Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

MEMORANDUM OPINION AND ORDER

Adopted: February 20, 2001 **Released:** February 21, 2001

By the Acting Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we address a request that the Commission waive certain aspects of its *Collocation Reconsideration Order*.[1] For the reasons set forth below, we grant BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively, "BellSouth") a conditional waiver of certain aspects of the *Collocation Reconsideration Order* pending Commission action on petitions for reconsideration of the 90-day provisioning interval.

II. BACKGROUND

2. On August 10, 2000, the Commission released the *Collocation Reconsideration Order*, which established national standards for processing physical collocation applications and provisioning physical collocation arrangements. Specifically, the Commission required that an incumbent local exchange carrier ("incumbent LEC") must tell a requesting telecommunications carrier whether a collocation application has been accepted or denied within ten calendar days after receiving the application, in instances where neither the state nor the parties to an interconnection agreement set a different deadline.[2] The Commission also required that an incumbent LEC must complete physical collocation provisioning within 90 calendar days after receiving an acceptable collocation application, except to the extent a state sets its own

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 2000 WL 1128623 (rel. Aug. 10, 2000) ("*Collocation Reconsideration Order*"). A summary of the *Collocation Reconsideration Order* was published at 65 Fed. Reg. 54433 (Sept. 8, 2000) ("*Collocation Summary*").

[2] *Collocation Reconsideration Order*, *supra* note 1, at ¶ 24.

collocation provisioning standard or an interconnection agreement between an incumbent LEC and a requesting carrier sets an alternative standard.[3]

3. In the *Collocation Reconsideration Order*, the Commission recognized that an incumbent LEC may have filed with the state commission a statement of generally available terms ("SGAT") or a tariff that sets forth the rates, terms, and conditions under which the incumbent LEC provides physical collocation. The Commission required that an incumbent LEC must file with the state commission any amendments necessary to bring its SGAT or physical collocation tariff into compliance with the national standards. The Commission specified that these amendments would be due 30 days after the *Collocation Reconsideration Order's* effective date (*i.e.*, by November 9, 2000).[4] The Commission also specified that the national standards would take effect within 60 days after the amendments filing for SGATs (*i.e.*, by January 8, 2001), and at the earliest point permissible under state law for tariffs, except to the extent the state commission specifies other application processing or provisioning intervals for a particular type of collocation arrangement.[5]

4. On November 7, 2000, the Common Carrier Bureau granted Verizon, SBC and Qwest conditional waivers of certain aspects of the *Collocation Reconsideration Order* pending Commission action on these carriers' petitions for reconsideration of the 90-day provisioning interval.[6] The Bureau also clarified that the November 9, 2000 deadline for amending SGATs and collocation tariffs applies only to the extent a state has not affirmatively set its own application processing and provisioning standards for physical collocation. Finally, the Bureau Order clarified that a state commission does not set such standards when it permits application processing and provisioning intervals to take effect without an affirmative determination that they comply with section 251(c)(6) of the Communications Act of 1934, as amended ("Communications Act" or "Act").[7]

5. On December 1, 2000, BellSouth filed a petition for conditional waiver of the 90-day collocation interval established in the *Collocation Reconsideration Order*. Specifically, BellSouth requests the same conditional waiver from the 90-day collocation interval that we granted Verizon and SBC in the *Collocation Waiver Order*. On December 18, 2000, BellSouth filed an *ex parte* letter indicating there are three states in which the state commission has not yet

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3 *Id.* at ¶ 29.

4 *See id.* at ¶ 36; *see also Collocation Summary*, 65 Fed. Reg. at 54433 (establishing an October 10, 2000 effective date for certain rules adopted in the *Collocation Reconsideration Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 65 FR 57291 (Sept. 22, 2000) (establishing the same effective date for the remaining rules adopted in that *Order*).

5 *Collocation Reconsideration Order, supra* note 1, at ¶ 36.

6 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, DA 00-2528 (Com. Car. Bur. rel. Nov. 7, 2000) ("*Collocation Waiver Order*").

7 47 U.S.C. § 251(c)(6).

set its own interval standard. Those states are Alabama, North Carolina, and Tennessee.[8] ITC^DeltaCom, Inc. d/b/a ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and WorldCom, Inc. ("WorldCom") oppose BellSouth's waiver request.

III. DISCUSSION

A. Waiver Request

6. We grant, in part, the petition of BellSouth for a conditional waiver of certain aspects of the *Collocation Reconsideration Order* pending Commission action on petitions for reconsideration of that *Order*. Specifically, BellSouth requests waiver of the 90-day provisioning interval set by the Commission in the *Collocation Reconsideration Order* pending Commission reconsideration of that interval. BellSouth proposes that its waiver be conditioned on compliance with alternative application processing and provisioning standards for physical collocation identical to the standards set for SBC and Verizon in the *Collocation Waiver Order*. We conclude that the equities favor the grant of the waiver only because we find that the alternative intervals upon which we condition the waiver will not create substantial additional delay in the provisioning of physical collocation space to competitors. Thus, by granting the waiver, we in no way retreat from the Commission's determination that a national standard for such intervals is essential in the absence of state commission action on such intervals. Accordingly, we condition the waiver on petitioner's implementation of those standards to the extent states within petitioner's region have not set their own application processing or provisioning standards for BellSouth's physical collocation operations.

Could waiver apply in other states?

7. As stated in our *Collocation Waiver Order*, the Commission may waive any provision of its rules for good cause shown.[9] In their petitions for reconsideration of the *Collocation Reconsideration Order*, Verizon, SBC, and Qwest raised issues as to whether the 90-day interval is appropriate, either generally or for particular types of arrangements. We also noted in the *Collocation Waiver Order* that these petitions for reconsideration and the comments on them greatly expand the record on reasonable physical collocation intervals beyond what was available to the Commission when it adopted the *Collocation Reconsideration Order*. While we express no opinion on the merits of these petitions for reconsideration or on what action the Commission might take in response to them, this greatly expanded record countenances pause

[8] The Alabama Public Service Commission ("Alabama Commission") filed comments in response to BellSouth's waiver request.

[9] 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

before we insist on absolute compliance with that *Order*. Consequently, we reject WorldCom's argument that the requisite "good cause" has not been provided.[10]

8. An additional consideration is that, in adopting the application processing and provisioning standards, the Commission specified that an incumbent LEC need not comply with them to the extent a state sets its own standards for physical collocation.[11] Granting the interim waiver requested by BellSouth will give state commissions additional time to evaluate whether different intervals are more appropriate in their states, as contemplated in the *Collocation Reconsideration Order*. At the same time, we continue to believe that it would be unfair to competitive local exchange carriers ("competitive LECs") to allow any incumbent LEC to continue the collocation provisioning performance that led us to adopt the national application processing and collocation provisioning standards. That performance, as the Commission determined in the *Collocation Reconsideration Order*, has substantially delayed many competitive LECs' efforts to obtain physical collocation and has impeded competitive LECs' ability to provide facilities-based service in much of the country.[12]

9. We therefore conclude that the public interest would be best served by conditioning waiver on BellSouth's commitment to meet reasonable alternative provisioning intervals. Accordingly, we condition our grant on petitioner's adoption of interim application processing and provisioning intervals in accordance with the procedures specified for SBC and Verizon in the *Collocation Waiver Order*. These intervals will remain in effect pending Commission action on the petitions for reconsideration of the *Collocation Reconsideration Order*, except to the extent a state sets its own intervals. These intervals will provide meaningful relief to many competitive LECs, without forcing BellSouth to implement the national standards prior to any federal or state consideration of their arguments that the current standards are unreasonably short. Moreover, we find that this waiver test is consistent with the Commission's goal in the *Collocation Reconsideration Order* of substantially reducing the delays competitive LECs encounter in seeking to use physical collocation to compete against incumbent LECs.[13]

10. BellSouth's request for the same conditional waiver of the 90-day interval that was granted to Verizon and SBC in the *Collocation Waiver Order* is a reasonable one. Pursuant to those waivers, Verizon and SBC are required to adhere to collocation intervals adopted by the New York Public Service Commission ("New York Commission"). Specifically, those waivers were, and this waiver is, conditioned upon compliance with New York Commission requirements that the incumbent LEC notify a requesting carrier whether its request can be accommodated within eight business days (roughly, 11 calendar days) of the incumbent LEC's receipt of a physical collocation application. Competitive LECs that have properly forecast their collocation demands are entitled to obtain physical collocation space within 76 business days

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10 WorldCom Comments at 2-3.

11 *Collocation Reconsideration Order*, *supra* note 1, at ¶¶ 24 & 29.

12 *Id.* at ¶¶ 20-21.

13 *See id.* at ¶ 20-23.

(roughly, 105 calendar days) when conditioned space is available. In addition, the New York Commission requires Verizon to provision arrangements involving major construction or special applicant requirements within 91 business days (roughly, 126 calendar days).[14] These provisioning intervals can be extended for 20 business days (roughly, 28 calendar days) if collocation space is not readily available and up to three months if the competitive LEC has not properly forecast its collocation demands.[15] The New York Commission also requires that Verizon provision augments to existing collocation arrangements within 45 business days (roughly, 63 calendar days) of receiving a competitive LEC's application.[16] As we stated in the *Collocation Waiver Order*, the New York Commission's standards are generally consistent with the Commission's goals, as set forth in the *Collocation Reconsideration Order* and we accordingly condition this waiver on compliance with these standards.[17]

11. We remain concerned, however, that the New York Commission's standards may result in excessively long intervals in instances where a competitive LEC has not properly forecast its collocation demands. For instance, under the New York standards, a failure to submit a timely and accurate forecast could subject a competitive LEC to intervals as long as 195 days for arrangements that do not involve major construction or special applicant requirements. In the context of this interim waiver order, we continue to find that this aspect of the New York standard would unfairly disadvantage competitors.[18] We therefore will allow BellSouth to increase the provisioning interval for a proposed physical collocation arrangement by no more than 60 calendar days in the event a competitive LEC fails to provide a timely and accurate forecast. WorldCom argues that BellSouth has gone beyond seeking to extend the terms of the *Collocation Waiver Order* to itself by also requesting that the Commission order competitive LECs to provide two-year forecasts.[19] We do not believe that it is a fair reading of BellSouth's request. In any event, the waiver we grant herein does not allow BellSouth to increase provisioning intervals due to failure of a competitive LEC to submit a timely and accurate forecast unless the competitive LEC has not properly forecast its collocation requirements three months in advance.[20] We expect BellSouth to use its best efforts to minimize any such increases, particularly during the initial implementation period when many competitive LECs may still be in the process of preparing their forecasts. In addition, absent a competitive LEC's express

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14 Verizon Petition for Waiver at Attachment C.

15 Verizon Petition for Waiver at Attachment C. We note that the New York Commission standards provide for no penalty for inaccurate competitive LEC forecasts, other than an increase in provisioning intervals.

16 *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services*, Opinion and Order Concerning Verizon's Provision of DSL Capabilities, Opinion No. 00-12, 8-10 (New York PSC, Oct. 31, 2000) ("*New York PSC Opinion No. 00-12*").

17 *See Collocation Waiver Order at ¶ 14.*

18 *Id. at* ¶ 15.

19 WorldCom Comments at 3.

20 *See* Verizon Petition for Waiver at Attachment C.

approval, BellSouth must use collocation forecasts obtained from the competitive LEC only for purposes of providing that carrier with reasonable and nondiscriminatory collocation arrangements.[21]

12. Subject to these modifications, we find that the New York Commission standards, including the 45 business day interval for augments, meet our criterion for an interim waiver of the national standards. To the extent any state has affirmatively specified different application processing or provisioning intervals for BellSouth's operations within that state, BellSouth, of course, must implement the alternative intervals in that state. For example, the Alabama Public Service Commission ("Alabama Commission") filed comments regarding BellSouth's waiver request to inform the Commission that the Alabama Commission has issued a decision on cageless collocation provisioning intervals and anticipates issuing a decision on additional collocation processing and provisioning intervals in the near future.[22] To the extent a state has set application processing or provisioning intervals for particular types of BellSouth collocation arrangements, BellSouth must implement those intervals in that state.[23] To the extent a state does not set such intervals, BellSouth must comply with the conditional waiver granted in this *Order*. BellSouth would be required to comply with any new state provisioning intervals when the state sets those intervals.

B. Implementing Procedures

13. In order to implement the conditions discussed above and thereby to effectuate the requested waivers, BellSouth must offer to provide all forms of physical collocation in accordance with those intervals, except to the extent a state has affirmatively specified its own application processing and collocation interval deadlines. These offers must be consistent with the procedures set forth in the *Collocation Reconsideration Order*.[24] BellSouth also must file with the state commissions any amendments necessary to bring its SGATs or collocation tariffs into compliance with the interim standards.[25] BellSouth will have fifteen days from the release of this Order to file these amendments. The interim standards shall take effect within 60 days after the amendments filing for SGATs, and at the earliest point permissible under state law for

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21 47 U.S.C. § 222.

22 *See* Alabama Commission Comments at 2. *See also* ITC^DeltaCom Comments at 2 (noting that the Alabama Commission, the Georgia Public Service Commission, and the Tennessee Regulatory Authority have issued orders regarding cageless collocation applications).

23 *See Collocation Reconsideration Order* at ¶ 37.

24 *See Collocation Reconsideration Order, supra* note 1, at ¶¶ 33-34.

25 *Id.* at ¶ 36.

tariffs, except to the extent the state commission affirmatively specifies other application processing or provisioning intervals for a particular type of collocation arrangement.[26]

II. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-254, 256, 271, 303(r), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition for Conditional Waiver filed December 1, 2000 by BellSouth Corporation and BellSouth Telecommunications, Inc. IS GRANTED TO THE EXTENT STATED HEREIN AND OTHERWISE DENIED, subject to the conditions stated in part III.A of this *Memorandum Opinion and Order*. BellSouth must implement the application processing and provisioning intervals for physical collocation described in Attachment C to Verizon's Petition for Conditional Waiver, as modified by the New York Commission in Opinion No. 00-12, subject to the modifications set forth in this Order.

15. IT IS FURTHER ORDERED that the conditional waiver granted in this *Memorandum Opinion and Order* IS EFFECTIVE IMMEDIATELY UPON RELEASE, in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Glenn T. Reynolds
Acting Deputy Chief
Common Carrier Bureau

[26] *Id.* The conditional waiver we grant BellSouth in this *Order* will take effect immediately upon this Order's release.

Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
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	)	

PETITION FOR CONDITIONAL WAIVER

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"), hereby respectfully request the same conditional waiver from the 90-day collocation interval established by the Commission in its recent *Collocation Order*[1] that it granted Verizon and SBC in its November 7, 2000 *Order*.[2] For the reasons set forth below, the Commission should grant BellSouth's request.

1. The Commission released its *Collocation Order* on August 10, 2000. This *Order* established, *inter alia*, that in the absence of a state standard or an alternative standard agreed to by a requesting carrier and an incumbent local exchange carrier ("ILEC"), the ILEC must

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1 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147 and 96-98, *Order On Reconsideration and Second Further Notice Of Proposed Rulemaking In CC Docket No. 98-147 And Fifth Further Notice Of Proposed Rulemaking In CC Docket No. 96-98*, FCC 00-297, released August 10, 2000 ("*Collocation Order*").

2 *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order (DA 00-2528), released November 7, 2000 ("*Waiver Order*").

provide physical collocation on a 90-day interval.[3] On November 7, 2000, the Commission granted Verizon and SBC conditional waivers of certain aspects of the 90-day provisioning interval pending the Commission's action on petitions for reconsideration. Specifically, the *Waiver Order* permits Verizon and SBC, in states that have not set their own provisioning intervals, to follow the application processing and provisioning interval established by the New York Public Service Commission as modified in the *Waiver Order*.[4]

2. Currently, in the three BellSouth states that have not set a state provisioning interval standard pursuant to one of the methods set forth in the *Collocation Order*, the 90-day interval established in the *Collocation Order* will apply when BellSouth is negotiating collocation terms and conditions pursuant to 47 U.S.C. § 252(a). The 90-day interval will also apply when a telecommunications carrier with an existing agreement requests to modify that agreement to conform to the *Collocation Order* pursuant to the Change of Law provision within that interconnection agreement. BellSouth has determined that where it must adhere to the national

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[3] *See Collocation Order* ¶ 21. Paragraph 36 of the *Collocation Order* requires ILECs "to file with the state commission any amendments necessary to bring a tariff or SGAT into compliance with the national standards. At the time it files these amendments, the incumbent also must file its request, if any, that the state set intervals longer than the national standards as well as all supporting information." BellSouth understands this requirement to be applicable only where a state has failed to set its own interval "by statute, through an existing or future rulemaking order, by enforcing a state tariff, or by applying the precedent of a state arbitration decision." *Collocation Order* ¶ 22. Where the state has set its own interval, the state interval applies.

[4] The provisioning standards set by the New York Public Service Commission could result in a provisioning interval of up to 195 days for collocation arrangements that do not involve major construction or special applicant requirements. The *Waiver Order* found this aspect of the New York standard could unfairly disadvantage competitors and modified it with respect to the waivers that were granted. The *Waiver Order* allowed Verizon and SBC to increase the provisioning interval for a proposed physical collocation arrangement by no more than 60 calendar days in the event a competitive LEC fails to provide a timely and accurate forecast. ¶ 16. In addition, the *Waiver Order* made clear that collocation forecasts obtained from a
(Footnote Continued)

provisioning interval, it cannot do so without preconditioning its premises. Realizing that not all premises can be preconditioned, BellSouth has attempted to identify premises that will likely have collocation demand in the next year based on recent activity. Additionally, BellSouth has asked telecommunications carriers to provide BellSouth with a two-year forecast of the targeted premises for collocation. The response, to date, has been insufficient to provide BellSouth with the data necessary to determine, with reasonable certainty, what premises should be prioritized for preconditioning. For this reason, BellSouth is concerned that its resources will be deployed ineffectively. The alternative collocation provisioning plan authorized in the *Waiver Order* would allow BellSouth to provision collocation arrangements within a time frame that has been determined to be an appropriate interval for promoting open competition in the local exchange market[5] and would prevent BellSouth from deploying resources inefficiently.

3. As noted in the *Waiver Order*, the Commission's goal in the *Collocation Order* was to ensure that physical collocation arrangements were made available on terms and conditions that are just, reasonable and nondiscriminatory. Thus, the *Collocation Order* established a national standard that would apply when a state has not determined an application processing and provisioning interval. Nevertheless, the *Waiver Order* recognizes that the petitions for reconsideration of the *Collocation Order* raise serious questions about whether a 90-day interval is reasonable. Without expressing any opinion on the merits of the pending petitions, the *Waiver Order* recognized that the record has greatly expanded since the *Collocation Order* was adopted

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competitive LEC may only be used for that carrier with reasonable and nondiscriminatory collocation arrangements.

[5] *Waiver Order* ¶14.

and as a result "countenances a moment of pause before we insist on absolute compliance with that *Order*."[6] The *Waiver Order* concluded that good cause existed to waive the 90-day interval required by the *Collocation Order* because:

> Granting interim waivers will give the state commissions additional time to evaluate whether different intervals are more appropriate in their states, as contemplated in the *Collocation Reconsideration Order*.... We therefore conclude that the public interest would be best served by conditioning waiver on their commitments to meet reasonable alternative provisioning intervals.[7]

4. The same reasoning that led the Commission to grant Verizon and SBC a conditional waiver of the 90-day interval should apply equally to BellSouth's circumstance. BellSouth's waiver request should be treated in the same deliberate and balanced manner that led the Commission to allow Verizon and SBC to use an alternative provisioning interval that affords competitive LECs timely collocation but does not force Verizon or SBC to implement a national standard before consideration of the arguments that the standards are unreasonably short.

5. If the Commission grants BellSouth's waiver request, BellSouth will use the application processing and provisioning intervals established by the New York Public Service Commission and modified in the *Waiver Order* for all collocation requests that arise in the three states in which the state commission has not yet prescribed other intervals. Having determined

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6 *Id.* ¶10.

7 *Id.* ¶ 11-12.

that such provisioning intervals serve the public interest and that good cause exists for waiver, the Commission should grant BellSouth's request.

Respectfully submitted,

BELLSOUTH CORPORTION
BELLSOUTH TELECOMMUNICTIONS, INC.

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Date: December 1, 2000

CERTIFICATE OF SERVICE

I do hereby certify that I have this 1st day of December 2000 served the following parties to this action with a copy of the foregoing **PETITION FOR CONDITIONAL WAIVER** by hand delivery or placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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Before the
Federal Communications Commission
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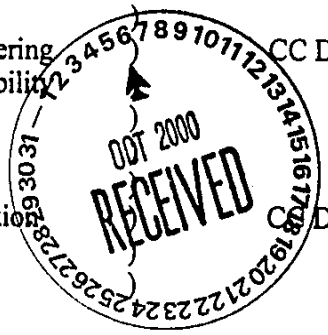

In the Matters of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
and	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR A WAIVER

Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth"), by and through their attorneys, hereby respectfully submit the following request for clarification or, in the alternative, for waiver of a section of the Commission's recent order regarding collocation.[1] Specifically, this request seeks clarification of the section of the *Collocation Order* related to amending state tariffs and statements of generally available terms and conditions ("SGAT") regarding collocation interval deadlines.

I. Discussion

The Commission released its *Collocation Order* on August 10, 2000. This *Order* established, *inter alia*, national provisioning interval standards for physical collocation.[2] In

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1 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147 and 96-98, *Order On Reconsideration and Second Further Notice Of Proposed Rulemaking In CC Docket No. 98-147 And Fifth Further Notice Of Proposed Rulemaking In CC Docket No. 96-98,* FCC 00-297, released August 10, 2000 ("*Collocation Order*").

2 *See Collocation Order* ¶ 21.

establishing these standards, however, the *Collocation Order* is explicitly clear in numerous sections that such standards are applicable in the absence of state standards or alternative standards agreed to by requesting carriers and incumbent local exchange carriers ("ILEC").[3] Indeed, the *Collocation Order* specifically states:

> We therefore conclude that we should adopt national standards for physical collocation provisioning *that will apply when the state does not set its own standards or if the requesting carrier and incumbent LEC have not mutually agreed to alternative standards.* A state could set its own standards by statute, through an existing or future rulemaking order, by enforcing a state tariff, or by applying the precedent of a state arbitration decision. An incumbent LEC, of course, may petition a state to extend the application processing and provisioning interval deadlines in specific circumstances (e.g., conditioning space in a premises is particularly difficult). For purposes of our rules, a state decision granting an extension constitutes a state standard for the arrangement in question.[4]

Accordingly, if a state has set its own provisioning interval standards as described above, the *Collocation Order* clearly provides that these are the standards that should apply in that state and not the national standards established by the Commission in the *Collocation Order*.

Despite these unambiguous provisions regarding the application of state standards when a state has enacted such standards, a later paragraph in the *Collocation Order* seems to contradict

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[3] *See e.g., id.* ¶ 21 ("...we find a need for national application processing and provisioning interval standards for physical collocation that will apply *in the absence of state standards.*"); ¶ 22 ("Absent national standards, *applicable in the absence of state standards or alternative standards agreed to by requesting carriers and incumbent LECs,* ..."); ¶ 23 ("Therefore, in the exercise of our authority, we find that maximum application processing and provisioning intervals for physical collocation that apply, *except to the extent a state sets its own standard or the parties have mutually agreed to an alternative standard,* ...." "We conclude that national standards for collocation provisioning that apply, *in the absence of a state standard or the parties' mutual agreement to an alternative standard,* will help avoid having telecommunications services delayed indefinitely pending the completion of state proceedings.")(emphasis added).

[4] *Id.* ¶ 22 (emphasis added).

these very provisions in applying the newly established national standards. Paragraph 36 of the *Collocation Order* states:

> In some instances, a state tariff sets forth the rates, terms, and conditions under which an incumbent LEC provides physical collocation to requesting carriers. An incumbent LEC also may have filed with the state commission a statement of generally available terms and conditions (SGAT) under which it offers to provide physical collocation to requesting carriers. *Because of the critical importance of timely collocation provisioning, we conclude that, within 30 days after the effective date of this Order, the incumbent LEC must file with the state commission any amendments necessary to bring a tariff or SGAT into compliance with the national standards. At the time it files these amendments, the incumbent also must file its request, if any, that the state set intervals longer than the national standards as well as all supporting information.* For a SGAT, the national standards shall take effect within 60 days after the amendment's filing except to the extent the state commission specifies other application processing or provisioning intervals for a particular type of collocation arrangement, such as cageless collocation. Where a tariff must be amended to reflect the national standards, those standards shall take effect at the earliest time permissible under applicable state requirements.[5]

BellSouth reads this paragraph as applying only where the requirements of paragraph 22 are not met, i.e., if a state commission has not adopted its own standards by "statute, through an existing or future rulemaking order, by enforcing a state tariff, or by applying the precedent of a state arbitration decision."[6] Thus, for example, if a state commission had conducted a proceeding in which it had established provisioning intervals from which an ILEC had implemented in its tariff or SGAT, or if an ILEC had filed a tariff regarding collocation which a state commission had formally accepted, BellSouth does not believe that paragraph 36 would require that the ILEC file an amendment to its tariff or SGAT changing the standards adopted by the state commission to the standards set by the *Collocation Order*. This would be in direct

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5 *Id.* ¶ 36 (emphasis added).

6 *Id.* ¶ 22.

opposition with the above-cited paragraph 22, which requires application of the national standards when a state commission has *not* acted or the parties have not reached an agreement on their own.

If BellSouth's reading of the *Collocation Order* is incorrect, however, the Commission should waive paragraph 36 to the extent it would require an adoption of the national standards in states that have already adopted collocation standards for at least three reasons. First, the Commission's decision to allow states to establish standards is consistent with the spirit of the *Collocation Order*. Without doubt, the state commissions that have established standards are much more cognizant of its particular state's situation and needs. Therefore, the state standards, and not the national standards, are more appropriate and should be applied.

Second, many of the competitive local exchange carriers ("CLEC") that argued zealously for national standards acknowledged that where states had established standards, national standards where not needed.[7] Thus, it is obvious to all interested parties that the state commission's standards should be applicable where they exist.

Finally, the *Collocation Order* points out that where state commissions have addressed the issue, in many cases they have actually set intervals that were equal or lower than the national intervals of the *Collocation Order*.[8] Accordingly, requiring an ILEC to conform to the national standards would be a burdensome task with no recognizable tangible benefit.

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7 *See Collocation Order* ¶ 36, n. 92.

8 *See e.g., id.* Texas commission set an interval of 90 days for caged and 70 days for cageless; Pennsylvania commission requires caged collocation within 90 days of receiving CLEC's deposit; Florida commission requires collocation within three months of receiving the CLEC's deposit. *Id.* ¶¶ 17 – 19.

II. Conclusion

Based upon the reasons stated herein, BellSouth requests that the Commission clarify that paragraph 36 of the *Collocation Order* does not require an ILEC to amend its state tariffs or SGATs to conform to the national collocation standards in states where the state commission has already set collocation standards through a state proceeding. If paragraph 36 does impose such a requirement, BellSouth asks that the Commission waive those requirements in those states that have already taken action consistent with paragraph 22. Without such a waiver, BellSouth will be faced with the untenable position of trying to determine which standards apply – those established by the state and set forth in the SGAT or tariff or those set forth in the *Collocation Order*. Under those circumstances, the *Collocation Order* has BellSouth caught between Scylla and Charybdis and the Commission must therefore waive the requirement of paragraph 36, which is inconsistent with the remainder of the *Order*.

Respectfully submitted,

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Date: October 4, 2000

CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of October 2000 served the following parties to this action with a copy of the foregoing PETITION FOR CLARIFICATION OR IN THE ALTERNATIVE FOR A WAIVER by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

*Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S. W.
Room TW-A325
Washington, D. C. 20554

*International Transcription Services, Inc.
The Portals, 445 12th Street, S. W.
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Washington, D.C. 20554

Elizabeth R. McClurkin

* VIA HAND DELIVERY

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

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Report No. 2446 October 11, 2000

PETITIONS FOR RECONSIDERATION AND CLARIFICATION OF ACTION IN RULEMAKING PROCEEDING

Petitions for Reconsideration and Clarification have been filed in the Commission's rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing and copying in Room CY-A257, 445 12th Street, S.W., Washington, D.C. or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857-3800. Oppositions to these petitions must be filed within 15 days of the date of public notice of the petitions in the Federal Register. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions have expired.

Subject: Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147)

AND

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-98)

Filed By: -Stephen L. Earnest for BellSouth Corporation and BellSouth Telecommunications, Inc. on 10/04/00[1]

-William T. Lake, Counsel for Qwest Corporation on 10/10/00

-Hope Thurrott, Attorney for SBC Communications Inc. on 10/10/00

-Joseph DiBella, Attorney for Verizon Telephone Companies on 10/10/00

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[1] The Petition for BellSouth Corporation is entitled "Petition for Clarification or in the alternative for a Waiver"

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2000 **Released:** November 7, 2000

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order, we address requests that the Commission clarify or waive certain aspects of its *Collocation Reconsideration Order*,[1] including the requirements for statements of generally available terms and conditions (SGATs) and physical collocation tariffs. For the reasons stated below, we clarify that the November 9, 2000 deadline for amending SGATs and collocation tariffs applies only to the extent a state has not affirmatively set its own application processing and provisioning standards for physical collocation. We also clarify that a state commission does not set such standards when it permits application processing and provisioning intervals to take effect without an affirmative determination that they comply with section 251(c)(6) of the Communications Act of 1934, as amended (Communications Act or Act).[2] In addition, we grant Verizon, SBC, and Qwest conditional waivers of certain aspects of the *Collocation Reconsideration Order* pending Commission action on these carriers' petitions for reconsideration of the 90-day provisioning interval. These waivers are conditioned on Verizon's, SBC's, and Qwest's implementation of alternative interim collocation provisioning standards, as set forth below.

II. BACKGROUND

2. On August 10, 2000, the Commission released the *Collocation Reconsideration Order*, which, among other actions, established national standards for processing physical collocation applications and provisioning physical collocation arrangements. Specifically, the

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[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 20 WL 1128623 (rel. Aug. 10, 2000) (*Collocation Reconsideration Order*). A summary of the *Collocation Reconsideration Order* was published at 65 Fed. Reg. 54433 (Sept. 8, 2000) (*Collocation Summary*).

[2] 47 U.S.C. § 251(c)(6).

Commission required that, where neither the state nor the parties to an interconnection agreement set a different standard, an incumbent local exchange carrier (incumbent LEC) must tell the requesting telecommunications carrier whether a collocation application has been accepted or denied within ten calendar days after receiving the application.[3] The Commission also required that, except to the extent a state sets its own collocation provisioning standard or an interconnection agreement between an incumbent LEC and a requesting carrier sets an alternative standard, an incumbent LEC must complete physical collocation provisioning within 90 calendar days after receiving an acceptable collocation application.[4]

3. In the *Collocation Reconsideration Order*, the Commission recognized that an incumbent LEC may have filed with the state commission an SGAT or a tariff that sets forth the rates, terms, and conditions under which the incumbent LEC provides physical collocation. The Commission required that an incumbent LEC must file with the state commission any amendments necessary to bring its SGAT or physical collocation tariff into compliance with the national standards. The Commission specified that these amendments would be due within 30 days after the *Order's* effective date (*i.e.*, by November 9, 2000).[5] The Commission also specified that the national standards would take effect within 60 days after the amendments' filing for SGATs (*i.e.*, by January 8, 2001), and at the earliest point permissible under state law for tariffs, except to the extent the state commission specifies other application processing or provisioning intervals for a particular type of collocation arrangement.[6]

III. DISCUSSION

A. Filing Requirements

4. The Commission's goal in the *Collocation Reconsideration Order* was to ensure that incumbent LECs provide physical collocation on terms and conditions that are just, reasonable, and nondiscriminatory in all states, rather than just those states that have established their own application processing and provisioning standards for physical collocation.[7] Accordingly, the Commission explained that the national standards for processing physical collocation applications and provisioning physical collocation arrangements would not apply to the extent that a state sets different standards.[8] To effectuate the standards set forth in the

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[3] *Collocation Reconsideration Order*, *supra* note 1, at ¶ 24.

[4] *Id.* at ¶ 29.

[5] *See id.* at ¶ 36; *see also Collocation Summary*, 65 Fed. Reg. at 54433 (establishing an October 10, 2000 effective date for certain rules adopted in the *Collocation Reconsideration Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 65 FR 57291 (Sept. 22, 2000) (establishing the same effective date for the remaining rules adopted in that *Order*).

[6] *Collocation Reconsideration Order*, *supra* note 1, at ¶ 36.

[7] *Id.* at ¶¶ 20-22.

[8] *Id.* at ¶¶ 24 & 29.

Collocation Reconsideration Order, the Commission required that incumbent LECs "must file with the state commission any amendments necessary to bring a tariff or SGAT into compliance with the national standards."[9] The Commission did not, however, state explicitly whether incumbent LECs must file SGAT or collocation tariff amendments in states that have set their own application processing and provisioning standards for physical collocation. BellSouth requests clarification that an incumbent LEC need not file SGAT or collocation tariff amendments in these states.[10] AT&T and DSLnet maintain that incumbent LECs should file SGAT or collocation tariff amendments in all states so that the state commissions may reevaluate in light of current information any application processing and provisioning standards previously adopted for physical collocation.[11]

5. We agree with BellSouth that requiring the filing of SGAT or collocation tariff amendments in states that have set their own application processing and provisioning standards for physical collocation would be inconsistent with the Commission's goal of having national standards that apply in the absence of state standards.[12] To eliminate any potential for confusion in this area, we clarify that an incumbent LEC need not file SGAT or tariff amendments pursuant to the *Collocation Reconsideration Order* in states that have affirmatively established such standards on either an interim or permanent basis. In all other states (that is, in all states that have not affirmatively established application processing and provisioning intervals for physical collocation), the *Collocation Reconsideration Order* requires that incumbent LECs amend their SGATs and collocation tariffs to the extent necessary to bring them into compliance with the national standards.[13]

B. Effect of State Commission Inaction

6. As stated above, the *Collocation Reconsideration Order* requires that an incumbent LEC "file with the state commission any amendments necessary to bring a tariff or

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[9] *Id.* at ¶ 36.

[10] BellSouth Petition for Clarification or in the Alternative for a Waiver, CC Docket No. 98-147, at 2-3 (filed Oct. 4, 2000) (BellSouth Petition).

[11] *See* Opposition of AT&T Corp. to Petitions for Reconsideration, CC Docket No. 98-147, at 4 (filed Nov. 1, 2000); Opposition of DSLnet Communications, LLC to Petitions for Reconsideration filed by Verizon, SBC, Qwest, and BellSouth, CC Docket No. 98-147, at 2-4 (filed Nov. 1, 2000).

[12] We note that, because the filings due November 9, 2000 must include any amendments necessary to bring the incumbent's SGAT and tariff filings into compliance with the national standards, *see* part III.B, *infra*, AT&T's and DSLnet's position would cause the national standards to supersede state standards absent an affirmative determination by the state commission that the state standards should be retained. Such a result would be contrary to the Commission's intent in the *Collocation Reconsideration Order*.

[13] *Collocation Reconsideration Order*, *supra* note 1, at ¶ 36. We note that the deadline for reply comments in connection with BellSouth's petition is November 13, 2000. Because BellSouth's petition concerns a November 9, 2000 filing deadline, however, we find good cause to waive reply comments in connection with that petition. We believe that since we rule in BellSouth's favor, no one will be prejudiced by the lack of an opportunity to respond to AT&T's and DSLnet's arguments.

SGAT into compliance with the national standards."[14] In adopting this requirement, the Commission made clear that an incumbent LEC could request, in conjunction with its SGAT or collocation tariff amendment filing, that the state commission set application processing or provisioning intervals for physical collocation different from the national standards. The Commission stated, however, that "[f]or an SGAT, the national standards shall take effect within 60 days after the amendment's filing except to the extent the state commission specifies other application processing or provisioning intervals for a particular type of collocation arrangement."[15] This deadline was based on section 251(f)(3) of the Communications Act, which specifies that a state commission must permit an SGAT to take effect no later than 60 days after receiving it, unless the state commission completes its review of the SGAT under section 252(f)(2) of the Act or the incumbent LEC agrees to an extension of the review period.[16] Qwest requests clarification that longer provisioning intervals proposed by an incumbent LEC in an SGAT may supersede the national standard where the state commission simply fails to act within the statutory 60-day period.[17] We disagree with Qwest's proposed interpretation.

7. Qwest's position is based on a misunderstanding of what an incumbent LEC must include in the SGAT and tariff amendment filings required by the *Collocation Reconsideration Order*. Specifically, those filings must include any amendments necessary to bring the incumbent LECs' SGATs and tariffs into compliance with *the national standards*. It is those standards that take effect when the state commission permits the amendments to take effect through operation of law. The *Collocation Reconsideration Order* does not permit an incumbent LEC to set unilaterally different standards by incorporating time periods of its own choosing into its SGATs and tariffs and having those standards take effect through inaction by the state commission. Indeed, such an approach would eviscerate the Commission's intent in the *Collocation Reconsideration Order* to establish national standards applicable except where specifically modified through interconnection agreement negotiations or deliberative processes of a state commission.

8. The Commission's underlying goal in the *Collocation Reconsideration Order* was to make sure that incumbent LECs process physical collocation applications and provision physical collocation arrangements within reasonable time frames. To make this happen, the Commission adopted national standards that apply except to the extent a state commission has affirmatively set alternative standards.[18] Because section 252(f)(3) of the Act mandates that

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[14] *Id.* at ¶ 36.

[15] *Id.* (*citing* 47 U.S.C. § 252(f)(3)).

[16] 47 U.S.C. § 252(f)(3). Under section 252(f)(2), a state commission may not approve an SGAT containing unjust and unreasonable terms and conditions for physical collocation. *Compare* 47 U.S.C. § 251(c)(6) *with* 47 U.S.C. § 252(f)(2).

[17] Qwest Petition for Waiver at 3; *see also* Petition of Qwest Corporation for Clarification or, in the Alternative, Reconsideration, CC Docket No. 98-147, at 2 (filed Oct. 10, 2000).

[18] *See Collocation Reconsideration Order*, *supra* note 1, at ¶¶ 20-23. Thus, a state commission does not affirmatively specify a state standard if it does no more than allow an interconnection agreement, SGAT, or tariff (continued....)

SGATs shall become effective no later than 60 days after the incumbent LEC files with the state commission, Qwest's position would permit the incumbent LEC to displace the national standards without any finding, by either a state commission or this Commission, that the alternatives meet statutory requirements. We find that such an approach is inconsistent with the Commission's intent in the *Collocation Reconsideration Order* to establish national standards in the absence of affirmative determinations by a state commission that different intervals are appropriate.[19]

C. Waiver Requests

9. We also grant, in part, the petitions of Verizon, SBC, and Qwest for conditional waivers of certain aspects of the *Collocation Reconsideration Order* pending Commission action on their petitions for reconsideration of that *Order*.[20] Specifically, each of the petitioners requests waiver of the 90-day provisioning interval set by the Commission in the *Collocation Reconsideration Order* and the filing requirements the Commission adopted to effectuate that interval pending Commission reconsideration of that interval. Each of the petitioners proposes that its waiver would be conditioned on their compliance with alternative application processing and provisioning standards for physical collocation.[21] Accordingly, we condition these waivers on each petitioners' adoption of the alternative intervals they propose and subject to certain modifications detailed below. We conclude that the equities favor the grant of the waivers only because we find that the alternative intervals upon which we condition the waivers will not create substantial additional delay in the provisioning of physical collocation space to competitors. Thus, by granting these waivers, we in no way retreat from the Commission's determination that a national standard for such intervals is essential in the absence of state commission action on such intervals.

10. The Commission may waive any provision of its rules for good cause shown.[22] In their petitions for reconsideration of the *Collocation Reconsideration Order*, Verizon, SBC, and

(Continued from previous page)
containing application processing and provisioning intervals for physical collocation to take effect without making a specific finding that those intervals are consistent with section 251(c)(6).

[19] The actions we take in this *Order* do not affect the Supplemental Final Regulatory Flexibility Analysis set forth in the *Collocation Reconsideration Order*, *supra* note 1, at ¶ 134 & Appendix C.

[20] In these petitions for reconsideration, Verizon, SBC, and Qwest argue that the 90-day provisioning interval is too short for at least some physical collocation arrangements. We do not address these petitions for reconsideration in this *Order*.

[21] AT&T Corp. (AT&T), Sprint Corporation (Sprint), and WorldCom, Inc. (WorldCom) oppose Verizon's, SBC's, and Qwest's waiver petitions, and the Association for Local Telecommunications Services (ALTS), Covad Communications Company (Covad), and DSLnet Communications, LLC (DSLnet) oppose SBC's and Qwest's waiver petitions. The United States Telephone Association (USTA) supports Verizon's, SBC's, and Qwest's waiver petitions, and BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth) support Verizon's petition.

[22] 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast* (continued....)

Qwest raise issues as to whether the 90-day interval is appropriate, either generally or for particular types of arrangements. We also note that these petitions for reconsideration and the comments on them greatly expand the record on reasonable physical collocation intervals beyond what was available to the Commission when it adopted the *Collocation Reconsideration Order*.[23] While we express no opinion on the merits of these petitions for reconsideration or on what action the Commission might take in response to them, this greatly expanded record countenances a moment of pause before we insist on absolute compliance with that *Order*.

11. This is especially true because, in adopting the application processing and provisioning standards, the Commission specified that an incumbent LEC need not comply with them to the extent a state sets its own standards for physical collocation.[24] Granting interim waivers will give the state commissions additional time to evaluate whether different intervals are more appropriate in their states, as contemplated in the *Collocation Reconsideration Order*. At the same time, we believe that it would be unfair to competitive local exchange carriers (competitive LECs) to allow any incumbent LEC to continue the collocation provisioning performance that led us to adopt the national application processing and collocation provisioning standards. That performance, as the Commission determined in the *Collocation Reconsideration Order*, has substantially delayed many competitive LECs' efforts to obtain physical collocation and has impeded competitive LECs' ability to provide facilities-based service in much of the country.[25]

12. We therefore conclude that the public interest would be best served by conditioning waiver on their commitments to meet reasonable alternative provisioning intervals. Accordingly, we condition our grant on petitioners' adoption of interim application processing and provisioning intervals in accordance with the procedures specified in part III.C.3 of this Order. These intervals will remain in effect pending Commission action on the petitions for reconsideration of the *Collocation Reconsideration Order*, except to the extent a state sets its own intervals. To be deemed reasonable, Verizon's, SBC's, and Qwest's commitments must include application processing and provisioning deadlines for physical collocation that are significantly shorter than those prevalent prior to the *Collocation Reconsideration Order*. The commitments thus will provide meaningful relief to many competitive LECs, without forcing Verizon, Qwest, or SBC to implement the national standards prior to any federal or state consideration of their arguments that the current standards are unreasonably short. Moreover, we find that this waiver test is consistent with the Commission's goal, in the *Collocation Reconsideration Order*, of substantially reducing the delays competitive LECs encounter in

(Continued from previous page)
Cellular). In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

[23] We note that reply comments regarding the petitions for reconsideration of the *Collocation Reconsideration Order* are due November 14, 2000.

[24] *Collocation Reconsideration Order*, *supra* note 1, at ¶¶ 24 & 29.

[25] *Id.* at ¶¶ 20-21.

seeking to use physical collocation to compete against incumbent LECs.[26] We now turn to Verizon's, SBC's, and Qwest's specific requests.

1. Verizon and SBC

13. Verizon and SBC request that we suspend the November 9 filing deadline for SGATs and physical collocation tariffs in those states where these incumbent LECs offer physical collocation consistent with application processing and provisioning interval standards set for Verizon by the New York Public Service Commission (New York Commission).[27] The New York Commission requires Verizon to notify a requesting carrier whether its request can be accommodated within eight business days (roughly, 11 calendar days) of Verizon's receipt of a physical collocation application. Competitive LECs that have properly forecast their collocation demands are entitled to obtain physical collocation space within 76 business days (roughly, 105 calendar days) when conditioned space is available. The New York Commission requires Verizon to provision arrangements involving major construction or special applicant requirements within 91 business days (roughly, 126 calendar days).[28] These provisioning intervals can be extended for 20 business days (roughly, 28 calendar days) if collocation space is not readily available and up to three months if the competitive LEC has not properly forecast its collocation demands.[29] The New York Commission also requires that Verizon provision augments to existing collocation arrangements within 45 business days (roughly, 63 calendar days) of receiving a competitive LEC's application.[30]

14. As the Commission observed in the *Bell Atlantic New York Order*,[31] the New York Commission has conducted an active and thorough review of the terms and conditions under which Verizon provides physical collocation in the State of New York. As a result of that review, the New York Commission's application processing and provisioning intervals generally are significantly shorter than those prevalent in the industry prior to the *Collocation*

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[26] *See id.* at ¶ 20-23.

[27] Verizon Petition for Waiver at 1; Motion to Supplement SBC's Petition for Conditional Waiver, CC Docket No. 98-147, at 1 (filed Oct. 27, 2000). We note that SBC proposes the New York Commission standards as alternatives to the interim standards proposed in SBC's Petition for Waiver. *See id.* In view of our action regarding the New York Commission standards, we do not address the interim standards proposed in that petition.

[28] Verizon Petition at Attachment C.

[29] Verizon Petition at Attachment C. We note that the New York Commission standards provide for no penalty for inaccurate competitive LEC forcasts, other than an increase in provisioning intervals.

[30] *Proceeding on Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services, Opinion No. 00-12*, Opinion and order Concerning Verizon's Provision of DSL Capabilities, 8-10 (New York PSC, Oct. 31, 2000) (*New York PSC Opinion No. 00-12*).

[31] *Application of Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 74 (1999) (*Bell Atlantic New York Order*), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

Reconsideration Order. Accordingly, we conclude that the New York Commission's standards are generally consistent with the Commission's goals, as set forth in the *Collocation Reconsideration Order*.

15. We are concerned, however, that the New York Commission's standards may result in excessively long intervals in instances where a competitive LEC has not properly forecast its collocation demands. For instance, under the New York standards, a failure to submit a timely and accurate forecast could subject a competitive LEC to intervals as long as 195 days for arrangements that do not involve major construction or special applicant requirements. In the context of this interim waiver order, we find that this aspect of the New York standard would unfairly disadvantage competitors, and we modify the conditions we place on the waivers accordingly.

16. In the *Collocation Reconsideration Order*, the Commission made clear that an incumbent LEC could require a competitive LEC to forecast its physical collocation demands. The Commission stated, however, that absent state action requiring forecasts, a requesting carrier's failure to provide a timely forecast would not relieve an incumbent LEC of its obligation to comply with the national standards.[32] We believe that extended delays for failure to forecast would be particularly unfair to competitors in the context of this interim waiver where competitors will not necessarily be on notice that forecasting is important in getting timely provisioning. We therefore will allow Verizon and SBC to increase the provisioning interval for a proposed physical collocation arrangement by no more than 60 calendar days in the event a competitive LEC fails to provide a timely and accurate forecast.[33] We expect Verizon and SBC to use their best efforts to minimize any such increases, particularly during the initial implementation period when many competitive LECs may still be in the process of preparing their forecasts. In addition, absent a competitive LEC's express approval, Verizon and SBC must use collocation forecasts obtained from the competitive LEC only for purposes of providing that carrier with reasonable and nondiscriminatory collocation arrangements.[34]

17. Subject to these modifications, we find that the New York Commission standards, including the 45 business day interval for augments, meet our criterion for an interim waiver of the national standards. Accordingly, pending Commission action on reconsideration of the *Collocation Reconsideration Order*, Verizon and SBC need not file SGAT or tariff amendments pursuant to that *Order* in those states where Verizon or SBC implements the application processing and provisioning intervals these interim standards in accordance with the procedures set forth in part III.C.3, below. To the extent any state has affirmatively specified different application processing or provisioning intervals for Verizon's or SBC's operations within that state, Verizon or SBC, of course, must implement the alternative intervals in that state.

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[32] *Collocation Reconsideration Order*, *supra* note 1, at ¶ 39.

[33] We take similar action with regard to Qwest's waiver request. *See* Part III.C.2, *infra*.

[34] 47 U.S.C. § 222.

2. Qwest

18. Qwest proposes that we condition its waiver on alternative standards that provide for a ten-day application processing and either a 45-day or a 90-day provisioning interval when the requesting carrier has provided a collocation forecast to Qwest at least 60 days prior to submitting its physical collocation application. Qwest proposes, however, a 20-day application processing interval and provisioning intervals ranging from 90 to 240 days when the requesting carrier has not provided a collocation forecast within that timeframe. The longest provisioning intervals are for arrangements requiring the installation of a power plant (180 days), diesel generator (240 days), or heating, ventilation, or air conditioning equipment (150 to 210 days depending on vendor and equipment availability).[35]

19. To a large extent, the application processing and provisioning intervals Qwest proposes are equal to or shorter than the intervals adopted as national standards in the *Collocation Reconsideration Order*. Accordingly, this set of relatively short intervals meets our waiver criterion. We also find Qwest's proposed reliance on forecasts reasonable as an interim measure to the extent it permits a 60-day increase in interval length when the carrier requesting collocation has failed to provide a timely and accurate forecast. We therefore will allow Qwest to increase the provisioning interval for a proposed physical collocation arrangement no more than 60 calendar days in the event a competitive LEC fails to timely and accurately forecast the arrangement, unless the state commission specifically approves a longer interval.[36] We expect Qwest to use its best efforts to minimize any such increases, particularly during the initial implementation period when many competitive LECs may still be in the process of preparing their forecasts. In addition, absent a competitive LEC's express approval, Qwest must use collocation forecasts obtained from the competitive LEC only for purposes of providing that carrier with reasonable and nondiscriminatory collocation arrangements.[37]

20. Subject to these conditions, we find that the intervals Qwest proposes meet our criterion for an interim waiver of the national standards. Accordingly, pending Commission action on reconsideration of the *Collocation Reconsideration Order*, Qwest need not file SGAT or tariff amendments pursuant to that *Order* in those states where Qwest implements these interim standards in accordance with the procedures set forth in part III.C.3, below. To the extent any state has affirmatively specified different application processing or provisioning

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[35] Qwest Petition for Waiver at 3 & Attachment B. We note that Qwest proposes no penalty for inaccurate competitive LEC forcasts, other than the increases in the application processing and provisioning intervals.

[36] We note that under Qwest's proposals, 150 days is the maximum time a carrier that submits a timely forecast would have to wait between the forecast's submission and completion of a collocation arrangement. *Id.* Specifically, a carrier that submits an acceptable collocation application to Qwest 60 days after submitting a forecast would be entitled to a provisioning interval of no more than 90 days. *Id.* For purposes of Qwest's interim plan, we think this maximum also should apply in the absence of a forecast, unless the state commission specifically approves a longer interval.

[37] 47 U.S.C. § 222.

intervals to Qwest's operations within that state, Qwest must implement the alternative standards in that state.

3. Implementing Procedures

21. In order to implement the conditions discussed above and thereby effectuate the requested waivers, Verizon, SBC, and Qwest must offer to provide all forms of physical collocation in accordance with those intervals, except to the extent a state has affirmatively specified its own application processing and collocation interval deadlines. These offers must be consistent with the procedures set forth in the *Collocation Reconsideration Order*.[38] Verizon, SBC, and Qwest also must file with the state commissions any amendments necessary to bring its SGATs or collocation tariffs into compliance with the interim standards.[39] Verizon, SBC, and Qwest will have fifteen days from the release of this Order to file these amendments. The interim standards shall take effect within 60 days after the amendments' filing for SGATs, and at the earliest point permissible under state law for tariffs, except to the extent the state commission affirmatively specifies other application processing or provisioning intervals for a particular type of collocation arrangement.[40]

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-254, 256, 271, and 303(r), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that this *Memorandum Opinion and Order* IS ADOPTED.

23. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-254, 256, 271, 303(r), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petitions for Conditional Waiver filed October 11, 2000 by the Verizon Telephone Companies, October 17, 2000 by SBC Communications Inc., and October 18, 2000, by Qwest Corporation ARE GRANTED TO THE EXTENT STATED HEREIN AND OTHERWISE ARE DENIED, subject to the conditions stated in part III.C of this *Memorandum Opinion and Order*. Verizon and SBC must implement the application processing and provisioning intervals for physical collocation described in Attachment C to Verizon's Petitions for Conditional Waiver, as modified by the New York Commission in Opinion No. 00-12, subject to the modifications set forth in this Order. Qwest must implement the application processing and provisioning intervals for physical collocation

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38 *See Collocation Reconsideration Order*, *supra* note 1, at ¶¶ 33-34.

39 *Id.* at ¶ 36.

40 *Id.* The conditional waivers we grant Verizon, SBC, and Qwest in this *Order* will take effect immediately upon this Order's release.

described in Attachment B to Qwest's Petitions for Conditional Waiver, subject to the modifications set forth in this Order.

24. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-254, 256, 271, 303(r), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the conditional waivers granted in part III.C of this *Memorandum Opinion and Order* ARE EFFECTIVE IMMEDIATELY UPON RELEASE.

25. IT IS FURTHER ORDERED, pursuant to sections 1-4, 201, 202, 251-254, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 251-254, 256, 271, 303(r), and authority delegated under sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Motion to Supplement SBC's Petition for Conditional Waiver filed October 27, 2000, by SBC Communications Inc., IS GRANTED.

26. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order* to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Dorothy T. Attwood

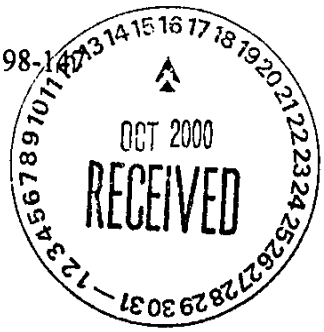
Dorothy T. Attwood
Chief, Common Carrier Bureau

COPY

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

16a

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	



COMMENTS OF BELLSOUTH

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SUMMARY

The Commission is not writing on a clean slate in this proceeding. The Commission is responding to a court order vacating and remanding aspects of its prior collocation rules that the court found exceeded the Commission's authority under the Communications Act. The Commission is bound by law to give full effect to the Court's mandate. Many of the proposals made in the *Second Further Notice* are inconsistent with this state of affairs.

In particular, the Commission must give substance to the Court's finding that Congress authorized intrusion into the property rights of the incumbent LECs only to the extent "necessary" to permit physical collocation for certain defined purposes. Those purposes are "interconnection" with the incumbent's network or "access to unbundled network elements" obtained from the incumbent. The Commission cannot expand this congressional authorization for policy reasons.

Limiting collocation rights to those authorized by Congress does not relegate competing carriers to using inefficient equipment. There are increasingly available alternatives to collocation at incumbent LEC premises. In Atlanta, over the past six weeks alone developers have announced over two million square feet of floor space outside the incumbent LEC central offices that are being converted to "collocation hotels." Any competing carrier that wishes to collocate equipment other than that authorized by Congress to be placed in incumbent LEC premises have ample opportunities to do so. In fact, a Commission ruling that follows the letter of the law will promote development of these market-based collocation alternatives.

The issue of mandated cross-connects between competing carriers' equipment has been answered by the Court of Appeals. The court clearly held that Section 251(c)(6) only authorizes mandatory collocation for the purpose of interconnecting with the incumbent's network, not for interconnecting with the networks of other competing carriers.

The court has also resolved the issue of who controls the assignment of space in the incumbent's central offices. The court recognized that the property owner retains the right to assign collocation space. Not only is this a legal requirement, but it is the proper answer from a policy perspective as well. Only if the incumbent controls the assignment of space can the amount of space available be maximized and the space be assigned efficiently. The Court has also recognized the right of the incumbent LEC to segregate its own equipment from that of competing carriers. This can only be accomplished if the incumbent has control over space assignment.

The Commission should not alter its existing rule that requires incumbent LECs to make space available in single-bay increments. Any smaller increment would create numerous technical and operational difficulties that would adversely affect both the incumbent LECs and competing carriers.

At remote incumbent LEC premises, the Commission should adopt a preference for adjacent collocation in which the competing carrier installs its own cabinet to house its own equipment. As shown in these Comments, adjacent collocation avoids numerous problems that would be created if the Commission made physical collocation the first alternative. If adjacent collocation is not practical at a given location, the Commission should establish virtual collocation as the second choice. Only if adjacent collocation and

virtual collocation are not practical at a given location should the incumbent LEC be required to offer physical collocation at remote locations. The Commission should reject Rhythms proposal to require incumbent LECs to allow collocation of individual line cards in the incumbent's digital loop carrier systems. As shown in these Comments, collocation of competing carrier's line cards is not necessary to access unbundled loops or sub-loops, and therefore do not meet the statutory standard for mandatory collocation. There are also a host of technical and operational issues that would be created by such a requirement that render such a requirement not practical.

In the *Order on Reconsideration* the Commission adopted a national standard provisioning interval of 90 calendar days in states where the state commission has not adopted a state standard provisioning interval. BellSouth believes that a 90-day standard cannot be met consistently if applied to unconditioned space. BellSouth urges the Commission to adopt a national standard of not less than 120 days for unconditioned space.

The *Order on Reconsideration* states that the 90 days begins to run when the incumbent receives "an acceptable collocation application." The Commission did not define what constitutes an "acceptable collocation application." BellSouth urges the Commission to define an "acceptable collocation application" as containing a firm order for collocation space and an undertaking to pay for that space. The incumbent LEC should not be required to undertake work and incur costs until the competing carrier has firmly committed to a specific collocation arrangement and to pay for the collocation space it has ordered.

The Commission should not adopt a national space reservation policy. Zoning and permitting intervals vary from state to state, and the state commissions are in the best position to evaluate whether a given space reservation policy is reasonable. The Commission should recognize that it takes a *minimum* of two years for an incumbent LEC to plan, design and construct a building addition. For that reason, no space reservation limitation for any type of equipment should be less than two years. If the Commission adopts a national standard for space reservation, it must recognize that the incumbent LEC has floor space needs for the equipment necessary to facilitate collocation such as digital cross-connect systems, distribution frames and power plant growth. The Commission should also consider the technical requirements that the incumbent LEC faces when making switch additions.

In conclusion, the Commission should modify its rules to faithfully implement the rulings of the Court of Appeals. It should not attempt to relitigate issues already decided by the Court. It should clarify what constitutes an "acceptable collocation application" to include a firm order and a commitment to pay for the collocation space. The Commission should lengthen the national standard for unconditioned space to a minimum of 120 days. These steps will speed the development of local competition by giving clear guidance to the competing parties and avoiding further litigation.

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

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

COMMENTS OF BELLSOUTH

BellSouth Corporation, on behalf of itself and its affiliates ("BellSouth"), hereby comments in response to the Second Further Notice of Proposed Rulemaking ("Second Further Notice"), FCC 00-297 (August 10, 2000), in the captioned proceeding.

The Second Further Notice responds to the decision of the D.C. Circuit Court of Appeals in *GTE v. FCC*, 205 F.3d 416 (D.C. Cir., 2000) which vacated portions of the collocation rules adopted in the *Advanced Services First Report and Order*, 14 FCC Rcd 4761 (1999). In doing so, the Court held:

> [T]he FCC's interpretations of "necessary" and "physical collocation" appear to diverge from any realistic meaning of the statute, because the Commission has favored the LECs' competitors in ways that far exceed what is "necessary" to achieve "physical collocation" and in ways that may result in unnecessary takings of LEC property.[1]

The Court admonished the Commission that the vacated rules were "overly broad and disconnected from the statutory purpose enunciated in Section 251(c)(6)."[2] Despite

[1] *GTE v. FCC*, 205 F.3d at 421.

[2] *GTE v. FCC*, 205 F.3d at 422.

this admonition, and the Commission's legal obligation to give effect to the Court's ruling,[3] the Second Further Notice seeks comment on proposals that are even further disconnected from the limited intrusion on the property rights of the incumbent LECs that Congress authorized. BellSouth urges the Commission to avoid the error of acting outside the limited authorization granted by Congress. In many instances, BellSouth has negotiated collocation arrangements that go beyond the requirements of the Commission's rules. These comments address only the mandatory requirements imposed by the Commission, and are not meant to suggest that BellSouth will refuse reasonable requests by collocators that go beyond the legal minimum.

I. Meaning of "Necessary" under Section 251(c)(6).

Section 251(c)(6) of the Communications Act requires that incumbent LECs permit competitors to collocate equipment "necessary for interconnection or access to unbundled network elements." The Commission interpreted this statutory language to require incumbent LECs to permit collocation of any equipment that is "used or useful" for either interconnection or access to unbundled network elements, regardless of whether such equipment includes a switching functionality, provides enhanced services, or offers other functionality.[4] The Court of Appeals vacated this aspect of the First Report and Order. The Court held:

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[3] 47 U.S.C. § 402(h) provides, in pertinent part, "In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court, and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, ..."

[4] Second Further Notice, ¶ 72.

> Something is *necessary* if it is *required* or *indispensable* to achieve a certain result. Thus, competitors who are protected by the Act have a right to collocate any equipment that is *required* or *indispensable* to achieve interconnection or access to unbundled network elements at the premises of the local exchange carrier.[5]

Noting that the Supreme Court found the Commission's definition of "necessary" in the context of Section 251(d)(2) was overly broad and "simply not in accord with the ordinary and fair meaning of the [statute's] terms", the Court of Appeals held that "necessary" must be construed "so as to limit 'necessary' to that which is required to achieve a desirable goal."[6]

Despite the fact that the Court clearly defined the "ordinary and fair meaning" of the word "necessary", the Commission invites comment on alternate definitions because of its policy concern that the Court's definition would "restrict collocators to deployment of equipment that can only be used for interconnection or access to unbundled network elements even if that equipment is not the most efficient for providing telecommunications services."[7] Such a rationale for expanding the statutory definition of "necessary" has already been rejected by the Court of Appeals:

> The FCC's Collocation Order seeks to justify this broad rule by contending that "competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers." Id. at 4777-78 p. 29. It was precisely this kind of rationale, based on presumed cost savings that the Supreme Court flatly rejected in Iowa Utilities Board. See 525 U.S. at 389-90. In short, the FCC's interpretation of "necessary" under § 251(c)(6) goes too far and thus "diverges from any

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[5] *GTE v. FCC*, 205 F.3d at 422 (emphasis by the court).

[6] *GTE v. FCC*, 205 F.3d at 423, citing *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[7] Second Further Notice, ¶ 77.

realistic meaning of the statute." Massachusetts v. Department of Transp., 93 F.3d at 893.[8]

Limiting collocation rights to those authorized by Congress does not relegate competing carriers to using inefficient equipment. There are increasingly available alternatives to collocation on incumbent LEC premises. For example, in downtown Atlanta, several existing buildings are being refurbished as "collocation hotels" where competing carriers can collocate any equipment they desire to utilize to serve their customers.[9] Limiting collocation on incumbent LEC premises to equipment which is "necessary" for interconnection or access to unbundled network elements will encourage the development of collocation alternatives for competing carriers. Applying the

[8] *GTE v. FCC*, 205 F.3d at 424.

[9] For example, within the last two months, Global NAPs announced that it would covert a 30,000 square foot industrial building in the West End of Atlanta into a collocation facility. *The Atlanta Journal and Constitution*, October 2, 2000, page 2D. Core Location is developing Metro Technology Center Atlanta, a one million square foot collocation and web-hosting facility in a former Sears warehouse. *The Atlanta Journal and Constitution*, September 29, 2000 page 4F. Teleplace Inc. has acquired a former Casual Corner Warehouse in Norcross containing 218,000 square feet to convert into a telecom hotel and data center. It expects to add another 200,000 square feet to the site next year. *The Atlanta Journal and Constitution*, September 18, 2000, page 2H. Teleplace is also converting the former Roberds store in Buckhead into a telecommunications facility, and promised a free Hawaiian vacation for two to any broker who brought a deal of 20,000 square feet or more to the building. *The Atlanta Journal and Constitution*, August 28, 2000, page 2D. Teleplace has also planned a three story, 110,000 square foot building next to the Roberds building, where WorldCom has leased half of the existing 80,000 square foot building. *The Atlanta Journal and Constitution*, August 22, 2000, page 1C. The Ivan Allen Building in downtown Atlanta is being converted into an 84,000 square foot telecom facility that will house the equipment of several companies. *The Atlanta Journal and Constitution*, September 15, 2000, page. 3C. JEBM Realty Corp. of New York is buying a 203,000 square foot industrial building in Forest Park that will be converted into a telecom hotel that will house equipment for telecommunications and high tech companies. In Suwanee, IDI sold a 303,000 square foot industrial building to ITC DeltaCom, which is converting it into an Internet data center, telecom hotel and headquarters for its eDeltaCom unit. *The Atlanta Journal and Constitution*, August 25, 2000, page. 3F. The top five floors of the historic Macy's building in downtown are being converted into 360,000 square feet for use by Internet, telecommunications and e-commerce companies. The first 55,285 square feet was leased by Colo.com, which operates collocation facilities for several clients. *The Atlanta Journal and Constitution*, August 22, 2000, page 3C.

"ordinary and fair meaning" of the term "necessary" will not "necessarily require competitors to provide service of a significantly lower quality than that which could be provided using equipment that employs other functions" as the Second Further Notice apparently fears.[10]

The Second Further Notice asks why excluding functionalities that are not "necessary" for interconnection or access to unbundled network elements from collocated equipment "would be just, reasonable and nondiscriminatory and, therefore, satisfy the requirements of sections 251(c)(2) and (3)."[11] Congress carefully limited the obligations of incumbent LECs under Section 251. Thus, the duty to provide for interconnection with the incumbent LEC's network is only "for the transmission and routing of telephone exchange service and exchange access."[12] Likewise, the duty to provide unbundled network elements is only "for the provision of a telecommunications service."[13] The duty to collocate is limited to "equipment necessary for interconnection or access to unbundled network elements...."[14] Since the interconnection and unbundled network element obligations are limited to the provision of telecommunications services, so is the duty to collocate. This is not to suggest that competing carriers cannot attach multi-function equipment to the incumbent LEC's network. It simply means that they cannot do so under the extraordinarily favorable terms set forth in Section 251.

[10] Second Further Notice, ¶ 77.

[11] Second Further Notice, ¶ 81.

[12] 47 U.S.C. § 251(c)(2)(A).

[13] 47 U.S.C. § 251(c)(3).

[14] 47 U.S.C. § 251(c)(6).

Paragraph 82 of the Second Further Notice addresses the provision of service through digital loop carrier ("DLC") systems. The decision to deploy DLC is an economic one. DLC is, in many cases, an alternative to deploying new copper feeder cable. BellSouth has employed DLC for many years. DLC replaces or augments copper loop facilities from the central office to the remote terminal. Copper is still the predominant facility from the remote terminal to the end user.[15] A large percentage of BellSouth's voice customers are now served over DLC. When a loop is provided over DLC, a "line card" is an integral part of the loop.[16] When a competing carrier obtains a subloop from a Feeder-Distribution Interface (FDI) to the end user, the subloop has accessible demarcation points at both ends.[17] Since it is accessible, in no case is a line card "necessary" for access to the unbundled subloop between the FDI and the end-user. In fact, BellSouth provides ADSL service today from remote products, such as remote DSLAMs, without the use of the DLC line card at all.

Since neither unbundled loops nor unbundled subloops require a CLEC provided line card, line cards are not "necessary" to the provision of telecommunications services, and incumbent LECs are not required to allow them to be collocated on the incumbent LEC's premises.

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[15]Exceptions are Fiber in the Loop systems where the fiber is brought to a pedestal at the end users' premises.

[16] Line cards are a function of the channelization of the DLC system. They provide the analog/digital conversion on the analog signals coming from the customer into a digital format that is multiplexed into the digital trunks feeding the DLC system.

[17] BellSouth has two subloop UNE offerings, feeder (from the central office to the FDI) and distribution (FDI to end-user). There is no element from the remote terminal to the FDI.

Paragraph 83 asks whether providers of "dark fiber" or interoffice transport are entitled to collocate in incumbent LEC central offices. As discussed above, only telecommunications carriers that are interconnecting with BellSouth or accessing UNEs are permitted to collocate in BellSouth's central offices. Carriers that are only providing their fiber and fiber terminations or interoffice transport to be used by other carriers with no intention of interconnecting with BellSouth or accessing UNEs are not entitled to collocate on BellSouth's premises.

II. Cross-connections between Collocators.

The Second Further Notice asks a series of questions premised on the proposition that the statute requires incumbent LECs to provide or permit cross connections between collocators. This premise was expressly rejected by the Court of Appeals:

> One clear example of a problem that is raised by the breadth of the Collocation Order's interpretation of "necessary" is seen in the Commission's rule requiring LECs to allow collocating competitors to interconnect their equipment with other collocating carriers. See Collocation Order, 14 FCC Rcd at 4780, p 33 ("We see no reason for the incumbent LEC to refuse to permit collocating carriers to cross-connect their equipment, subject only to the same reasonable safety requirements that the incumbent LEC imposes on its own equipment.") The obvious problem with this rule is that the cross-connect requirement imposes an obligation on LECs that has no apparent basis in the statute. Section 251(c)(6) is focused solely on connecting new competitors to LECs' networks. In fact, the Commission is almost cavalier in suggesting that cross-connects are efficient and therefore justified under Section 251(c)(6). This will not do. The statute requires LECs to provide physical collocation of equipment as "necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier," and nothing more. As the Supreme Court made clear in Iowa Utilities Board, the FCC cannot reasonably blind itself to statutory terms in the name of efficiency. Chevron deference does not bow to such unbridled agency action.[18]

[18] *GTE v. FCC*, 205 F.3d at 423-24.

The Court has clearly held that "Section 251(c)(6) is focused solely on connecting new competitors to LECs' networks." The Commission is bound by statute to give effect to that finding.[19]

The Second Further Notice seeks to find a statutory basis to require cross connections between collocators in other statutory language, such as Section 251(a)(1) and Section 251(c)(2). Section 251(a)(1) simply defines the duty of every telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." This duty applies to carriers who have no duty to collocate at all. It clearly cannot expand the specific statutory duty of interconnection imposed only on incumbent LECs. That duty is defined by Section 251(c)(2), which establishes the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." (Emphasis added.) Section 251(c)(2) clearly provides no statutory basis for the Commission to require that incumbent LECs permit collocating carriers to cross-connect among themselves.

III. Meaning of "Physical Collocation" under Section 251(c)(6).

The Second Further Notice asks a series of questions regarding the space assignment policies of incumbent LECs, and whether those policies require the adoption of national rules. In *GTE v. FCC* the Court vacated the Commission's requirements that allowed collocators to select any unused space in the LEC central office, prohibited the LECs from requiring competitors to use separate entrances to access their own

[19] See 47 U.S.C. § 402(h), cited above.

equipment, and prohibited LECs from segregating CLEC equipment in isolated rooms or floors. The Court found there is nothing in Section 251(c)(6) that allows competitors, over the objection of the LEC property owners, to pick and choose preferred space on the LECs' premises. The Court held that the statute requires only that the LECs make space available for physical collocation, nothing more. The additional requirements imposed by paragraph 42 of the *Collocation Order* were found to exceed what is "necessary" to achieve reasonable "physical collocation" and in ways that may result in unnecessary takings of LEC property. "Once again we find that the FCC's interpretation of Section 251(c)(6) goes too far and thus 'diverges from any realistic meaning of the statute.'"[20]

The Court of Appeals decision makes it clear that the LECs have the full bundle of rights of a property owner, subject only to the statutory right of a competing carrier to collocate its equipment for purposes of interconnection with the incumbent's network or to access unbundled network elements. The Commission may invade those property rights only to the extent "necessary."

There is no need for the Commission to adopt a national space assignment policy. Each LEC central office is unique, as are zoning and permitting intervals that vary from state to state. If there are disputes about an incumbent's space assignment policies, the state commissions are best situated to resolve any disputes on a case-by-case basis.

Not only does the incumbent have a legal right to assign space within its premises, it also is the proper party to do so from a policy perspective. The incumbent LEC is best positioned to assign space in the most efficient fashion to maximize the space available for future use by the ILEC and CLECs alike. If each requesting CLEC is

[20] *GTE v. FCC*, 250 F.3d at 426.

allowed to select any unused space in the central office based only on its own self-interest, the resulting assignments of space will not be efficient and will not maximize the amount of space available. BellSouth's policy is to assign space for collocated equipment that requires a minimum amount of space preparation and which can be occupied by the collocator in the shortest period of time. BellSouth does reserve growth floor space for its own needs that is contiguous to its existing equipment. If adequate space is available, BellSouth provides collocators with the same opportunity to reserve growth space that is contiguous to their installed equipment. No further regulations are required.

The Second Further Notice invites comment on whether the incumbent may lawfully place collocators in a room or other isolated space separate from the incumbent's own equipment.[21] The Court of Appeals has clearly answered that question in the affirmative. The Commission's concern that separating the equipment of the collocators from that of the incumbent would adversely affect the ability of the collocator to interconnect is unfounded. Separation of collocation space does not inhibit interconnection. Premises designed to house telecommunications equipment are designed to allow interconnection of all of the telecommunications equipment space. The fact that these spaces may be on separate floors or in separate rooms does not inhibit interconnection. BellSouth applies consistent building support systems and network infrastructure standards for all telecommunications space, whether occupied by BellSouth equipment or collocated equipment. BellSouth prepares all space with the expectation that the space may, at some point, be used for BellSouth equipment. "Relegating"

[21] Second Further Notice, ¶ 97.

collocated equipment to space separated from BellSouth equipment would neither improve nor diminish its quality.

IV. Minimum Space Requirements.

In the Second Further Notice, the Commission notes that its existing rules require incumbent LECs to make collocation space "available in single-bay increments."[22] It seeks comment on whether it has statutory authority to require incumbent LECs to make collocation space available in smaller units such as a "quarter-bay." It also asks whether this statutory authority extends to requiring incumbent LECs to permit placement of CLEC equipment within the same racks or bays as incumbent LEC equipment when no other physical collocation space is available.[23]

Section 251(c)(6) addresses the remedy available when physical collocation space is unavailable. It authorizes the incumbent LEC to offer virtual collocation "if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." The Commission has also embraced "adjacent collocation" as a solution when there is not adequate space in the incumbent LEC premises for physical collocation.[24]

BellSouth believes that it is not "practical" to require incumbent LECs to offer physical collocation space in less than single-bay increments. In central office premises, infrastructure design is based upon equipment installed in industry-standard equipment

[22] Second Further Notice, ¶ 99.

[23] Second Further Notice, ¶ 100.

[24] Second Further Notice, ¶ 110.

racks. The Second Further Notice does not offer specific standards that would be applied for "spaces too small to accommodate a rack." In the absence of a specific proposal, BellSouth is concerned that requiring physical collocation in spaces smaller than a rack would impair the ability of the incumbent LEC to maintain the integrity of the existing standards. Sub-rack collocation would introduce the following difficulties: 1) all physical separation of equipment space would be eliminated; 2) space management would become overly complex, since space would have to be managed at the rack mounting-plate level; 3) there would be increased risk of one party damaging the equipment of another while installing, modifying or removing equipment, thereby resulting in equipment damage claims by parties occupying the same rack; 4) equipment cable management would have to occur at the rack level; 5) having up to four or more collocators occupy the same rack will result in space contention as multiple parties attempt simultaneous access to the rack for construction, maintenance, operation, or modifications;[25] 6) accuracy of asset records would suffer due to the requirement to identify ownership at the unit level rather than the rack level; 7) increased performance risks that would have to be managed by the incumbent LEC;[26] and 8) further erosion of security infringing on the right of the incumbent LEC to secure its equipment.[27] Were the Commission to require incumbent

[25] Even at the rack level space contention has become a significant problem. Mandated sub-rack collocation would greatly exacerbate this problem. Where collocators agree to share physical collocation space, BellSouth permits such arrangements.

[26] For example, the heat dissipation from one party's equipment could adversely affect the performance of another party's equipment that is mounted directly above in the same rack.

[27] The ability of all parties to secure their equipment would be impaired with sub-rack collocation. With rack-level collocation, individuals can be observed and questioned about their presence in the floor space of other parties. That is not practical if the Commission requires sub-rack collocation. BellSouth has no objection to collocators installing equipment cabinets for security purposes, provided such cabinets comply with NEBS requirements for supporting overhead cable racking and auxiliary framing.

LECs to permit CLEC equipment to be collocated in the same rack as the equipment of the incumbent, all of the above problems would occur and, in addition, the right of the incumbent LEC to reserve space for future growth would be impaired.

Because every central office is different, the Commission should not attempt to impose national standards that assume that a "one-size-fits-all" approach is appropriate. Congress has entrusted the implementation of the statutory collocation obligation to the state commissions in situations involving space shortages, and this Commission should respect that allocation of responsibility.

V. Collocation at Remote Incumbent LEC Premises.

The Second Further Notice asks whether and to what extent the Commission should modify its collocation rules to facilitate subloop unbundling.[28] In light of the Court of Appeals decision, the Commission must revisit its remote premises collocation requirements. The Court of Appeals recognized the right of the incumbent LECs to segregate collocators equipment from the incumbent LECs' own equipment.[29] At most remote premises, such segregation is impractical. As the Commission acknowledges, many enclosures are specifically designed to house the equipment of a single manufacturer.[30] In such circumstances, "physical collocation is not practical ...because of space limitations,"[31] and the statute permits the incumbent LEC to offer virtual collocation in lieu of physical collocation. The Commission has also endorsed adjacent collocation as an alternative to physical collocation in situations where physical

[28] Second Further Notice, ¶ 104.

[29] 205 F.3d at 426.

[30] Second Further Notice at ¶ 105.

collocation space is not available. Adjacent collocation would solve many of the concerns raised by physical collocation at remote premises.

The Commission requests comment on whether physical collocation in remote terminals presents security concerns.[32] Security concerns are obviously far greater in a remote location than in a manned central office. CLEC personnel would have unsupervised access to incumbent LEC and other CLEC equipment and services when physical collocation is required at remote premises. Those concerns would be greatly ameliorated if the standard form of collocation for remote premises were virtual or adjacent collocation. For example, if the CLEC provides its own cabinet, there would be no technical concerns and few security concerns because each company would have access only to its own equipment.

Paragraph 104 also asks for comment regarding procedures for ensuring that CLECs receive the necessary power and other technical support in remote terminals. When physical collocation in remote terminals is required, technical support will necessarily be based on CLEC engineering design for the proposed equipment installation. The incumbent LEC will need to have access to the CLEC technical needs, e.g., current drain, heat rise, etc., to make the determination whether the proposal is feasible at a given site. Again, these technical concerns, and information sharing requirements, can be ameliorated if the CLEC places its own cabinet. If adjacent collocation is used, the CLEC will deal with the local power company for its power

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[31] 47 U.S.C. § 251(c)(6).

[32] Second Further Notice at ¶ 104.

requirements and can deal directly with its manufacturer for the technical support requirements for its equipment.

The Second Further Notice asks incumbent LECs to describe their current deployment of controlled environmental huts, controlled environmental vaults, and cabinets, as well as their plans for future deployment of these structures.[33] BellSouth has deployed approximately 36,000 remote electronics enclosures. Of these, approximately 3,500 are controlled environmental enclosures. The remainder are cabinets. Deployment of new electronics enclosures is triggered by new development, exhaust of existing facilities in developed areas, or to add new capabilities in areas where they are not currently available. The type of enclosure deployed at a given site is determined by the volume and type of services expected to be provided from that enclosure, and the power consumption and heat dissipation of the electronics to be deployed.

BellSouth's future plans for deployment of remote structures will depend largely on the outcome of this proceeding. If the Commission adopts an adjacent collocation policy, BellSouth's existing procedures will continue. If the Commission continues to mandate physical collocation in remote premises, BellSouth and the CLECs will have to develop mutually acceptable procedures for forecasting CLEC demand, determining the locations where CLECs intend to collocate, evaluating the type of equipment the CLEC intends to deploy for size, power and heat dissipation requirements, etc. This effort can be avoided if the Commission adopts an adjacent collocation policy in remote locations.

The Commission asks incumbent LECs to state how much space within each type of remote terminal will be available for physical collocation. No space was planned for

physical collocation in BellSouth's previously deployed electronics enclosures. Enclosures are sized to meet expected demand for BellSouth's current and planned services. Since enclosures are sized to meet projected demand, there may be some empty space in existing enclosures at any given time. That does not mean, however, that the space is available for physical collocation. If the growth space is used for collocation, the incumbent LEC will be required to place an additional enclosure when its expected demand is realized. In addition, the existence of some empty space today does not mean that power supplies and heat dissipation capacity will be adequate to allow the installation of electronics other than those for which the space was originally planned.

Unless a site-by-site survey is done, there is no way for BellSouth to know with certainty what space currently exists. To conduct a physical inventory of space available at 36,000 remote locations would be extraordinarily expensive and time consuming. BellSouth estimates that it would take in excess of 100,000 person/hours just to conduct site inventories. This does not include travel time or the time required to develop a tracking database and to input data. It would be far more efficient for the incumbent LECs to determine if adjacent collocation can be implemented at a site and have the CLEC place an adjacent cabinet.

The Commission seeks comment on whether incumbent LECs plan to retrofit existing remote terminals with relatively compact equipment in order to make space available for collocation. BellSouth is retrofitting existing cabinets where economically feasible, but experience has shown that retrofitting is impractical in all but a very few applications. There is a high maintenance cost associated with retrofitting due to plug-in

[33] Second Further Notice at ¶ 105.

costs. Depending on the amount of work required to retrofit a cabinet, it can be prohibitively expensive to attempt retrofitting. The most cost-effective solution would be an adjacent cabinet placed by the CLEC where space is available.

The Commission asks whether it should require that incumbent LECs allow the placement of CLEC and incumbent LEC equipment in the same racks or bays in remote locations, even if not required to do so in central offices.[34] BellSouth has described above the numerous issues that make sub-rack collocation impractical in central offices. Those same factors apply in remote terminals. In addition, when equipment is mixed in bay spaces, it is difficult for technicians to work on one LEC's equipment without touching, exposing or possibly disconnecting another LEC's equipment in the same rack. For those reasons, BellSouth does not feel that it is practical for there to be physical collocation of multiple carriers' equipment in a single bay. The Commission should allow incumbent LECs to offer virtual or adjacent collocation at remote premises.

The Commission asks whether incumbent LECs should be required to provide requesting carriers with demographic and other information regarding particular remote terminals. The only information incumbent LECs should be required to provide is whether space is available in a specific remote location. Incumbent LECs should not be required to provide proprietary information to competitors such as the number of customers working behind a particular site or the types of services the incumbent or any collocator is offering to those customers.

In paragraph 108, the Second Further Notice asks for suggested solutions for the collocation space shortages within remote terminals. BellSouth believes that the most

practical and cost effective solution is to offer adjacent collocation for the CLEC to place its own cabinet whenever possible. This would eliminate security concerns, technical compatibility concerns, and would allow the CLEC to monitor and track its own equipment for usage and growth. The CLEC could plan for its own future growth without having to interface extensively with the incumbent LEC.

The suggestion in the Second Further Notice that the Commission might require incumbent LECs to make a certain amount of additional space available for collocation in all remote terminals is completely impractical. This is not like the existing requirement that incumbent LECs consider the needs of collocators when planning central office additions or replacements. Here the Commission would be requiring the incumbent LECs to provide additional space in tens of thousands of locations on the outside chance that someday some CLEC may want to collocate in a few locations. This goes far beyond what Congress has authorized. If the Commission wants incumbent LECs to provide space for collocators, it must require CLECs to submit specific forecasts for where and how much space they will require, and then require the CLEC to pay for the space whether it collocates there or not. The better solution is to have the CLECs place their own cabinets for their own equipment.

The Second Further Notice asks for comment on Rhythm's proposal to require incumbent LECs to permit collocation of individual line cards in digital loop carrier systems located in incumbent LECs' remote terminals "assuming that these line cards are equipment necessary for interconnection or access to unbundled network elements."[35]

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[34] Second Further Notice at para. 107.

[35] Second Further Notice at ¶ 109.

BellSouth has demonstrated in response to paragraph 82, above, that CLEC-provided line cards are not necessary for interconnection or access to unbundled elements. Therefore, the premise to this question is false. Further, it would be highly impractical for CLECs to insert their own line cards in BellSouth's digital loop carrier systems. BellSouth deploys many different types of digital loop carrier systems and each has many different types of line cards. If a CLEC were to insert an incorrect line card, it could render an entire digital loop carrier system inoperative.[36] In addition to continuity of service concerns, BellSouth has maintenance concerns. Digital loop carrier equipment, like any other equipment, sometimes requires replacement of cards that have particular problems. It is difficult to see how the Commission could ensure that the CLEC concurs and participates in the replacement. Finally, collocation of CLEC line cards in BellSouth digital loop carrier systems would create tremendous record-keeping, inventory and asset management concerns when some of the inventory is owned by a CLEC.

In paragraph 110, the Commission asks for comment on how to make adjacent collocation an acceptable substitute for physical collocation. BellSouth believes that adjacent collocation should be the first collocation option at remote locations. CLECs should be allowed to place structures suitable for their equipment. BellSouth has itemized above the many difficulties created by physical collocation at remote premises. These many difficulties are ameliorated or eliminated altogether when the CLEC utilizes

[36] This is unlike "line sharing," where operational difficulties turning up or maintaining the CLEC's data service might impact the voice service. In that scenario, the customer that is impacted is also the customer subscribing to the CLEC's data service. In that event, the customer has the option to simply discontinue the data service. Here customers who have no interest in the CLEC's service could be affected by way of operational mistakes. If the Commission orders the incumbent LECs to permit CLECs to insert their own line cards, the CLEC would be held responsible for any damage to the incumbent's facilities and for loss-of-use that their negligence may cause.

adjacent collocation. The Commission asks whether incumbent LEC easements permit adjacent collocation of remote terminals.[37] This will vary on a case-by-case basis. Most easements for remote terminals were negotiated without the thought of another LEC locating on the same site.[38] In some cases, the easements are restricted to BellSouth use only. BellSouth is willing to assist the CLECs in negotiating in good faith with the property owner to permit additional LECs to utilize the existing easement. BellSouth believes, however, that the CLEC has the ultimate responsibility to resolve any obstacles it encounters in connection with collocation at remote incumbent LEC premises.

Where adjacent collocation is not practical, BellSouth favors virtual collocation over physical collocation at remote locations.[39] Many of the problems associated with physical collocation at remote terminals can be alleviated by virtual collocation. BellSouth suggests that the Commission reverse the order of collocation options applicable to central office collocation (physical, virtual, adjacent) for remote locations. BellSouth supports adjacent collocation as the first option, followed by virtual and then physical.

[37] Second Further Notice at ¶ 111.

[38] In situations where BellSouth has the right to permit CLECs to access the easement, it is willing to do so.

[39] Second Further Notice at ¶ 112.

VI. Line Sharing.

The Commission asks what changes in the collocation rules, if any, should be adopted to facilitate line sharing.[40] BellSouth does not believe that any changes in the collocation rules are needed to implement line sharing.

VII. Provisioning Intervals.

In the *Order on Reconsideration* the Commission adopted as a national standard a 90-day provisioning interval for all types of physical collocation. In the Second Further Notice, the Commission asks for comments on whether shorter provisioning intervals should be adopted for certain types of collocation.[41] The major time-consuming steps to provision caged, cageless and shared space collocation are identical, so the intervals should not be different. The Commission also asks for comment on whether it should adopt a shorter provisioning interval where a CLEC agrees to construct its own cage.[42] The construction of a cage would not affect the provisioning interval at all. The items that take the longest to design and construct are the mechanical conditioning, asbestos abatement, power plant installations and the like. This type of work affects the entire building. It is the responsibility of the building owner/landlord to undertake this type of construction, not the CLEC.

The Commission asks for comment on whether different collocation intervals should apply to conditioned and unconditioned space.[43] As noted above, the majority of the time needed to complete a collocation arrangement occurs when major building work

[40] Second Further Notice at ¶ 112.

[41] Second Further Notice at ¶ 114.

[42] Second Further Notice at ¶ 115.

is required to provide conditioned space. In the *Order on Reconsideration* the Commission adopted a national standard of 90 days for both conditioned and unconditioned space. The Commission cited no record evidence to support its 90 day requirement in the absence of conditioned space. Indeed, its only justification for adopting a 90 day requirement was its concern that "intervals significantly longer than 90 days, such as the 180 calendar day interval Sprint suggests for previously unconditioned space, would not generally result in competitive LECs receiving access to space within incumbent LEC premises within reasonable time frames."[44] That rationale, of course, begs the question of whether it is feasible for the incumbent LECs to provision previously unconditioned space in 90 days. BellSouth urges the Commission to adopt a longer provisioning interval than 90 days for previously unconditioned space. BellSouth endorses a provisioning interval of at least 120 days as the national standard for unconditioned space.

In the *Order on Reconsideration* the Commission adopted a 90-day interval that begins to run when the incumbent LEC receives "an acceptable collocation application."[45] The Commission did not define what constitutes an "acceptable collocation application." Elsewhere, the Commission recognizes that the incumbent LEC "may require a competitive LEC to pay reasonable application fees or portions of the total collocation charges prior to processing a collocation application or provisioning a collocation arrangement."[46] BellSouth urges the Commission to clarify that "an

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[43] Second Further Notice at ¶ 115.

[44] *Order on Reconsideration* at ¶ 29.

[45] *Order on Reconsideration* at ¶ 29.

[46] *Order on Reconsideration* at ¶ 38.

acceptable collocation application" must constitute a "firm order" for collocation space and an agreement to pay for the collocation space. Until that time the CLEC has not committed to order the space. It has only made an inquiry about the availability of space and its cost. It is unreasonable to require the incumbent LEC to expend resources to provision collocation space prior to the CLEC making a firm commitment to take the space and pay for it. Prior to that time, the CLEC can simply not place an order without financial penalty, or it can change its order, e.g., from caged to cageless, that would require the incumbent LEC to have to rework its planning, design and construction. Therefore, BellSouth requests that the Commission define "an acceptable collocation application" to include a firm order for collocation space and an agreement to pay for the space.

VIII. Space Reservation Policies.

In the *Order on Reconsideration* the Commission noted the efforts of several states to adopt space reservation policies. It found that the state commissions should have the primary responsibility to resolve space reservation disputes.[47] It asks for comment on whether the Commission should adopt a national space reservation policy that would apply where a state does not set its own standard.[48] The Commission should not adopt a national space reservation policy. Zoning and permitting intervals vary from state to state. The best way for the Commission to ensure reasonable space reservation policies is to permit the negotiation/state arbitration process to work. Alternatively, state

[47] Second Further Notice at ¶116.

[48] Second Further Notice at ¶ 117.

commissions may conduct generic proceedings to adopt uniform space reservation policies for that state.

BellSouth's current contracts have a reasonable and nondiscriminatory policy that allows the ILEC and CLEC to reserve space for two years future growth.[49] That interval recognizes that it takes a *minimum* of two years for the incumbent LEC to plan, design and construct a building addition. This allows time to handle real estate purchases, zoning issues, planning approval, design, permitting, and construction of the building and the internal superstructure. BellSouth believes that the carriers and the state commissions are in the best position to establish space reservation policies, and that national standards are not required.

Should the Commission conclude that a national space reservation policy is required, it must recognize and address all legitimate floor space requirements. A simple time-limited floor space reservation policy does not address such issues. For example, incumbent LECs are not only required to provide floor space for collocated equipment, but are also *required* to provide for interconnection of the collocated equipment to the incumbent's network and to provide power for the collocated equipment. Network interconnection requires floor space for the associated digital cross-connect systems and distributing frames. Power for collocated equipment requires floor space for the associated power plant and power distribution equipment. If the incumbent LEC is not allowed to reserve adequate floor space for these systems/equipment to supply the

[49] A one year limit for transport equipment, such as was adopted by the Texas Commission, introduces the possibility that an incumbent LEC could unexpectedly lose transport growth capacity beyond the next twelve months' forecasted need. Since building additions typically require two years to complete, no space reservation limitation of less than two years should be established for any type of equipment.

"connectivity" and equipment power, the availability of floor space for collocated equipment is of little value.

From a practical perspective, an incumbent LEC should be allowed to reserve sufficient floor space for digital cross-connect systems, distributing frame and power plant growth to accommodate the total anticipated connectivity and power requirements of the equipment to be installed in the facility's remaining available floor space, regardless of equipment ownership. One solution would be for the incumbent LEC to consider these requirements as part of its own immediate floor space needs. In any event, such provisions should be included as part of any national policy.

Switching equipment introduces a unique concern. Technical limitations, primarily in the form of cable length limitations, must be considered when planning switch expansions. If space reservation policies fail to recognize those requirements, a switching system could become stranded, with all future expansion space beyond technical limits. If that happened, the switch would have to be capped at its existing capacity or replaced with a completely new system. Either case would require the incumbent LEC to expend significant incremental capital to expand switching capacity. Any national policy adopted by the Commission must have sufficient flexibility to allow the incumbent LEC to consider the engineering perspective applicable to each unique switch/facility.

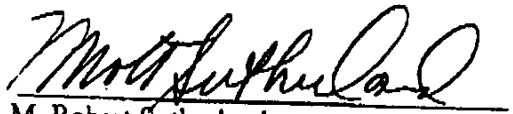
IX. Conclusion.

The Commission should modify its rules to be faithful to the holding of the Court of Appeals. It should not attempt to relitigate issues already decided by the Court. It should clarify what constitutes "an acceptable collocation application" and should

lengthen its national standard interval for previously unconditioned space. Taking these steps will speed up the development of local competition by providing clear guidance to the parties and by avoiding further litigation.

Respectfully submitted,

BELLSOUTH CORPORATION
By its attorneys



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October 12, 2000

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

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

REPLY COMMENTS OF BELLSOUTH

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November 14, 2000

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

In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF BELLSOUTH

BellSouth Corporation ("BellSouth") hereby replies to the comments of interested parties in the captioned proceeding. Page citations are to the parties' opening comments in this proceeding unless otherwise noted.

I. Summary.

The Commission is bound by law to implement fairly the opinion of the Court of Appeals. Requests by CLECs to ignore the express findings of the Court simply invite further litigation and more uncertainty as to the competitive ground rules that govern this industry. The Commission should recognize that unreasonably short national provisioning intervals do not serve the public interest. Based on the expanded record in this proceeding, the Commission should adopt longer default intervals for unconditioned space and "start the clock" running only when the CLEC has submitted a firm order for collocation space. The Commission should not adopt an overly prescriptive approach, but should rely on the state commissions to adopt reasonable collocation rules that reflect the realities of conditions in that state.

II. The decision of the Court of Appeals is final and binding on all parties.

This proceeding is the result of the ac of the Court of Appeals reversing and remanding the Commission's decision in *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999)("*Collocation Order*"). *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)("*GTE*"). The competitive local exchange carriers ("CLECs") take the position that the Court of Appeals decision is merely precatory, and that the Commission is free to readopt rules expressly overturned by the Court. *See, e.g.,* Covad at 12-14. That view is clearly contrary to law. As BellSouth demonstrated in its opening comments, the Court of Appeals opinion is binding on the Commission by statute, 47 U.S.C. Sec.402(h), and it is "the duty of the Commission, in the absence of proceedings to review such judgment, to forthwith give effect thereto...." BellSouth at 1-2. If the Commission or any party to the proceeding before the Court of Appeals thought the Court interpreted the statute improperly, its remedy was to institute "proceedings to review such judgment", i.e., a petition for a writ of certiorari to the Supreme Court. No party did so, and the Court's interpretation of the statute is now final and binding law. *See, Greater Boston Television Corp. v. FCC*, 463 F.2d 269, 291 (D.C. Cir. 1971); *Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 281 (D.C. Cir. 1993). *See also, Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981).

The Court of Appeals made several specific rulings that the Commission must honor on remand. The Court narrowed significantly the permissible construction of the term "necessary" in 47 U.S.C. Sec. 251(c)(6). The Court defined "necessary" as "required or indispensable" and expressly rejected the Commission's interpretation that

something is "necessary" if it is "used or useful". In striking down the requirement that incumbent LECs permit CLECs to "cross-connect" with each other, the Court held:

> The statute requires LECs to provide physical collocation of equipment as "necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier" and nothing more. *GTE*, 205 F.3d at 423.

The Court also rejected the Commission's attempt to expand the statutory definition of "necessary" to require collocation of "integrated equipment that lowers costs and increases the services they [CLECs] can offer their customers." *GTE*, 205 F.3d at 424. The Court noted that it "was precisely this kind of rationale, based on presumed cost savings, that the Supreme Court flatly rejected in *Iowa Utilities Board.*"

In rejecting the Commission's requirement that incumbent LECs permit CLECs to choose their own collocation space and to collocate their equipment in with the equipment of the incumbent LEC, the Court held that "there is nothing in Section 251(c)(6) that endorses this approach." *GTE*, 205 F.3d at 426. While the Commission clearly has discretion in how to implement the Court's holdings, it is not free to disregard them.

III. The meaning of "Necessary" under Section 251(c)(6).

Section 251(c)(6) requires that incumbent LECs:

> ...provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier....

AT&T and other CLECs argue that the "just, reasonable and non-discriminatory" language creates a separate and independent statutory basis for requiring incumbent LECs to make their premises available to CLECs. AT&T at 32-33. This is clearly an

incorrect reading of the statute. The "necessary" clause defines *what* a CLEC is entitled to collocate on the incumbent LEC's premises; the "just, reasonable and non-discriminatory" clause defines *how* the required collocation is to be implemented. AT&T's reading of the statutory "just, reasonable and non-discriminatory" clause as creating an independent right of collocation would render the "necessary" clause a mere surplusage. AT&T's reading is also inconsistent with this Commission's prior holdings that were undisturbed on appeal. For example, the Commission found that incumbent LECs were not required to permit collocation of CLEC circuit switches. 47 C.F.R. § 51.323. If AT&T's reading of the statute were correct, the fact that incumbent LECs house their own circuit switches in their central offices would allow CLECs the right to collocate their circuit switches. This is clearly contrary to any reasonable construction of the statute.

Supra argues that BellSouth permits collocation of circuit switches while SBC does not. Supra is correct that BellSouth has, as a voluntary contractual matter, agreed to allow collocation beyond that which is required by 47 C.F.R. § 51.323. The Commission should do nothing that would discourage parties from negotiating agreements that go beyond the minimum required by law. Supra's request that if one incumbent LEC allows collocation of a certain piece of equipment all ILECs must do so has no basis in the statute and would discourage voluntary agreements that go beyond the statutory minimum. Supra at 15-16.

The CLECs universally request the Commission to either require the incumbent LECs to cross-connect CLEC equipment or to allow CLECs to self-provision cross connects. The Court of Appeals has expressly held that cross-connects are not

"necessary" for interconnection or to access unbundled network elements ("UNEs"), and therefore cannot be mandated under the statute. CLECs have the option of negotiating a reasonable commercial arrangement for cross connects on the premises of the incumbent LEC, or cross-connecting in collocation space other than the incumbent's premises. BellSouth pointed out in its opening comments that such commercial collocation space is becoming increasingly available and reduces the need of CLECs to collocate at the premises of the incumbent LEC. Covad recognizes that collocation can take place outside the incumbent LEC premises, but complains that "if access were to take place at another location, the copper loops would have to be extended, and more complex and technically limiting cross-connects and interconnection would be necessary." Covad at 21. Of course, it was precisely this rationale that has been rejected by both the Supreme Court and the Court of Appeals in *GTE*, 205 F.3d at 424:

> The FCC's Collocation Order seeks to justify this broad rule by contending that "competitive telecommunications providers must be permitted to collocate integrated equipment that lowers costs and increases the services they can offer their customers." *Id.* at 4777-78. It was precisely this kind of rationale, based on presumed cost savings that the Supreme Court flatly rejected in *Iowa Utilities Board. See* 525 U.S. at 389-90. 119 S.Ct. 721.

As important, the proliferation of commercially available collocation space outside the incumbent LECs' premises belies the notion that the costs described by Covad are sufficiently high to render such arrangements financially unattractive. This marketplace evidence undermines AT&T's bald assertion that "Collocation is essential to most facilities-based local competition." AT&T at 5.

Competitive fiber providers ask the Commission to find that they are allowed to collocate their facilities in incumbent LEC central offices. *See* comments of Fiber

Technologies at 1-2; MFN at 2. To the extent that these parties seek access to provide fiber transport capacity to CLECs rather than to interconnect with the incumbent LEC network or to access UNEs provided by the incumbent LEC, the statute gives them no right to collocate on the incumbent LECs premises. Competitive fiber providers can and do connect with CLECs today outside of the ILEC premises.

CLECs also claim that it is "necessary" for them to insert their own line cards in the incumbent's digital subscriber line ("DSL") equipment. BellSouth demonstrated in its opening comments that "collocation" of CLEC line cards is not necessary to access either unbundled loops or sub-loops. Alcatel, the world's leading supplier of xDSL equipment, bluntly states: "CLECs and other competitive carriers simply do not need the right to use their own line cards to collocate and provide their intended services. Permitting such overly broad and [un]necessary open access would threaten network integrity and would slow innovative product development." Alcatel Executive Summary. Alcatel demonstrates that permitting CLECs to install their own line cards or requiring incumbent LECs to virtually collocate line cards on their behalf is not technically feasible. Alcatel at 15-17; 19-22. Alcatel also demonstrates the infeasibility of ordering physical collocation in remote terminals and the advantages of adjacent collocation at remote sites. Alcatel at 17-18.

Nortel Networks, a world leader in technology, also comments that it is not practical to allow CLECs to collocate their own line cards within incumbent LEC DLCs. Nortel notes that there are no industry standards to allow interchangeability of line cards, no efforts underway to develop such standards, and due to the evolving nature of technology, no practical means "to develop industry standards without thereby stifling

technological development." Nortel at 4. The Commission should abandon any notion of permitting CLECs to place their own line cards in incumbent LEC DSL equipment.

IV. Provisioning Intervals.

CLECs present a variety of provisioning intervals for different types of collocation that are shorter than the intervals adopted in the *Collocation Order*. BellSouth urges the Commission not to adopt unreasonably short provisioning intervals as a national standard.

First, merely announcing a national standard that is unreasonably short will not provide faster actual collocation access to CLECs. Unreasonably short provisioning intervals will simply force the industry to establish more reasonable intervals before the state commissions. If the Commission adopts reasonable intervals based on the extensive record evidence now available to it, a proliferation of state proceedings can be avoided.

In a *Memorandum Opinion and Order* released November 7, 2000 in this docket, DA 00-2528, the Commission considered requests for waiver of the national standard pending action on petitions for reconsideration of the national standard filed by Qwest, Verizon and SBC. The Commission held:

> 10. The Commission may waive any provision of its rules for good cause shown. In their petitions for reconsideration of the *Collocation Reconsideration Order*, Verizon, SBC and Qwest raise issues as to whether the 90-day interval is appropriate, either generally or for particular types of arrangements. We also note that these petitions for reconsideration and the comments on them greatly expand the record on reasonable physical collocation intervals beyond what was available to the Commission when it adopted the *Collocation Reconsideration Order*. While we express no opinion on the merits of these petitions for reconsideration or on what action the Commission might take in response to them, this greatly expanded record countenances a moment of pause before we insist on absolute compliance with that *Order*.

The Commission allowed the petitioning ILECs to adopt state approved collocation intervals that expressly recognize that providing physical collocation in previously unconditioned space can require a substantially longer interval than the national standard of 90 days. If power plant, diesel generator or heating, ventilation, or air conditioning equipment is needed, a much longer interval is needed, depending on vendor and equipment availability. The Commission also recognized that the incumbent LEC is entitled to a timely and accurate forecast by the CLEC, and that in the absence of such a forecast, an additional 60 day increase in the interval is appropriate. *Id.*, ¶¶ 18-19.

BellSouth urges the Commission to take these realities into account in prescribing national collocation intervals in this proceeding. The extensive record developed in states such as New York and the conclusions reached by the state commissions examining such records should convince this Commission that longer standard collocation intervals are required when certain conditions are present like those described above.

In its initial comments, BellSouth noted that the national interval begins to run when the incumbent LEC receives "an acceptable collocation application." BellSouth urged the Commission to clarify that an "acceptable collocation application" must constitute a "firm order for collocation space and an agreement to pay for the collocation space." BellSouth at 22-23. In its opening comments, Sprint agrees with BellSouth that the collocation interval "should run from the date the CLEC accepts the ILEC's price quote, rather than the date the CLEC submits its application...." Sprint at 27. Sprint states:

> Since the present rule, at least for conditioned space, was adopted in response to Sprint's petition for reconsideration, Sprint confesses to a bit

> of embarrassment in seeking a different point from which to start the clock running. However, the simple fact is that after an additional sixteen months' experience with collocation, both as an ILEC and a CLEC, Sprint believes that its previous position, coupled with a 90-day period for provisioning caged collocation in conditioned space, was unrealistically short to be a general rule. To meet that interval would require the ILEC to commence work as soon as the order is received—before determining if the order is acceptable, before providing a price quote to the CLEC, and before receiving a firm order commitment from the CLEC. The ILEC would incur costs that, absent a rule to the contrary, would not be recoverable if the CLEC's application were defective or if the CLEC rejected the ILEC's price quote.... Sprint at 28.

BellSouth urges the Commission to define "an acceptable collocation application" in such a way that the national collocation interval does not begin to run until the CLEC has made a firm commitment to the collocation arrangement it is ordering from the ILEC. Any other resolution would require that the Commission create a cost recovery mechanism for the costs incurred in abortive situations in which the CLEC does not ultimately accept the collocation space prepared for it.

Sprint also suggests that the Commission make its rules "of nationwide applicability, rather than default provisions that apply only in the absence of state rules." Sprint at 27. BellSouth strongly disagrees. The two state commissions filing comments in this proceeding, the New York Department of Public Service and the Florida Public Service Commission both strongly urge the Commission to continue allowing the states to set their own standards. The Florida Public Service Commission comments contain an extensive discussion as to why overly prescriptive national standards are not in the public interest. The Commission should continue its present course of applying national standards only in the absence of state standards. No matter how complete the paper record compiled in this proceeding, it cannot substitute for the case by case determination

of what constitutes a reasonable balance between incumbent LEC and CLEC interests, much less where the public interest lies in a particular dispute.

The interval for caged and cageless physical collocation should be the same. The fact that an incumbent LEC does not have to build a cage for cageless collocation in no way justifies a shorter interval. An incumbent LEC's provisioning interval for physical collocation is not controlled by the time required to construct an arrangement enclosure. The construction of the cage is done concurrently with the provisioning of the physical collocation space and thus does not drive significant additional time. Often it can be done in a single day. The incumbent LEC must do the same infrastructure work as is necessary for a caged collocation arrangement, including the completion of the space conditioning, adding to or upgrading the heating, ventilation, and air conditioning system for that area, as necessary, adding to or upgrading the power plant capacity and power distribution mechanism, as necessary, and building out network infrastructure components such as cable racking, and the number of cross-connects requested by the CLEC. The absence of a cage has little bearing on the overall provisioning interval. Because space preparation and network infrastructure work must be completed regardless of the type of arrangement selected, and because construction of a cage is performed concurrently with and not in addition to those work activities, there is no justification for shortening the interval for provisioning cageless physical collocation arrangement.

Similarly, the intervals for various augments to collocation space that have been proposed by the CLECs do not take into account the variety of conditions that may exist and the work that may be required in order to provision the augments. The addition of space to an existing arrangement may require as much work as, or in some cases more

work than, was required to provision the original request. Requests for additional cable terminations may require the engineering and construction of additional cable racking. Augments of all nature can have varying impacts on the work required to provide that augment, depending on the type of premises and the conditions that exist within that premises. A myriad of examples can be provided, all leading to the same conclusion: one should not apply an interval to all augments based on the fact that a particular type of augment can be provisioned in a shorter interval under limited circumstances. The intervals for augments should be the same as those for original collocation requests. If the augment is completed prior to the interval permitted, the incumbent LEC should not hold that space and should turn it over to the CLEC in a timely manner.

In determining the premises in which BellSouth is required to permit collocation, the property rights of the owners of that property and the contractual rights and obligations of the incumbent LEC and the property owner should be considered. In most cases, obtaining rights to use a private property owner's land is a negotiated process. Property owners often refuse to permit such use, resulting in the incumbent LEC either condemning the property or seeking similar rights from an alternative property owner. In cases where an incumbent LEC is successful in obtaining the right to use land from a private party, the landowner commonly limits those rights to placement of the incumbent LEC's facilities. When a property owner permits the incumbent LEC to assign the right to occupy, the assignment is sometimes contingent on the assignee complying with certain conditions or the relinquishment of other incumbent LEC rights. The incumbent LEC does not have ultimate control over the property.

Sprint argues that if additional rights are needed for CLECs to occupy private rights of way, the incumbent LEC should have an initial obligation to secure the necessary permission of the property owner. Sprint at 24-25. BellSouth disagrees. An incumbent LEC should not be required to obtain additional rights from a property owner to facilitate collocation. When an incumbent LEC's premises is located on leased land or on an easement, an incumbent LEC's obligation to permit collocation should be limited to whatever rights the incumbent LEC was granted. Any additional rights should be procured by the CLEC from the property owner and the incumbent LEC's obligation to permit collocation should be contingent on the right to occupy being granted. To require otherwise would impose an unrealistic and unnecessary burden on the incumbent LEC. Moreover, to the extent an incumbent LEC does not "control" the property, the incumbent LEC should be relieved from the provisioning intervals until such time as the right to occupy the land is procured by the CLEC.

V. Reservation/Reclamation of Space.

An incumbent LEC should take into consideration future demands of collocators in constructing additional space at a premises, whether a central office or remote site. However, the manner in which the incumbent LEC determines how much additional space to add and what portion of that space is dedicated to collocation should be based upon criteria similar to that used by the incumbent LEC in determining its own future requirements, e.g. historical demand and forecasted demand.

The determination of whether a CLEC is appropriately reserving space or maintaining unused space should be determined by the state commission upon the incumbent LEC submitting a request for waiver due to space exhaust at a premises. In reviewing an

incumbent LEC's petition for waiver the state commission determines whether the CLEC's space reservation is appropriate; at the same time, the state commission should determine whether the CLECs are appropriately reserving space or if such reservation constitutes warehousing.

VI. Conclusion.

The Commission should fairly implement the decision of the Court of Appeals, including the Court's definition of "necessary" and the limitations on collocation obligations that the Court found inconsistent with the statute. It should adopt longer provisioning intervals where space conditioning is required. The provisioning interval should only begin when a CLEC has submitted a firm order for collocation space, and should be extended if the CLEC does not provide an accurate and timely forecast.

Respectfully submitted,

BELLSOUTH CORPORATION
By its attorneys

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November 14, 2000

COPY

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

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

MOTION FOR LEAVE TO ACCEPT AS TIMELY FILED THE COMMENTS OF BELLSOUTH

BellSouth Corporation, on behalf of itself and its affiliates ("BellSouth"), hereby respectfully, moves the Commission for leave to accept the Comments of BellSouth, in the above referenced proceeding one business day out of time. The grounds for this Motion are as follows:

On October12, 2000, BellSouth experienced logistical difficulties beyond its control related to the filing of the above-referenced Comments. As a result, BellSouth was unable to deliver the Comments to the Office of the Secretary.

BellSouth dispatched its Comments for delivery by courier service at 5:55pm on October 12, 2000. The courier service mistakenly delivered Comments to the wrong address. Upon realizing the mistake, the courier service arrived at the Office of the

CD 10-16-00

Secretary at 7:07pm. The courier service did not successfully file the Comments of BellSouth with the Commission until the morning of October, 13, 2000.

As a result of these unforeseen difficulties, the attached Comments of BellSouth are thus filed one day late. Because these Comments will be filed with the FCC's Office of the Secretary and the Commission's copy contractor, International Transcription Services, and duly served as required, less than one business day after the date upon which the pleadings were due, BellSouth submits that no interested party will be prejudiced in any way by the grant of this motion.

For the forgoing reasons, BellSouth respectfully requests that this Motion for Leave to Accept Comments Out of Time be granted.

Respectfully submitted,

Jonathan Banks /DP

M. Robert Sutherland
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BellSouth Corporation
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Suite 1800
Atlanta, GA 30309
(404) 249-2207

October 13, 2000

STAMP and RETURN

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

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
and	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

COMMENTS OF BELLSOUTH

M. Robert Sutherland
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October 12, 2000

BellSouth Corporation, on behalf of itself and its affiliates ("BellSouth"), submits these comments in response to the Fifth Further Notice of Proposed Rulemaking ("*Notice*"), FCC 00-297 (August 10, 2000), issued in the captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The Commission's Fifth Further Notice (*Notice*) raises several issue concerning how the Commission's loop unbundling rules should apply to the new investments ILECs are making to upgrade their last mile transmission facilities, but seems to miss the issue of *whether* those rules can apply to these new ILEC investments.[2] This is a fundamental flaw, and the *Notice* needs to be completely rethought for at least two reasons. First, the Supreme Court's *Iowa Utilities Board* decision and the Commission's own *UNE Remand Order*[3] are clear that a fact-based finding of impairment is an essential pre-requisite to unbundling ILEC facilities. However, there is no finding (or record) in the *UNE Remand Order* proceedings that CLECs would be impaired in delivering advanced services without unbundled access to ILEC facilities. ILEC investments in new and upgraded last mile facilities networks cannot be unbundled so that CLECs can provide advanced services until the Commission makes the required findings.

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[1] See *In re* the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, adopted August 9, 2000, released August 10, 2000, FCC 00-297. *Notice.*

[2] *Notice* at ¶ 118.

[3] Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, Third Report and Forth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, (rel. Nov. 5, 1999)(*UNE Remand Order*).

Second, the *Notice* absolutely fails to grapple with the essential overall questions of the Commission's statutory responsibility to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability."[4] Requiring ILEC investment in new advanced services facilities to be sold at government-set prices will discourage ILEC investment, and encourage CLECs to free-ride on ILEC investment rather than deploy their own facilities. This result is especially ill-advised because CLECs and other firms are as well-positioned as ILEC to invest in new last mile facilities.

[4] 47 U.S.C. § 706(a).

The Commission raises the right questions in its more recent and broad-ranging Notice of Inquiry concerning whether to regulate high-speed access over cable facilities.[5] In the *NOI* the Commission explains that "[t]he convergence of technologies that allows the provision of high-speed services over traditional cable television facilities, telecommunications lines, and other facilities raises several fundamental questions concerning the Commission's traditional approaches to such technologies."[6] Key policy questions raised in that *NOI* concern whether market forces will continue to guarantee open access and whether a "uniform framework" should apply to "all providers of high-speed services," including specifically "[w]ireline incumbent and competitive LECs."[7] The *Notice's* narrow proposal to consider how to unbundle ILEC advanced services facilities in isolation, without resolution of the essential policy questions raised by the *NOI* -- policy questions that affect all providers of high-speed and advanced services -- is untenable.

BellSouth is a leader in the initial exploration of using fiber technologies to deliver advanced services to consumers. The deployment of fiber to serve consumers is both expensive and risky. UNE regulation of new fiber deployment is likely to remove the financial incentive for BellSouth to deploy fiber last mile facilities in order to provide consumers advanced services.

Subjecting ILEC investments in upgrading local loops would conflict with well-established Commission precedent that there is vibrant competition to deliver advanced services. The Commission cannot and should not proceed to unbundle ILEC investment

[5] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry, GN Dkt. No. 00-185 (rel. Sept. 28, 2000)(*NOI*).
[6] *NOI* at ¶ 1.
[7] *NOI* at ¶¶ 34, 43-44.

in new loop technologies to deliver these services without, at a minimum, carefully analyzing whether these risky new investments can be unbundled under the test set out in the *UNE Remand Order*. The Commission should also complete its consideration of the overarching questions teed up in the *NOI* concerning whether advanced services should be regulated, and if so, whether a uniform framework is necessary to encourage investment and innovation, before singling out ILEC last mile investments for regulation.

II. BELLSOUTH'S PLANS TO DELIVER ADVANCED SERVICES BY INVESTING IN NEW LOOP TECHNOLOGIES

BellSouth is at the forefront of using fiber technologies to deliver advanced services to consumers. BellSouth is already deploying fiber-in-the-loop (FITL) to deliver advanced services on a limited basis. BellSouth is also investing in Integrated fiber-in-the-the-loop (IFITL) technology to combine voice, data and video services over an integrated loop facility. BellSouth IFITL facilities pass over 150,000 homes today.

BellSouth continues to invest in upgrading its current network to deliver voice and data services more efficiently. The first section below describes BellSouth's investment in upgrading its current network. The second describes BellSouth's experience with fiber in the loop and its plans to invest in building new networks based on fiber loop technologies in order to deliver advanced services to consumers.

A. Upgrading Today's Network

BellSouth has been actively deploying electronics to upgrade its copper loops for some time. These electronics consist primarily of Digital Loop Carrier (DLC), fiber optic multiplexers and Digital Subscriber Line (DSL) products. Today, BellSouth serves approximately 9 million lines through DLC systems. These systems range in size from small two-line transport systems up to systems with as many as a few thousand lines. BellSouth has been placing DLC since the 1970s. In most cases involving larger DLC systems, fiber is used between the DLC Remote Terminal (RT) and the central office. Smaller DLC systems are deployed on copper using DSL-like technology. BellSouth uses both Time-Division Multiplexing and Wave Division Multiplexing (WDM) products today to make additional bandwidth available at DLC RT sites. (BellSouth uses a coarse WDM approach that uses only two wavelengths. Utilizing additional wavelengths poses several technical and economic issues, as discussed below. BellSouth is now evaluating Dense Wave Division Multiplexing for use on certain CO-to-CO routes, but is not considering using DWDM in the loop.)

In order to deliver higher speed consumer Internet access BellSouth is actively deploying DSLAMs in central offices and remote terminals. Although remote DSLAMs are generally fed by fiber, some are still served over copper. Where they are served by fiber, WDM is being used today in some locations to provide a high-bandwidth data circuit to the CO for ATM traffic, in addition to a narrowband circuit.

B. Investing In Tomorrow's Network

BellSouth is also investing in what is in essence a new fiber loop network that, if it can be broadly deployed, could provide advanced services to the consumers as

contemplated by the Congress and the Commission.[8] The IFITL technology that BellSouth is testing allows voice, data and video to be delivered to consumers over an integrated local network. BellSouth FITL facilities, which can deliver voice and data, currently pass about 550,000 homes. About 150,000 of these homes are served by upgraded IFITL facilities, which add the ability to provide multichannel video programming.

FITL deployments generally occur in "no plant" areas where new telecommunications facilities must be placed, primarily to serve new housing developments. FITL is also first choice for copper plant replacements when the area to be replaced is significantly large and market requirements exist. FITL deployments have averaged about 100,000 homes passed per year and are expected to continue (closely tied to new housing starts). Where BellSouth has an active Cable TV franchise and market demand is high enough to warrant investment, FITL systems are upgraded to IFITL. In year 2000, we expect about 20,000 of these new 100,000 FITL homes passed to be IFITL/video homes passed.

IFITL works by literally marrying two common telecommunications architectures. The base system is either a time-division-multiplexed/SONET Fiber to the Curb Digital Loop Carrier or an ATM Fiber to the Curb Digital Loop Carrier. Overlaid on this base system is an advanced Hybrid Fiber Coax (HFC) system that shares the same fiber from the Remote Terminal (RT) to the curbside pedestal (ONU). In both fiber to

[8] Section 706 of the Act defines "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." The Commission recently defined "high-speed" as "those services with over 200 kbps capability in at least one direction." Advanced services are those services with over 200 kbps capability in both directions. *Second 706 Report* at ¶ 11. BellSouth's IFITL architecture can provide services at speeds well over 200 kbps in both directions. Service provided over IFITL can

the curb designs, as well as our emerging fiber to the home architecture under field testing today, a very broad spectrum of light is used in the 1550-nanometer window to provision the HFC system carrying the cable service. This 1550 HFC spectrum is presently incompatible with DWDM in that the former has a broad linewidth that overshadows the narrow linewidth used with DWDM. There two types of spectrum usage cannot coexist on the same system.

Today, BellSouth delivers voice and data services to a group of houses over fiber by using a single wavelength – one color. BellSouth uses time division multiplexing to provide separate voice and data channels to individual households. Employing different wavelengths for each household, the equivalent of making each wavelength (or color) the equivalent of a loop does not appear to be workable at present. Doing so would require balancing the power of multiple lasers and accomplishing a number of other difficult technical tasks.

Video services, where available, are delivered to the RT over fiber on a separate wavelength using coarse WDM. WDM uses two colors, one to deliver voice and data and a second to deliver video. BellSouth does not use DWDM in the loop and has no current plans to do so.

The costs of installing fiber loops so that consumers can benefit from advanced services will be immense. BellSouth estimates that the capital costs of overbuilding its current copper facilities would run well over 1,000 dollars per household passed. Of course, there are many millions of households in BellSouth's region. Although the cost of fiber has decreased substantially over the last several years, installing fiber loops still

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meet the Commission's goal for advanced telecommunications capability that will create "a two-way, truly interactive medium rather than one that is passive and entertainment-oriented. *Second 706 Report* at 12.

costs significantly more than copper. The incremental costs of deploying fiber in greenfield housing developments, which is where BellSouth has chosen to engage in its limited deployment of fiber, runs a few hundred dollars more per household passed than copper.

Because deploying fiber loops costs substantially more than copper loops, even in greenfield developments, the financial case underlying BellSouth's current greenfield deployment of fiber loops depends on being able to reap some financial upside beyond the retail revenues from selling voice and data services to consumers. Whether sufficient market demand for these additional services -- from consumers or carriers -- will appear is uncertain. However, it is clear that subjecting this risky investment to UNE regulation is likely to destroy the financial justification for deploying fiber loops. UNE regulation would allow competitors to free ride on BellSouth's investment at government set prices, lowering the potential for basic retail revenues from voice and data services, and limiting the ability to reap additional revenues from providing advanced services. Greenfield deployment of fiber loops, let alone the wide-scale fiber overbuilds necessary to make advanced services available to all consumers, will not be financially justifiable if the Commission chooses to subject these new investments to UNE regulation.

III. The *Notice's* Approach Is Wrong; ILEC New Investment In Last Mile Facilities Cannot Be Subject To Unbundling So That CLECs Can Deliver Advanced Services Until The Commission Finds That CLEC Ability To Deliver Advanced Services Would Be Impaired Otherwise And That Unbundling Meets The Policy Objectives Of Congress And The Commission

The *Notice* seems to assume that as ILECs invest in improving their networks, CLECs are entitled to those upgrades and any newly created features, functions or

capabilities as unbundled network elements at prices set by the government.[9] However, before any unbundling can occur, section 251(d)(2) requires that the Commission find that carriers are impaired in their ability to deliver the services at issue. Thus, the Commission must apply the impairment test set out in its *UNE Remand Order* before proceeding further. In particular, the Commission must apply its impairment test to advanced services and to newly deployed loop facilities where CLECs have the same opportunity to invest in deploying facilities over their own.

The *Notice* simply skips these legal prerequisites. For example, the *Notice* seeks comment on how to guarantee that CLECs get enough of the new capacity on fiber loops that ILECs are deploying so that CLECs can deliver "entertainment quality video."[10] The idea that UNE access is available so CLECs can become cable television providers or providers of "entertainment," does not have the benefit of any Commission finding of impairment, and cannot legally be justified under section 251(d)(2).

A. Unbundled Access To ILEC Fiber Loops And Other Network Upgrades Requires A Finding Of Impairment; All The Evidence Suggests That CLEC's Are Not Impaired In Their Ability To Provide Advanced Services Without Unbundling

[9] Thus, the *Notice* asks whether ILEC efforts to upgrade their networks "necessitates any modification to or clarification of the Commission's local competition rules" instead of asking whether those rules allow for unbundling of this new investment at all. *Notice* at ¶ 118.

[10] *Notice* at n. 264 ¶ 126. Another example is the *Notice's* inquiry into unbundling entire wavelengths in the local loop. *Notice* at ¶ 121. Again, this appears to be intended to provide CLECs with capacity to offer advanced services including cable television services.

The Supreme Court's *Iowa Utilities Board* decision and the Commission's *UNE Remand Order* are absolutely clear that a pre-condition to compelled unbundling is a finding of impairment for the services at issue based on a careful analysis of network alternatives. Yet, the *Notice* reads as though the Commission intends to skip over the question of *whether* its current unbundling rules for loops and sub-loops can be applied to new last mile facilities needed to provide advanced services in favor of going directly to the question of *how* those rules should be applied.[11]

The *Notice* approach is not only directly at odds with the Commission's past approach to compelled unbundling, but also directly inconsistent with section 251(d)(2) and the Supreme Court's *Iowa Utilities Board* decision. What's more, this approach would reverse the Commission's considered course of approaching unbundling decisions: "we generally do not impose such [unbundling] obligations first and conduct our "impair" inquiry afterwards."[12] New facilities for advanced services cannot, and should not, be unbundled by the operation of labels rather than the considered analysis required by the statute, Commission policy and commonsense.

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[11] *Notice* at ¶ 118.

[12] *Supplemental Order Clarification* at ¶ 16.

As acknowledged in the *UNE Remand Order*, section 251(d)(2) sets the standard for unbundling network elements. Network elements may only be unbundled where they meet that section's "necessary" or "impair" requirements. The statutory impair standard requires consideration of whether a carrier's ability to "provide the services it seeks to offer" would be impaired without access to a particular unbundled element. In addition to section 251(d)(2)'s explicit factors, the Commission separately weighs the effects unbundling would have on innovation and investment.[13]

The Commission's judgment in the *UNE Remand Order* that loops should be UNEs did not consider impairment relative to the offering of advanced services and so cannot be extended as the *Notice* seems to propose.

> Section 251(d)(2) does not compel us, once we determine that any network element meets the "impair" standard for one market, to grant competitors automatic access to that same network element solely or primarily for use in a different market. That provision asks whether denial of access to network elements 'would impair the ability of the telecommunications carrier seeking access to provide *the services that it seeks to offer.*[14]

Evaluating impairment as it relates to the specific services the carrier seeks to offer is an essential step in the Commission's analysis under section 251(d)(2). Thus, the Commission analyzes whether the same network elements can be unbundled for local service separately from whether they can be unbundled for access services. *Id.* Just as "Congress itself drew an explicit statutory distinction between [local and access markets]," *Id.*, it drew a line between local and advanced services. *Compare* 47 U.S.C. §

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[13] *UNE Remand Order* at ¶¶ 101-116.

[14] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 (rel. June 2, 2000)(*Supplemental Order Clarification*) at ¶ 15.

153(47)("defining telephone exchange service") and § 706(c)(1)(defining "advanced telecommunications capability").

A finding that a CLEC's ability to offer local exchange services would be impaired without access to UNE loops cannot by itself support a finding that the CLEC"s ability to offer advanced services would be impaired. The factual record bears this out. For example, one important factual basis for the Commission's decision to unbundle ILEC loops that cannot support UNE treatment of advanced services loops was the finding that only ILECs have "vast and ubiquitous" loop facilities for delivering local services.[15] The Commission has consistently found that ILECs do *not* have ubiquitous last mile facilities to deliver advanced services.[16]

A second important basis for the *UNE Remand Order* finding that cannot be transferred was that ILECs supplied the great majority of local service.[17] In sharp contrast, it is ILEC competitors that have the substantial lead in providing advanced services.[18]

The Commission has found that the question of whether a finding of impairment for one set of services can be transferred to another is a difficult "empirical" one requiring record evidence. Answering that question requires a careful analysis of whether the services are "so closely interrelated from an economic and technological perspective" that the finding can be transferred.[19]

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[15] *UNE Remand Order* at ¶ 182.
[16] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) (*Second 706 Report*) at ¶ 70 (only 1% of the market receives advanced services, and most of those subscribers are served by cable companies).
[17] *UNE Remand Order* at ¶ 127.
[18] *Second Report* at ¶ 96.
[19] *Supplemental Order Clarification* at ¶ 16.

Before unbundling new ILEC investment in the last mile facilities necessary to deliver advanced services so that CLECs may use them to deliver advanced services, the Commission *must* analyze impairment as it relates to advanced services as well as the effect on investment and innovation in advanced services that unbundling would have. In particular, this will require record evidence and careful analysis in the following three areas. First, as noted, the *UNE Remand Order*'s consideration of loop unbundling did not analyze whether the ability of carriers to offer advanced services would be impaired without access to advanced services UNEs at government set prices. The Commission must develop a record relevant to the ability of carriers to offer advanced services without unbundled access to ILEC advanced services facilities. Today's "burgeoning competition" to provide advanced services exists without unbundled access to ILEC fiber loops envisioned by the *Notice*.[20]

This competition alone would seem to preclude a finding of impairment. It is supported by a number of other Commission findings, including that the advanced services business is "nascent," that the pre-conditions of natural monopoly are absent, that several technologies are well positioned to serve as the last mile connection and that ILECs, if anything, trail in the deployment race.[21] In this context, it is difficult to envision a factual record that would support a finding of impairment without unbundled access to the investments in new last mile facilities that BellSouth, for one, is making.

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[20] *UNE Remand Order* at ¶ 316.

[21] *Second Advanced Services Report* at ¶¶ 48, 70, 94-111.

Second, the Commission must analyze the effects unbundling will have on investment and innovation in advanced services.[22] There are important differences between the effects of unbundling today's loops and the effects of unbundling new investment in last mile facilities for advanced services. "[I]nvestments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services."[23]

The Commission's analysis of whether to unbundle packet switching used to deliver advanced services highlights the differences in the investment and innovation dynamic between older and newer services.

> We are mindful that regulatory actions should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.

UNE Remand Order at ¶ 316.

The need for "facilities-based investment and innovation" to deliver advanced services is all the greater when it comes to last mile facilities. In fact, because investment in last mile facilities is sunk to a much higher degree than investments in

[22] Even a conclusion that carriers would be impaired in their ability to offer advanced services without unbundling would not be sufficient to lead to UNE treatment of last mile facilities used for advanced services. The Commission's multi-part test requires consideration of the effect of unbundling on investment and innovation, and the results of that analysis may determine the outcome. Thus, the Commission has determined that packet switching should not be unbundled due to the negative effects unbundling would have on ILEC investment in packet technologies.

switching, decisions to invest in last mile facilities are likely to be even more sensitive to the Commission's unbundling policies. The Commission's reasoning that packet switching should not be unbundled even where circuit switching is because of the different effects on investment and innovation is likely to compel a similar distinction between today's loops and tomorrow's last mile advanced services facilities.

Third, the Commission's analysis of whether newly deployed advanced services facilities can properly be unbundled must take into the account the fact that CLECs and other firms can also choose to invest in deploying similar new facilities. Thus, CLECs can choose to install fiber in new subdivisions, just as BellSouth is doing. Unbundling BellSouth's new investments in fiber loops is more like unbundling investment dollars than unbundling network elements.

The Commission's recent *UNE Remand Order* will affect this analysis. That order provides for UNE treatment of dark fiber loops and sub-loops, among other things. These local loop elements "should significantly increase competition in local markets."[24] As a result, the Commission declared that, in the future, "we must take the market effects of those new rules into account as we conduct our 'impair' analysis." *Id.* The availability of these new loop elements will affect the analysis of whether CLECs would impaired without access to newly deployed ILEC loops.

B. Two Specific Unbundling Concerns

Two specific concerns about the unbundling proposed in the *Notice* are raised here. First, BellSouth has a major concern about 'wavelength unbundling' or any

[23] *UNE Remand Order* at ¶ 314.
[24] *Supplemental Order Clarification* at ¶ 17.

mandated scheme that would direct the use of specific wavelengths or frequencies on its fiber systems, particularly FITL and IFITL. Any action that would divide fiber into specific wavelengths at this time would jeopardize BellSouth's current delivery of entertainment services over fiber facilities. BellSouth's IFITL technology currently uses coarse WDM to add enough capacity to deliver entertainment in addition to voice and data. With WDM, only two wavelengths are available. BellSouth does not believe that DWDM will be useable in the local loop in the near future. In these circumstances, wavelength unbundling may prevent BellSouth from delivering entertainment services. This would diminish competition in some markets as well as possibly interrupting cable services for BellSouth customers in areas where there is no effective competition for cable services. Reserving specific wavelengths for CLECs would balkanize BellSouth's fiber loops, and reduce flexibility to deliver competitive advanced services now and in the future, especially as the amount of wavelength necessary to provision the service the CLEC wishes to deliver decreases.[25]

[25] BellSouth believes that, where unbundling is appropriate, offering virtual circuits on its network, as opposed to opened or unbundled wavelengths, would allow it to manage its facilities to provide circuits and services in the most efficient manner.

Second, the *Notice* suggests the possibility of unbundling ILEC facilities and tailoring rules so that firms would be guaranteed capacity on ILEC facilities so they could deliver "entertainment quality video" services.[26] Unbundling ILEC facilities so that other firms can use these facilities to compete with cable companies goes well beyond what Congress intended and the Commission's authority under the Act. Any such attempt at unbundling would appear to run afoul of Congress's directive that a LEC that delivers cable service "shall not be required, pursuant to Title II of this Act, to make capacity available on a nondiscriminatory basis to any other person."[27] And, section 251(d)(2) would require a separate analysis of whether unbundling could be justified based on impairment of a carrier's ability to offer video services. Finally, as noted above, BellSouth's financial case for deploying fiber loops depends on revenues over and above today's voice and data revenues. Limiting the revenue opportunity from delivering entertainment-type services by imposing UNE regulation would threaten the deployment of fiber loops.

VI. Unbundling Would Be Inconsistent With The Need For Investment And Innovation And Would Improperly Prejudge The Outcome Of The Recent *NOI*'s Consideration Of A Uniform Framework For Regulatory Treatment Of All Providers Of High-Speed Services

[26] *Notice* at n. 264.

[27] 47 U.S.C. § 651(b)(BellSouth holds a number of cable franchises).

Advanced services are in their infancy today. Only 1% of the mass market receives advanced services. *Second 706 Report* at ¶ 70. Huge amounts of new investment in last mile facilities will be required to expand today's limited offerings to reach the mass market broadly. *UNE Remand Order* at ¶ 317. The Commission's approach to regulating these new investments must account for the need to encourage investment by all firms and all technologies and the likely effects of treating competitors unequally.[28]

The necessary investment in broadband local facilities is coming from a broad array of competitors. The Commission has identified several competing technologies suited to providing high-speed and advanced service, including cable modems, DSL, several types of wireless offerings and satellite.[29] Firms are investing in each of these technologies and beginning to roll-out offerings. The innovative use of fiber loops to deliver advanced services to the mass market, as contemplated by BellSouth's FITL projects, is still too new to figure in the Commission's list of competing technologies.

This nascent market is likely to be very competitive. Competition among cable, wireless, satellite and telephony networks means that "the preconditions for monopoly appear absent in the 'last mile' of the advanced services market." *Advanced Services Report* at ¶ 48(footnotes omitted). Currently, cable providers have built a large lead in the race to provide advanced services. At the end of 1999, cable providers had 78% of residential high speed services, ADSL had about 16% and "other" had the remaining 6%. Thus, cable providers enjoyed a share roughly 5 times greater than the next closest

[28] The recent *NOI* on high-speed access over cable facilities proposes to investigate these issues.
[29] *Second 706 Report* at ¶¶ 94-111: *NOI* at ¶ 7("service providers are deploying a variety of networks that rely on different network architectures and transmission paths, including copper wire, cable, terrestrial wireless radio spectrum, satellite radio spectrum or a combination of these and other media."

competitor. A very substantial 62% of high-speed cable subscribers already receive advanced services. *Second 706 Report* at ¶ 96.

Rolling out advanced services to the mass market is risky. The Commission has noted one important category of risk facing firms like BellSouth that are evaluating investing in new approaches to delivering advanced services. "[I]nvestments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services, such as traditional plain old telephone service."[30] *UNE Remand Order* at ¶ 314.

All advanced services competitors and potential competitors face this consumer demand risk. All face technological risks of varying degrees, although the risks facing BellSouth in deploying FITL are particularly high because the technology is relatively unproven. And, all face competitive risks given the number of competitors and competing technologies the Commission has already identified. Given this competitive playing field, and the need for substantial new investment to expand today's service offerings to the remaining 99% of the mass market, there is every reason for the Commission to encourage investment by all firms in this market.

The *Notice's* implication that today's loop unbundling obligations could simply be extended without a policy rationale or legal analysis to new fiber loops deployed to provide advanced services is contrary to Commission practice and represents a striking error. *Notice* at ¶¶ 122, 125. This approach will only serve to discourage new investment necessary to bring advanced services to the broad mass market. In fact, the market-

[30] Of course, the risks of providing POTS service continue to increase given the continuing reductions in wireless pricing and the increasing subscribership to cable telephony offerings.

leading cable firms have strongly and successfully argued to-date that even the hint of Commission regulation of their new offerings would eliminate *any* incentive they have to upgrade cable networks. AT&T has argued that "No company would invest billions of dollars...if competitors which have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride in the investments and risks of others."[31]

The Commission has chosen to rely on market forces to govern access to upgraded cable plant used to deliver advanced services. *Cable NOI.* There no reason to believe, and none put forward in the *Notice*, that similar reliance on market forces to govern access to ILEC upgrades would not be equally effective.

Similarly, the Commission refused to extend UNE obligations generally to ILEC investments in packet technologies in order to reduce the regulatory disincentives to investment. The Commission wished to avoid "stifl[ing] burgeoning competition in the advanced service market," noting that "in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation. *UNE Remand Order* at ¶ 316.

There is every reason to apply these pro-investment precedents to ILEC investment in what is in essence a new loop network. For example, BellSouth's decision to invest in deploying new fiber facilities and the electronics necessary to provide advanced services over those facilities will be profoundly affected by the prospect of UNE regulation

[31] C. Michael Armstrong, *Telecom and Cable TV:Shared Prospects of the Communications Future*, delivered to the Washington Metropolitan Cable Club (Nov. 2, 1998) available at <<www.att.com/speeches/98/981102.maa.html.

UNE regulation of fiber loop deployment would work a number of harms. It would substantially reduce the prospect of a market reward for a risky deployment, while doing nothing to reduce the risk of failure. If BellSouth overcame the technical and economic obstacles to providing an offering over this new technology that met consumer acceptance, CLECs would simply opt to free ride on that investment at UNE prices. If BellSouth's efforts failed, CLECs would walk away with none of the loss. Furthermore, The piece part unbundling of UNE loops contemplated by the *Notice* threatens essential engineering economies from concentrating traffic at various points in the loop network. The additional costs of engineering a loop network for shared access, the delay of waiting for necessary standards to accommodate optical interconnection in a multi-carrier environment, and the loss of flexibility as CLECs stake claims to chunks of fiber spectrum all pose further substantial handicaps to fiber loop deployment.

ILECs have no monopoly nor particular advantage on the last mile facilities needed to deliver advanced services and UNE regulation of newly deployed ILEC fiber loops makes little sense where no competing last mile facility is subject to such regulation. All these facilities can be classed as providing telecommunications services.[32] And, the Commission is not legally compelled to regulate ILEC investments in these facilities differently. For example, the Commission has refrained from general unbundling of ILEC investments in packet services to preserve investment incentives. Efforts by ILECs to deploy that last mile, by upgrading copper, and especially by deploying new fiber loops, should receive the same regulatory treatment as the last mile facilities of their competitors.

[32] *NOI* at ¶ 18.

IV. ILEC Decisions To Retire Copper Cannot And Should Not Be Subject To General UNE Requirements

The *Notice* seeks comment on the retirement of copper loops from service. BellSouth retires copper for a number of reasons, as described below, although, as a general matter, BellSouth does not retire copper that is providing adequate service. Retirements occur on a piecemeal basis throughout the entire network, principally to replace deteriorated facilities. Thus, out of the thousands of network jobs worked in any given year that lead to retirement of copper, little of that retired copper may provide adequate voice service, let alone data service. If copper cable in good condition is retired, it is most often due to circumstances such as road moves. In these circumstances, the cable must be removed or abandoned and cannot be maintained in place.

BellSouth currently deploys fiber and Next Generation DLC (NGDLC) as the first choice for new loop feeder facilities and to replace copper facilities that have deteriorated or that have been displaced by public projects such as right-of-way improvements. When BellSouth places fiber and associated electronics in the feeder plant, copper feeder is rarely entirely displaced. It is far more common that, when fiber is placed to an RT, existing copper feeder is left connected in the network in order to serve feeder distribution interfaces (FDI), or re-connected to serve other FDIs closer to the CO.

When fiber feeder replaces copper facilities entirely, the vacated copper cable is retired and removed or abandoned in place. Generally, aerial copper cable and copper cable in conduit are removed. Buried copper cable outside of conduits is abandoned due to the high cost of removal. Removing the aerial or underground cable is often necessary to free space on poles and in conduit so that BellSouth can place other facilities. Thus,

retiring copper creates space on poles and in conduits so that fiber facilities capable of providing high-speed and advanced services can be put into service.

Although the *Notice* correctly points out that the Commission has held that dark fiber is a UNE, it is not clear that that holding is applicable to vacant copper that an ILEC would retire.[33] Unlike dark fiber, vacant copper is not "dormant but ready for service."[34] Instead, it is dormant, may not be capable of providing acceptable service at all, and, in the case of aerial and underground copper, may need to be removed from service so that other facilities can be placed.

The *Notice* asks whether the "removal of copper plant would be consistent with incumbent LECs' obligations under section 251(c)(3)."[35] Section 251(c)(3) requires nondiscriminatory access to UNEs. Removing copper from the network, and replacing it with other facilities, treats all carriers equally and cannot run afoul of that section. The old copper is no longer available to BellSouth or other carriers, and the replacement facilities are.

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[33] *Notice* at ¶ 129.
[34] *Id.*
[35] *Notice* at ¶ 131.

In essence, the *Notice* proposes a set of federal rules that would regulate whether and how ILECs can upgrade their local networks by moving from copper to fiber. These rules would inevitably slow the upgrading of ILEC networks and impose substantial administrative and operational costs on ILECs, all of which will restrict the rollout of advanced services. For example, removing vacant copper cables may be necessary in order to create space to lay fiber. Imposing a requirement that BellSouth obtain federal approval for changing out copper for fiber on a particular route is likely to result in a substantial delay.[36] Clearly, such a set of rules would be inconsistent with the deregulatory intent of the Act.

Given the fact that BellSouth works thousands of jobs a year that may retire copper cable, the administrative burden associated with notification of planned cable retirements and the sale of such cable would be enormous. Much of that burden would be for absolutely no possible benefit because the copper would not provide adequate service.

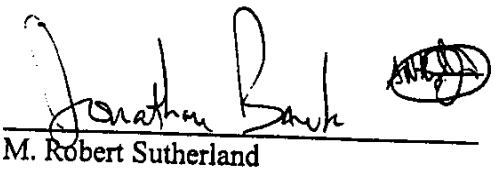
Requiring ILECs to keep copper in their network even though customers would be better and more economically served with more efficient network facilities runs counter to the Commission's pricing methodology. That methodology assumes that ILECs operate the most efficient network. Limiting the ability of ILECs to make their networks efficient runs afoul of that methodology. In addition, restricting the ability of ILECs to make their networks more efficient will raise the cost of providing service to consumers and will artificially create pressure to raise prices.

Handicapping the ability of ILECs to upgrade their networks by imposing a federal regulatory process on retiring facilities that no longer provide adequate service

[36] *Id.*

would harm consumers and may further cement the lead of cable providers when it comes to providing high-speed Internet access and advanced services. The Commission should refrain from instituting any program to regulate ILEC efforts to increase the efficiency of their networks.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have this 13th day of October, 2000 served the following parties to this action with a copy of the foregoing **MOTION FOR LEAVE TO ACCEPT AS TIMELY FILED THE COMMENTS OF BELLSOUTH** by hand delivery to the parties listed below.

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*** VIA HAND DELIVERY**