

**ORDER NO. 74671**

IN THE MATTER OF THE PETITIONS FOR APPROVAL OF AGREEMENTS AND ARBITRATION OF UNRESOLVED ISSUES ARISING UNDER SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996.	* * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND  _____  CASE NO. 8731 PHASE II(c)  _____
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**I. PROCEDURAL HISTORY**

On November 18, 1997, AT&T Communications of Maryland (“AT&T”) filed with the Commission a “Petition to Require that Bell Atlantic-Maryland Continue to Offer ‘Combined’ Network Elements Under Its Interconnection Agreement with AT&T and Under Maryland Law.” (“Petition”) The Petition noted that Bell Atlantic-Maryland, Inc. (“BA-MD”) provided notice on October 27, 1997 that, following a ruling of the United States Court of Appeals for the Eighth Circuit,<sup>1</sup> BA-MD would no longer accept orders for unbundled elements in a combined status. In the Petition, AT&T argued that BA-MD’s decision violated the companies’ interconnection agreement. Furthermore, AT&T contended that the Commission retained authority under Maryland law to direct BA-MD to offer a platform of combined unbundled network elements.

On November 26, 1997, the Commission delegated this matter to the Hearing Examiner Division and further requested that an expeditious hearing be held. A Notice of Prehearing Conference was issued on December 1, 1997. On December 8, 1997, BA-MD filed an Opposition to AT&T’s Petition, arguing that the Eighth Circuit decision

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<sup>1</sup> According to the Petition, the Eighth Circuit struck down a Federal Communications Commission (“FCC”) rule that prohibits incumbent local exchange carriers (“ILECs”) from separating already combined elements. Iowa Utilities Board v. FCC, 120 F.3d 753 (8<sup>th</sup> Cir. Oct. 14, 1997) (“Iowa Decision”)

struck down such a requirement as contrary to the Telecommunications Act of 1996 ("1996 Act"). BA-MD requested that the Commission deny AT&T's Petition.

At the prehearing conference on December 10, 1997, various parties entered their appearance.<sup>2</sup> The Hearing Examiner determined that a single hearing would be held covering both the legal issues as well as the substantive issues regarding the merits of requiring BA-MD to provide the platform of combined unbundled network elements.

Accordingly, the parties filed written comments and a legislative hearing was held on January 8, 1998. The following persons provided comment or testimony: Robert V. Falcone, Donna Carney, and Blaine Darrah on behalf of AT&T; Chet Kudtarkar and Michael Messina on behalf of MCI; Geoffrey Waldau on behalf of Staff; and Donald E. Albert and James G. Pachulsky on behalf of BA-MD.

On January 16, 1998, the Hearing Examiner issued his decision. The Hearing Examiner found that the Eighth Circuit decision precluded the Commission from directing BA-MD to provide the platform of combined network elements as requested by AT&T and other parties. The Hearing Examiner rejected the claim that the Eighth Circuit decision does not affect state authority to order that the platform be provided.

Numerous parties appealed the Proposed Order.<sup>3</sup> All of the appellants contend that the Hearing Examiner incorrectly concluded that the Commission's authority under state law to order the provision of combined network elements has been preempted by the

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<sup>2</sup> In addition to AT&T and BA-MD, appearances were entered by MCI Telecommunications Corporation ("MCI"); Sprint Communications Company, L.P. ("Sprint"); RCN Telecom Services of Maryland, Inc. ("RCN"); the Department of the Army ("DOA"); the Maryland Office of People's Counsel ("OPC"); and the Staff of the Public Service Commission of Maryland ("Staff"). KMC Telecom, Inc. ("KMC") subsequently petitioned for leave to intervene, which was granted.

<sup>3</sup> Appeals were filed by American Communications Services, Inc., the Office of People's Counsel, Staff, Sprint, RCN Telecom Service of Maryland, Inc. ("RCN"), KMC Telecom II, Inc. ("KMC"), AT&T, and MCI.

Eighth Circuit's interpretation of the 1996 Act.<sup>4</sup> In response, BA-MD contended that the Proposed Order should be upheld.

## **II. BACKGROUND**

In 1996, Congress amended the Communications Act of 1934 with the purpose of fostering competition in both the interexchange and local exchange markets. The Telecommunications Act of 1996 ("1996 Act") was designed, in part, to facilitate the entry of competing companies into local telephone service markets. The 1996 Act requires incumbent local exchange carriers ("ILECs") to allow new entrants access to their networks in three different ways. Specifically an ILEC must (1) permit requesting competitors to interconnect with the ILECs local network; (2) provide competitors with access to individual elements of its network on an unbundled basis; and (3) allow competitors to purchase its telecommunications services for resale. 47 USCA §251(c)(2)-(4) (West Supp. 1997) Together these duties regarding interconnection, unbundled network elements, and resale are intended to provide would be competitors with realistic opportunities to enter the market for local exchange service. Through these three duties, and the 1996 Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>5</sup>

The 1996 Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between ILECs and competing carriers to implement the

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<sup>4</sup> RCN and KMC also objected to the Hearing Examiner's failure to address their claims that BA-MD should be prohibited from requiring physical or virtual collocation as the sole means of access to UNEs. MCI also argued that BA-MD was contractually obligated to provide MCI with combined network elements pursuant to a Letter Agreement executed on May 29, 1997.

1996 Act's substantive requirements. When a competing carrier asks an ILEC to provide interconnection, unbundled network elements, or resale, both the ILEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the 1996 Act's goals. 47 USCA §§251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. 47 USCA §252(b). The final agreement, whether accomplished through negotiation or arbitration, must be approved by the state commission. 47 USCA §252(e)(1).

Several sections of the 1996 Act direct the Federal Communications Commission ("FCC") to participate in the 1996 Act's implementation.<sup>6</sup> On August 8, 1996, the FCC issued its First Report and Order in which it established rules to implement the local competition provisions of the 1996 Act.<sup>7</sup> In this Order, the FCC identified various network elements and determined, pursuant to its authority under §251(d)(2) that an ILEC must make each of the elements the FCC had identified available to competitors on an unbundled basis. The FCC further required, pursuant to its authority under §251(c)(3), the ILEC to recombine network elements at the request of competing carriers and prohibited the ILEC from separating elements which may be currently combined.

Soon after the FCC issued its First Report and Order, many petitioners filed motions to stay the FCC's order. After the appeals were consolidated in the Eighth Circuit, that court decided to temporarily stay the operation and effect of the pricing

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<sup>5</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

<sup>6</sup> See, §§251(b)(2), (d)(1), (e), 252(e)(5).

<sup>7</sup> First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 FCC Rcd. 15499 (August 8, 1996)(First Report and Order).

provisions and the “pick and choose” rule.<sup>8</sup> The FCC rules concerning the combining of network elements were not stayed by the Court.

On July 18, 1997, the Eighth Circuit issued an opinion in which it affirmed in part and vacated in part the FCC’s First Report & Order.<sup>9</sup> Among the FCC rules vacated by the court were those rules requiring ILECs to recombine network elements at the request of a competing carrier as well as the FCC rule prohibiting the ILEC from separating elements which may be currently combined.

### III. DISCUSSION

#### A. Federal Preemption of State Law

The primary contention of BA-MD is that the 1996 Act, as interpreted by the Iowa decision, prohibits the Commission from requiring BA-MD to combine network elements for competitors. As noted earlier, the Iowa Court vacated an FCC rule which imposed upon ILECs a duty to combine network elements for CLECs, based upon the provisions of 47 U.S.C.A. §251 (c)(3). That subsection imposes upon ILECs such as BA-MD the duty:

To provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point at rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and

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<sup>8</sup> Iowa Utilities Board v. FCC, 109 F. 3d 418 (8<sup>th</sup> Cir. 1996), motion to vacate stay denied, \_\_\_ US \_\_\_, 117 S.Ct. 429, 36 LE.2d 328 (1996). With its “pick and choose” rule, the FCC interpreted §252(i) of the 1996 Act to allow requesting carriers to “pick and choose” among individual provisions of other interconnection agreements that have previously been negotiated between the ILEC and other requesting carriers without being required to accept the terms and conditions of the agreements in their entirety.

<sup>9</sup> Iowa Utilities Board v. FCC, 120 F. 2d 753, (8<sup>th</sup> Cir. 1997), cert. granted sub. nom. AT&T Co. v. Iowa Utilities Board, \_\_\_ US \_\_\_, 118 Sct. 879, 139 Led 2d 867 (1998).

conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. (Emphasis Added)

The Eighth Circuit interpreted §251(c)(3), particularly the last sentence, as precluding the FCC from levying a duty on ILECs to do the actual combining of elements for competitors. Iowa, 120 F.3d at 813.

The Supremacy Clause of the U.S. Constitution defines the outer limits of the preemption doctrine. It states that federal laws “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>10</sup> Consideration of issues arising under the Supremacy clause “starts with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.” Rice v. Sante Fe Elevator Corp., 331 US 218, 230 (1947). The Supreme Court has held that “[t]he crucial question in any preemption analysis is always whether Congress intended that federal regulation supersede state law.” Louisiana Public Serv. Comm’r v. FCC, 476 U.S. 355, 369 (1986). Accordingly, the crux of preemption is Congressional intent. Barnett Bank of Marion County v. Nelson, 517 US 25, 30 (1996).

As the Supreme Court has reiterated, there are three ways to demonstrate Congressional preemptive intent. First, Congress can define explicitly the extent to which its enactments preempt state law. See, Shaw v. Delta Airlines, Inc., 463 US 85,

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<sup>10</sup> U.S. Constitution, article VI, cl. 2.

95-98 (1983). Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal system will be assumed to preclude enforcement of state laws on the same subject.” Rice, 331 US at 230.

Finally, state law is preempted to the extent that it actually conflicts with federal law. Thus, the courts have found preemption where it is impossible for a private party to comply with both state and federal requirements, see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 US 132, 142-143 (1963), or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 US, 52, 67 (1941).

It is undisputed that Congress has not explicitly preempted our authority to order BA-MD to provide combined network elements. Furthermore, Congress also specifically addressed whether the implied preemption doctrine should be applicable. In §601 (c)(1), Congress stated:

This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State or local law unless expressly so provided in such Acts or amendments.

When Congress has explicitly addressed the issue of preemption, as it has in §601(c), there is no need to engage in an analysis searching for implied preemption. Cipollone v. Liggett Group, Inc., 505 US 504, 517 (1992). §601(c) expresses the Congressional intent that there will be no implied preemption of state authority.

Several other sections of the 1996 Act also address the extent of state authority.

Many parties to this proceeding cited §261(c), which states:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

However, the Eighth Circuit determined that this provision does not apply to state rules pertaining to interconnection and access obligations, Iowa, 120 F. 3d at 806. Thus, §261(c) is not applicable to the determination of whether state commissions are preempted from requiring ILECs to combine network elements.

Similarly, many parties also relied on §251(d)(3) to support their position regarding federal preemption. This subsection, entitled "Preservation of State access regulations," provides:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission [FCC] shall not preclude the enforcement of any regulation, order, or policy of a state commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section, and

(C) does not substantially prevent implementation of the requirements of this section and the purpose of this part.

By its terms, this subsection operates to limit the **FCC's** authority to preempt a state commission order. Clearly, this provision is a limitation on the FCC, not on state commissions. Thus, this subsection, like §261(c), is inapplicable to the determination of whether our authority has been preempted.

Two sections of the 1996 Act are relevant to our determination of whether our authority has been preempted. The first to be considered is §253(b). This section states:

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal services, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

According to the Eighth Circuit, this provision allows states to impose additional requirements as long as they are competitively neutral and consistent with the universal service obligations of §254. Iowa, 120 F.3 806-807. Our authority to place additional requirements on telecommunications carriers is further supported by §252(e)(3) which states:

Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

These provisions preserve the ability of states to protect specific intrastate interests and place additional requirements to those prescribed by the 1996 Act or the FCC, subject to the general condition that competition will not be frustrated. Thus, we have the authority to place additional requirements<sup>11</sup> on telecommunications carriers so long as those requirements are competitively neutral and consistent with universal service obligations. Requiring BA-MD to combine network elements for requesting competitors meets both of these conditions.

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<sup>11</sup> In another context, the Supreme Court has stated that the term requirement "appears to presume that the State is imposing a specific duty . . . ." Medtronic, Inc v. Lohr, 518 US 470, 472 (1996).

However, BA-MD argues that we are preempted from ordering the company to combine network elements because any such order would actually conflict with federal law. As noted earlier, BA-MD contends that the 1996 Act, as interpreted by the Iowa decision, prohibits this Commission from requiring the company to combine network elements for a competitor. We find that BA-MD reads the Iowa decision too broadly. The Eighth Circuit itself has described the Iowa holding:

In short, because the FCC action currently at issue – requiring LECs to provide access to shared transport on an unbundled basis – was made pursuant to express statutory authority, this case is distinguishable in this important respect from *Iowa Utilities Board*, where we held that the FCC has no authority to order LECs to combine network elements. Southwestern Bell Telephone Co. v. FCC, 153 F.3d 597, 606 (8<sup>th</sup> Cir., August 10, 1998) (Emphasis Added)

The FCC can exercise authority over state matters only where Congress has given the FCC clear authority to do so. Thus, the FCC may not act without an unambiguous grant of authority. Where no clear grant of intrastate authority is conveyed to the FCC, the states and not the FCC have jurisdiction over intrastate matters. The Eighth Circuit found that Congress had delegated authority to the FCC in six specific sections of the 1996 Act, including §251(c)(3) regarding the elements of the network to be unbundled. Iowa, 120 F. 3d. at 797 n.10. But because the 1996 Act does not explicitly address the issue of ILECs providing combined network elements, the Eighth Circuit held that the FCC had no authority for its rule requiring ILECs to combine network elements.

The question presented to and answered by the Eighth Circuit was whether the 1996 Act could be relied upon as a source of authority for the FCC's rule requiring ILECs to provide combined network elements. The Eighth Circuit's decision was a narrow opinion which held that the plain meaning of §251 (c)(3) of the 1996 Act does not

require ILECs to combine network elements on behalf of requesting carriers. Accordingly, the FCC could not rely upon this subsection as a source of authority to promulgate rules requiring ILECs to recombine.

The fact that the FCC lacks the authority under the 1996 Act to require ILECs to combine network elements does not mean that any state requirement in this regard would be in conflict with the 1996 Act. In a number of instances the courts have recited the principle that state law does not “conflict” with federal law where state law imposes stricter standards in pursuit of federal goals. See, e.g. Florida Lime & Avocado Growers v. Paul, 373 US 132, 142-43 (1963) (minimum federal agricultural produce standards do not preempt more demanding state standards); Atherton v. FDIC, 519 US 213 (1997) (federal law imposing a gross negligence standard of care on savings and loan officers did not preempt state law imposing a stricter standard of simple negligence). Where stricter state standards do not compromise the goal of the federal legislation, they will not be subject to preemption.

Furthermore, Congress’ decision that the telecommunications industry should be subject to a dual regulatory scheme is an important consideration in the determination of whether state commissions are preempted. Congress has expressly divided regulatory authority between the states and the Federal government. It is inevitable that “jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system.” Louisiana Public Service Commission, 476 US 355, 375 (1986). Conflict preemption must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States. Triggering conflict preemption whenever a state attempts to establish a requirement in

addition to those found in Federal law would thoroughly undermine the regulatory scheme which Congress went to so much trouble to establish.

Under BA-MD's reading of the 1996 Act, any state order imposing a requirement on an ILEC beyond those imposed by the 1996 Act would automatically conflict with federal law. Under this interpretation, all state commissions are authorized to do is duplicate the requirements already imposed by the Federal Act. Such a reading would render both §§252(e)(3) and 253(b) meaningless. This could not be what Congress intended when it preserved the state's authority under these sections.

None of the circumstances which permit preemption apply in this proceeding. Rather than express a clear intent to preempt, Congress expressed its intention to preserve State authority. See, e.g. §§261(c), 601(c) and 252(e). There is no express preemption of such state authority in the 1996 Act and pursuant to §601(c), no preemption is to be implied.

Finally, a requirement that BA-MD provide combined network elements would not conflict with federal law. First, it is possible for BA-MD to comply with both federal and state law because there is simply no federal requirement with which a private party must comply. The 1996 Act does not prohibit an ILEC from providing combined network elements, it simply does not require the ILEC to do so. Since the 1996 Act imposes no prohibition on the ILECs, BA-MD is free to obey any state determination that ILECs should provide combined network elements.

Second, a requirement that BA-MD combine network elements would not frustrate "the accomplishment and execution of the full purposes and objectives of Congress." Hines, supra, at 67. To the contrary, the evidence presented to the Hearing

Examiner leads to the conclusion that this requirement would hasten the accomplishment of the 1996 Act's central objective: to introduce competition into local exchange markets.

Based on the foregoing analysis, we find that there is nothing in the 1996 act that would preclude a state commission from exercising its independent authority under State law to require that an ILEC provide combined network elements.

## **B. Commission Authority Under State Law**

Having decided that Federal law does not preempt a state commission from requiring the ILEC to combine network elements, we must determine whether we in fact possess authority under Maryland law to adopt such a policy. We find that this Commission has authority under Maryland law to require BA-MD to provide combined network elements when requested by a competing carrier. The General Assembly has given the Commission broad authority to regulate public utilities in a manner that best serves the interests of Maryland consumers. The Public Utility Companies Article, §2-113, of the Annotated Code of Maryland affords the Commission substantial latitude to ensure utilities operate "in the public interest"; and to "promote adequate, economical and efficient delivery of utility services in the State without unjust discrimination." This provision provides us with broad authority to review network use and interconnection in the competitive market.

The Commission's authority to structure and regulate the telecommunications market to ensure that competition develops in a manner which is in the public interest has been settled for some time. The Commission's first decision authorizing a flexible approach to rate regulation was issued in 1983.<sup>12</sup> In 1984, the Commission concluded

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<sup>12</sup> In Re Commission's Policy on the Resale of Telephone Services, Order No. 66319, August 10, 1983. The Commission authorized the resale of Wide Area Telephone Service and Message Toll Service, and established a liberal entry policy for resale carriers.

that the level of competition in the interexchange market and the absence of market power of non-dominant interexchange carriers justified the presumption that competition would operate to ensure that these companies' rates would be just and reasonable.<sup>13</sup> The Commission also established a new regulatory treatment for AT&T, the dominant provider of long distance telecommunications service between Maryland's local access and transport areas.<sup>14</sup>

Our first alteration of the regulatory regime under which BA-MD operated occurred in 1985. We authorized BA-MD to implement a flexible pricing plan for its message toll services.<sup>15</sup> In 1988, the Commission found that certain of BA-MD's services were subject to either active or indirect competition and authorized market pricing of those services.<sup>16</sup> In 1990, this regulatory flexibility was expanded. We created a bifurcated incentive-based flexible regulated structure for BA-MD that expanded the existing policy of separating BA-MD's services into those that could be market priced and those that could not, among other things.<sup>17</sup>

The first major step in opening Maryland's local telephone markets to competition began on July 26, 1993, with MFS Intelenet of Maryland, Inc.'s (MFS) filing of an application for authority to provide and resell local exchange and intrastate exchange telecommunication services in Maryland. In addition to applying for authority,

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<sup>13</sup> Re MCI Telecommunications Corp., 75 Md. PSC 331 (1984).

<sup>14</sup> Re AT&T Communications of Maryland, Inc., 75 Md. PSC 495 (1984); Re AT&T Communications of Maryland, Inc., 77 Md. PSC 208 (1986), adhered to on rehearing, 78 Md. PSC 202 (1987).

<sup>15</sup> Re Chesapeake & Potomac Telephone Co. of Maryland, 76 Md. PSC 238 (1985) Prior to 1993, BA-MD was known as the Chesapeake and Potomac Telephone Company of Maryland or C&P.

<sup>16</sup> Re Chesapeake and Potomac Telephone Company of Maryland, et al., 79 Md. PSC 169 (June 30, 1988).

<sup>17</sup> Re Chesapeake and Potomac Telephone Company of Maryland, 81 Md. PSC 395 (1990).

MFS requested that we establish specific policies and requirements for the interconnection of competing local exchange networks.<sup>18</sup>

In the first phase of the MFS proceeding,<sup>19</sup> we approved, in principle, the unbundling of local exchange links and ports. Our policy required unbundling by BA-MD to the extent that the purchase of unbundled elements is requested by a competing carrier and is reasonable and technically feasible without causing damage to network integrity. We also granted MFS authority to provide telephone service on both a facilities and resale basis. BA-MD was required to provide for interconnection with MFS at tandem and end office switches. An interim interconnection rate also was established for local call termination on BA-MD's network. Finally, MFS was permitted to file a tariff to establish a charge for the termination of calls on its own network.

Concurrent with our consideration of the MFS application, we instituted a proceeding to investigate generic issues and policy matters regarding the appropriate regulation of providers of local exchange and exchange access services.<sup>20</sup> The intent of this proceeding was to provide guidance with regard to the policies which the Commission intended to adopt to facilitate the development of an economically efficient competitive local exchange market in Maryland. In our Order, we determined that there are no specific statutory prohibitions against competitive entry into any of the telecommunications markets in Maryland so long as the competition at issue is in the

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<sup>18</sup> In setting the application for hearing, we concluded that the proceeding should serve to establish generic policies, procedures and requirements for telecommunications carriers seeking to provide competitive local exchange telephone service in Maryland.

<sup>19</sup> Re MFS Intelenet of Maryland, Inc., 85 Md. PSC 38 (April 25, 1994).

<sup>20</sup> Re Regulation of Firms, Including Current Telecommunications Providers, and Cable Television Firms, Which May Provide Local Exchange and Exchange Access Services in Maryland in the Future, 85 Md. PSC 187 (October 5, 1994)

public interest. We also reiterated our view that local exchange competition can advance the public interest.

With regard to unbundling issues, we established a process whereby after a competing carrier requested a specific network element be unbundled, Staff would convene a collaborative process to work out the technical details and pricing. If the matter could not be resolved satisfactorily, the Commission would take up the matter on an expedited basis.<sup>21</sup> We also determined that pricing policies which combine Total Service Long Run Incremental Costs with some markup for fixed and common costs would provide useful guidance for our determination of interconnection rates.

Our final action involving the competitive telecommunications marketplace before the passage of the 1996 Act occurred in the second phase of the MFS proceeding.<sup>22</sup> In this phase, we determined that a reciprocal interconnection rate structure should be used. We found that BA-MD should be allowed to charge one rate for tandem interconnection and another for end office interconnection and adopted specific rates for each. We also set interim rates for unbundled links and ports. Finally, we agreed that the Commission should establish wholesale prices for BA-MD's local exchange services but deferred the matter of appropriate rates to a future proceeding.

As the above recitation demonstrates, we took an active role in the formation and encouragement of the telecommunications competitive marketplace long before states

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<sup>21</sup> This decision appears to be eerily foreshadowing the 1996 Act's provision allowing for mediation if the ILEC and competing carrier cannot reach agreement. See, §252(a)(2) of the 1996 Act.

<sup>22</sup> Re MFS Intelenet of Maryland, Inc., 86 Md PSC 467 (December 28, 1995).

received the “benefit” of the 1996 Act. These decisions were not based upon any federal directive but were founded on our broad and well-settled authority from the Maryland General Assembly. The decision that BA-MD should be required to combine network elements is just a continuation of the ongoing process of creating a competitive market which we started in 1983.

Therefore, we conclude that we have the authority under the *Public Utility Companies* Article to order BA-MD to combine network elements as requested by competing carriers and to order BA-MD to refrain from disassembling network elements which already are combined in the manner that the competing carrier desires. Furthermore, we conclude that such an order would be in the public interest.<sup>23</sup>

When a competing carrier orders unbundled network elements, the separation of those elements by BA-MD is unacceptable. Such separation and recombination serves no public purpose and provides no cost benefits. BA-MD will incur additional costs in disassembling its network and the competing carrier will also incur additional costs putting these elements back together again in collocation space. These additional and unnecessary costs ultimately would be passed on to the consumer.

Furthermore, disassembling network elements will put customers out of service unnecessarily while the disconnection and subsequent reconnections are made. The many new cross connections required will introduce new points of failure into the system and thus unnecessarily threaten the quality of service which customers receive from

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<sup>23</sup> MCI also raised the issue of whether a letter agreement signed by BA-MD was enforceable. This issue was raised and more fully briefed by the parties in Case No. 8731, Phase II(b). The Commission will address the issues involving the letter agreement in our Order in that proceeding.

competing carriers. There are no technical or service-enhancing reasons for BA-MD to require that customers' existing service arrangements be dismantled and reassembled at the competing carrier's collocation. For existing BA-MD customers, the combined unbundled network elements are already in place, connected together and fully operational. A competing carrier that wants to offer service to an existing customer using the already combined elements should be able to receive those elements in a manner that allows the competing carrier to serve customers without interrupting service.

Finally, unlike the FCC's rule concerning the combination of network elements, our requirement is consistent with the 1996 Act's distinction between providing service through resale or through unbundled network elements because we can provide BA-MD with compensation for the work it performs in combining the network elements. Compensation is a pricing issue. State commissions, rather than the FCC, set retail prices for local services and resolve disputes over network element prices and wholesale discounts. See, 47 USC §252(d). The FCC lacks the authority to ensure that ILECs receive compensation for the work necessary to create the combination. However, a state commission can set element prices to ensure that the ILEC receives compensation for creating any combinations the state may require the ILECs to offer. Therefore, BA-MD may charge a reasonable, non-recurring, cost-based price for combining the unbundled network elements.

#### **IV. CONCLUSION**

Based on the foregoing analysis, we conclude that the 1996 Act does not preempt our authority to order BA-MD to combine network elements and refrain from disassembling network elements which are already combined and which CLECs wish to

purchase. Furthermore, we find that on the basis of Maryland law, it is in the public interest to require BA-MD to provide combined network elements in order to facilitate the efficient provisioning of local telecommunications services to Maryland consumers.

Finally, we find that BA-MD is entitled to receive compensation in the form of a non-recurring, cost-based charge for combining the unbundled network elements. To the extent that such a charge is not contained in an existing interconnection agreement between BA-MD and a competing carrier, the parties are directed to negotiate such a charge.

**IT IS, THEREFORE,** this 2nd day of November, in the year Nineteen Hundred and Ninety-Eight, by the Public Service Commission of Maryland.

**ORDERED:** (1) That Bell Atlantic-Maryland, Inc. shall combine network elements as requested by competing carriers through the provisions of the parties' approved interconnection agreement;

(2) That Bell Atlantic-Maryland, Inc. shall refrain from disassembling currently combined network elements to the extent that such elements are already combined in a manner the competing carrier desires;

(3) That Bell Atlantic-Maryland, Inc. and the competing carriers shall negotiate a non-recurring, cost-based charge to compensate Bell Atlantic-Maryland, Inc. for combining network elements to the extent that such a charge is not contained in the parties' interconnection agreement;

(4) That motions not granted by action taken herein are denied.

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Commissioners

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