

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

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MAY 17 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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In the Matter of )  
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Petition for Declaratory Ruling )  
by the Inmate Calling Services )  
Providers Task Force )  
\_\_\_\_\_ )

RM-8181

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**OPPOSITION TO PETITIONS FOR RECONSIDERATION, WAIVER AND STAY**

The Inmate Calling Services Providers Task Force ("Inmate Task Force") hereby submits this Opposition to the various petitions filed by certain incumbent local exchange carriers ("LECs") who are seeking an unwarranted delay in the implementation of the Commission's February 20, 1996 Declaratory Ruling that inmate calling systems are Customer Premises Equipment ("CPE"). Specifically, the Inmate Task Force opposes the following LEC petitions: (a) the March 21, 1996 "Petition for Partial Reconsideration or Stay" filed by Bell Atlantic, BellSouth, NYNEX and Pacific/Nevada Bell (the "Bell Companies' Petition"), (b) the March 21, 1996 "Petition for Waiver" filed by Pacific Bell and Nevada Bell (the "Pacific/Nevada Waiver Petition"), (c) the March 21, 1996 "Petition for Waiver" filed by Southwestern Bell Telephone Company (the "SWBT Waiver Petition"), and (d) the April 5, 1996 "Petition for Reconsideration and Stay" of Cincinnati Bell Telephone Company (the "CBT Petition"). For the reasons set forth below, the Commission should deny each of the LEC petitions.

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I. **THE REQUESTS FOR WAIVER AND STAY ARE PROCEDURALLY DEFICIENT AND MUST BE DISMISSED.**

As an initial matter, to the extent that the LECs request a stay and/or waiver of the Declaratory Ruling, those requests are procedurally deficient on their face and should be dismissed without further consideration. On April 4, 1996, the Inmate Task Force filed an "Opposition to Petition for Stay" relating to the Bell Companies' request for stay. That pleading is attached hereto and incorporated by reference. In addition to the Bell Companies, CBT also requested a stay. That request should be dismissed for the same reasons set forth in the attached pleading.<sup>1</sup>

For similar reasons, the Pacific/Nevada Bell Waiver Petition and the SWBT Waiver Petition should be dismissed outright as they do not even recognize, let alone attempt to satisfy, the well-established waiver standard for CPE. The Commission articulated its stringent CPE waiver standard in its reconsideration of Computer II. The Commission "made it clear in that decision that a carrier seeking a waiver from the separation mandated in Computer II must carry the burden of showing that the waiver is in the public interest by demonstrating – in special detail – that [the Commission's] 'concerns about cross-subsidization or other anticompetitive affects ... are outweighed by the possibility of imposition of unreasonable costs upon consumers ...." American Telephone & Telegraph Company, 88 FCC 2d 1, 6 (1981)(citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 50, 58 (1980)). Neither Pacific/Nevada Bell nor SWBT made any such showing. Thus,

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<sup>1</sup> CBT's Petition should also be dismissed as it was late-filed. Petitions for reconsideration of the February 20, 1996 Declaratory Ruling were due on March 21, 1996. 47 C.F.R. § 1.106(f). CBT's Petition was filed on April 5, 1996.

their petitions must be dismissed for failure to state a claim upon which the Commission can grant the relief that they request.

II. **THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT WARRANT OR JUSTIFY DELAY.**

In one fashion or another, each of the LECs argue that the Declaratory Ruling should be delayed pending the outcome of the rulemaking required by Section 276 of the Telecommunications Act of 1996 ("Act"). Contrary to what the LEC petitioners would have the Commission believe, Section 276 of the Act does not warrant a delay of the Declaratory Ruling. Nor can it be used to sanction the LEC petitioners continued non-compliance with the existing CPE rules. If anything, in light of the Act, the Commission should accelerate the implementation of the Declaratory Ruling; it should not halt implementation of a ruling that Congress clearly agrees is in the public interest.

First, as the Inmate Task Force stated in its attached Opposition to Petition for Stay, the LECs have failed to recognize the underlying premise of the Declaratory Ruling. They continually misstate the Commission's ruling as affecting inmate-only payphones. The ruling is much broader. The ruling makes clear that inmate-only calling systems are not within the Lonka exemption for payphones. Inmate calling systems are private systems that frequently include such things as computers and related processing equipment – equipment that is and always has been CPE.

The accounting and related mechanisms for CPE such as inmate calling systems have been in existence for almost 10 years. Surely, the LEC petitioners should have little difficulty in figuring out how to comply with the Declaratory Ruling as to the

parts of their inmate calling systems that are the same as equipment that has always been subject to the CPE rules. Adding the payphone-shaped terminals into the existing cost accounting rules for CPE should be a relatively easy task. Indeed, the Bell Companies' claim that "new Part 64 cost pools would need to be developed" is disingenuous. Those portions of inmate-only calling systems that have been treated as CPE in other contexts of the CPE rules can fit into existing cost pools; there is no reason why new cost pools should be necessary. The portions of inmate calling equipment that consists of the payphone terminal should not be difficult to include.

Second, each of the LEC petitioners, with the possible exception of CBT whose particular argument is addressed below, recognize and understand that Section 276 requires that inmate calling systems be unbundled from the network, something that the Declaratory Ruling makes clear the LECs should have been doing all along. The rules and regulations that the Commission will adopt pursuant to Section 276 will at a minimum satisfy the requirements of the existing Computer III safeguards. While the Commission may ultimately expand upon those safeguards, the Act does not authorize the Commission to limit the existing CPE rules as they currently apply to inmate calling systems. Thus, the Declaratory Ruling does not require the LEC petitioners to take any action that the rules adopted pursuant to the Act will not ultimately require.<sup>2</sup> Contrary

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<sup>2</sup> Following the Commission's initial Computer II decision, 77 FCC 2d 384 (1980), the existing rules regarding CPE were adopted in a series of orders commencing with Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 143 (1987). While the CPE rules are not identical to the Computer III requirements, which were developed for enhanced services, the CPE rules are fundamentally the same and serve the same purposes by promoting "arms length" dealing between the LECs' regulated activities and their unregulated competitive activities. If anything, the requirements for CPE are less stringent than the requirements under Computer III. Thus, the LECs will not be required  
(Footnote continued)

to what the LEC petitioners contend, the fact that Congress ordered the Commission to take action that the Commission already took on its own initiative is not a reason to delay implementation; congressional affirmance is a reason to firmly uphold and implement the Declaratory Ruling quickly so that the rules adopted pursuant to the Act can be implemented without unnecessary delay.

Indeed, given that the LECs will inevitably have to take the actions required by the Declaratory Ruling by virtue of the Act, it is inconceivable how the public or the Commission will be served by a delay.<sup>3</sup> To the contrary, a delay would be inconsistent with Congress' mandate and the Commission's goals to promptly implement the Act, including Section 276. In an effort to meet the various and strict time limitations set forth in the Act, the Commission has streamlined its processes and taken other unprecedented actions designed to, using the Commission's own phrase, "change business as usual." The LEC petitioners are apparently oblivious to the burden placed on the Commission; they seek to prolong "business as usual," at least as it best suits their needs, by asking the Commission to delay the effectiveness of the ruling – a ruling that Congress has otherwise mandated the Commission to adopt within a short period of time. Thus, the arguments raised by the LEC petitioners are clearly inconsistent with the intent of Congress and the Commission's goals and efforts to promptly implement the Act.

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(Footnote continued)

to take any steps under the Declaratory Ruling that they will not ultimately have to take once the Section 276 rulemaking is complete. Similarly, no action taken under the CPE rules and the Declaratory Ruling will have to be "undone."

<sup>3</sup> By contrast, if the Act required that the Commission ultimately overrule or change the existing Computer III requirements, the LECs' arguments may have more validity. But that is simply not the case.

In a misguided effort to support their argument, the LEC petitioners suggest that Congress wanted no enforcement of the existing CPE requirements until a "comprehensive rulemaking" is complete. Congress did nothing of the sort. Congress clearly did not want the public to be deprived of the benefits of a regulatory action that Congress otherwise ordered the Commission to take. Rather, Congress wanted to ensure that the Commission took prompt action to eliminate the LECs' illegal practice of treating CPE as regulated equipment. The Declaratory Ruling is consistent with that Congressional intent. There is nothing "piecemeal" about requiring the LECs to come into compliance with a regulatory regime that the LECs should have been complying with since 1984 and which Congress in substance mandated in Section 276. Nor is there any indication that Congress wanted to exempt LECs from complying with the existing CPE requirements during the pendency of a more comprehensive rulemaking.

More significantly, the LEC petitioners have failed to show how any obligation imposed by the Declaratory Ruling will cause them undue burden or otherwise justify the relief requested. Again, all of the actions required by the Declaratory Ruling are actions the LECs will ultimately have to take pursuant to a statute. The public would be best served if the LECs begin to take those actions now rather than at a later date. For example, the Bell Company petitioners suggest that the Bell Companies may be required to make a "manual review of their records, and in some cases, a physical inspection of the [correctional] facility" to see what type of equipment they actually have. Despite the fact that such a claim only serves to reaffirm the correctness of the Declaratory Ruling, if, as the Bell Companies contend, a manual review of their equipment is necessary, then such a review will also be necessary once

the rulemaking is complete. Thus, compliance with the Declaratory Ruling now will only help ensure prompt implementation of the new rules once they are adopted.

The LEC petitioners' claim that they will be required to take needless and redundant actions once the new rules are adopted is also baseless. There is simply no reason to believe that the new rules will require the LECs to take any action – such as a manual re-review of their equipment – if it has already been done in compliance with the Declaratory Ruling.

Finally, SWBT and Pacific/Nevada argue in their respective waiver petitions that Section 402 of the Act restricts the ability of the Commission to require the LECs to file revisions to their Cost Allocation Manuals ("CAM") in order to take into account their inmate systems. This argument is misplaced. Contrary to the carriers' claim, Section 402 does not mean that the Commission is prohibited from ordering LECs who have not complied with its CPE rules to come into compliance. Yet that is the strained interpretation SWBT and Pacific/Nevada would have the Commission believe.

III. **REGARDLESS OF WHICH LECs ARE SUBJECT TO THE ACT, ALL LECs MUST COMPLY WITH THE DECLARATORY RULING.**

CBT goes one step further than the other LECs by suggesting that Section 276 of the Act may not apply to LECs other than the Bell Companies and that the uncertainty is a further justification for delay. Again, CBT like the other LEC petitioners confuses the relationship between the Declaratory Ruling and the Act. The Declaratory Ruling and the existing CPE rules clearly apply to independent LECs like CBT. Whether or not Section 276 explicitly refers to independent LECs does nothing to change that fact.

Even if Section 276 does not apply to independent LECs – a contention which is wrong but which the Commission need not address here – the Commission still has the authority to apply its CPE rules broadly. Nothing in the Act prohibits or restricts the Commission's authority in this regard.

Even CBT concedes that the Commission has the authority to impose its unbundling requirements on independent LECs regardless of how broadly Section 276 applies. Thus, CBT is forced to resort to the same misplaced logic of the other LECs – i.e. that the Commission should delay implementation of the order until it addresses payphone unbundling obligations for independent LECs in a comprehensive manner. Just as it is wrong for the Commission to delay the Declaratory Ruling pending the outcome of the Section 276 rulemaking, it is equally wrong to delay the Declaratory Ruling pending resolution of a comprehensive payphone proceeding for independent LECs.

WHEREFORE, the Inmate Task Force respectfully requests that the Commission dismiss or deny the LEC petitions.

May 17, 1996

Respectfully submitted,



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I hereby certify that on May 17, 1996, a copy of the foregoing Opposition to Petitions for Reconsideration, Waiver and Stay was delivered by first-class mail to the following parties:

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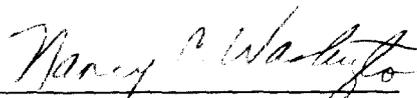
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Petition for Declaratory Ruling )  
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Providers Task Force )

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**OPPOSITION TO PETITION FOR STAY**

The Inmate Calling Services Providers Task Force ("Task Force") hereby opposes the March 21, 1996 "Petition for Partial Reconsideration or Stay" of Bell Atlantic, BellSouth, NYNEX and Pacific/Nevada Bell (the "Bell Companies' Petition").<sup>1</sup> To the extent that the Bell Companies' petition requests a stay of the Commission's February 20, 1996 Declaratory Ruling in this proceeding, that request is both procedurally and legally deficient on its face and may not be considered by the Commission.

First, except as stated in the caption, nowhere in the petition do the Bell Companies' even request a stay. Rather, the only relief requested is for the Commission

<sup>1</sup> Section 1.44(d) of the Commission's rules, 47 C.F.R. § 1.44(d), requires that oppositions to a request for stay shall be filed within 7 days after the request is filed. Although the certificate of service accompanying the Bell Companies' petition states that the petition was served by mail to the undersigned counsel on March 21, 1996, the petition was sent to the undersigned counsel's previous law firm. As such, the undersigned counsel did not receive a copy of the petition until several days after March 21, 1996. To the extent that it is necessary, we hereby request leave to file this opposition outside of the time required by the Commission's rules.

to reconsider the implementation schedule set forth in the Declaratory Ruling.<sup>2</sup> The so-called stay request is, in fact, a request for relief on the merits. Thus, the Bell Companies have submitted a request for a delay in the time period required for implementing the order, not a request for preservation of the status quo pending disposition of their request for a time delay. A stay, therefore, cannot be granted.

Second, section 1.44 (e) of the Commission's rules states that "any request for stay of the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission." 47 C.F.R. § 1.44(e)(emphasis added). The Bell Companies purported request for a stay was not set forth in a separate pleading and must therefore be dismissed without further consideration.

Third, even if the petition did properly request a stay, nowhere in the petition do the Bell Companies recognize or discuss the applicable standard for a stay, namely the four-prong test of Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). That test requires a stay petitioner to demonstrate that (1) absent a stay, it will be irreparably injured; (2) it is likely to succeed on the merits; (3) a stay would not cause harm to other parties; and (4) a stay is consistent with the public interest. The Bell Companies did not even attempt to address any of these four requirements. Thus, the request for stay is legally deficient on its face and must therefore be dismissed.

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<sup>2</sup> It is our understanding that the Petition for Reconsideration will be placed on public notice and that a pleading cycle will be established. The Task Force will respond to the reconsideration portion of the Bell Companies' petition once a pleading cycle has been set.

Apart from these *prima facie* procedural deficiencies, there is nothing in the Bell Companies' petition that could even begin to satisfy the strict requirements for a stay. The sole contention for the Bell Companies' petition is that the Commission should delay implementation of the Declaratory Ruling until the Commission adopts rules on payphone unbundling as required by Section 276 of the Telecommunications Act of 1996. However, the Bell Companies have missed the point of the Commission's ruling. They continually misstate the Commission's ruling as affecting inmate-only payphones. The ruling is much broader. The ruling makes clear that inmate-only calling systems are not within the Torka exemption for payphones. Inmate calling systems are private systems that frequently include such things as computers and related processing equipment – equipment that is and always has been customer-promises equipment ("CPE").

The accounting and related mechanisms for CPE such as this have been in existence for almost 10 years. Surely, the Bell Companies should have little difficulty in figuring out how to comply with the ruling as to the parts of their inmate calling systems that are the same as equipment that has always been subject to the CPE rules. Adding the payphone-shaped terminals into the existing cost accounting rules for CPE should be a relatively easy task. Indeed, the Bell Companies' claim that "new Part 64 cost pools would need to be developed" is disingenuous. Those portions of inmate-only calling systems that have been treated as CPE in other contexts of the CPE rules can fit into existing cost pools; there is no reason why new cost pools should be necessary. The portions of inmate calling equipment that consists of the payphone terminal should not be difficult to include.

Even if new cost pools are necessary, the Bell Companies have recognized that they will soon be required to separate inmate-only systems from the regulated accounts pursuant to the requirements of Section 276. Further, if the Bell Companies are correct in stating that they will need to conduct a "manual review" of their records, then a "manual review" of these records is also something that they are going to have to do anyway to comply with Section 276. Thus, there is no way that the ruling causes harm to the Bell Companies, let alone the irreparable harm necessary for a stay. To the contrary, if the Bell Companies' contention is correct, the ruling will assist Bell Companies in their efforts to comply with the requirements of the Act.

Indeed, the non-structural safeguards that the Commission must establish pursuant to its implementation of Section 276 must – at a minimum – satisfy the existing Computer III requirements. While the Commission may ultimately expand upon those safeguards, it is clear that, at a minimum, the Bell Companies will have to comply with the existing rules. Thus, it is inconceivable that complying with the Declaratory Ruling can "irreparably harm" the Bell Companies. It is even more inconceivable how they are likely to succeed on the merits of avoiding implementation of the existing standards absent a repeal of Section 276 by Congress. In short, there are simply no grounds for a stay.

The Bell Companies' additional claim that they will be unable to comply with the ruling within the time allotted because of the time constraints involved in unbundling an unspecified network service is misleading. First, there is nothing in the record that indicates that the Bell Companies utilize central office functions in their inmate calling systems. To the contrary, the premise of the Commission's ruling is that

the Bell Companies are utilizing CPE, not the central office, to provide the functionality at the terminals.

If, as the Bell Companies contend, there are network services that will need to be unbundled and which are subject to a twelve month disclosure requirement, the appropriate remedy is a waiver, not a stay. In such a case, the Bell Companies also will need a waiver to comply with the Commission's disclosure rules once the Section 276 rules are adopted. If a waiver is needed anyway, the Bell Companies should seek the waiver; they may not seek a stay until they have first filed the waiver request.<sup>3</sup> Indeed, if the Bell Companies will need a waiver of the disclosure rules once the Section 276 rules are adopted, they should begin the unbundling process now so that it is substantially complete by the time the new rules are established. Otherwise, the Bell Companies will surely again cite the alleged twelve month disclosure requirement as a basis for delay in implementation of the new rules once they are established.

In any event, the information in the Bell Companies' filing will support neither a stay nor a waiver. The Bell Companies provide no details on what type of functionality is used. Absent more information, there is no way that a stay could be granted. A stay and/or a waiver requires sufficient facts to allow the Commission and other parties to address the merits.

Finally, there is no basis for the Bell Companies claim that a stay is in the public interest. To the contrary, for the Bell Companies to succeed on this claim, the

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<sup>3</sup> By pointing to the appropriate procedural course, the Task Force is by no means conceding that a waiver or a stay could or should be granted. See text following this note.

Commission would be forced to rule that compliance with the CPE rules in general is contrary to the public interest since most of the equipment included in the Bell Companies' inmate calling systems is, and always has been, CPE.

WHEREFORE, the Task Force respectfully requests that the Commission dismiss or deny the Bell Companies' request for stay.

April 4, 1996

Respectfully submitted, .



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Certificate of Service

I hereby certify that on April 4, 1996, a copy of the foregoing Opposition to Petition for Stay was delivered by first-class mail to the following parties:

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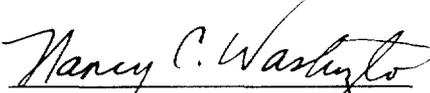
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