BellSouth Comments at 59.

residential customers per square mile, which would make residential customers in these zones easier and cheaper to serve, particularly in multiple dwelling units (MDUs). In addition, in light of the existence of special access and our related decisions today regarding loop and transport, CLECs can potentially serve many residential and other customers even beyond Zone 1. Based on the evidence of significant CLEC deployment and the comments of many CLECs that currently use their own switches, I am unpersuaded that CLECs would be materially impaired if they could not obtain unbundled switching in Zone 1.[6]

With respect to the EEL, I am certainly persuaded that this functionality (which allows transmission from the CLEC's switch to its customers via the incumbent's facilities) will make it *easier* for CLECs to provide service. But the question the Court has mandated that we answer is not whether access to parts of the incumbent's network makes it easier for CLECs but whether denial of such access would "impair" CLECs' ability to provide service within the meaning of section 251(d)(2).[7] If parts of the incumbent network satisfy this standard, then the Act requires that we make them available. What our decision today does is to muddy an already complicated analysis. On the one hand, we insist that we cannot mandate the EEL pending the Eighth Circuit's resolution of the appeal of our authority to require combinations of elements. On the other hand, in the face of repeated and well-documented incumbent requests to remove switching as an unbundled element, we provide strong and direct incentives to incumbents to provide the EEL as a condition of such removal. To make matters worse, we do so even though we also conclude that our existing rules permit CLECs to obtain the same functionality as the EEL, at least in many circumstances, by simply converting special access services to network elements. I think the cleaner approach would have been either to wait for the Eighth Circuit's combination ruling or simply decide whether the EEL should be made available as its own network element.

Having said all that, I do generally support most of the remainder of the item, and I commend my colleagues and the Common Carrier Bureau for their diligence and hard work in working through these issues. Despite my misgivings about a few of the bottom lines, I fully recognize that an enormous amount of blood, sweat and tears have gone into the decisions we reach here. (I have cried some of these tears myself.) The Bureau, in particular, is to be commended for bringing us this far in our efforts to grapple with the voluminous and highly-complex record that the parties have developed in this docket.

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[6] I should add, however, that my belief that declining to unbundle switching in Zone 1 would address many, but not all, of my concerns regarding geographic variations and the impact of those variations on our impairment analysis. By using a broad national approach based on highly-disputed generalities, I still fear that the Commission has failed to pay adequate attention to the Court's instruction that we assess the availability of elements outside the incumbent's network, including self-provisioning. A preferable option would have been to provide some time-limited ability for state commissions that perceive their markets are different to remove elements from the national list, based on a showing consistent with this decision and our existing rules. This authority was advocated by the vast majority of state commenters in this docket. *See, e.g.*, Washington Utilities & Transportation Commission Comments at 2, California Public Utilities Commission Comments at 7, and New York Department of Public Service Comments at 5.

[7] *See* 47 U.S.C. §251(d)(2)(B).

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

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