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July 18, 1996

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The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street N.W., room 814
Washington, D.C. 20554

Re: Informal Comments on CC Docket No. 96-98 - Notice of Proposed Rulemaking

Dear Chairman Hundt:

The Hawaii Public Utilities Commission (PUC) respectively submits informal comments on the Notice of Proposed Rulemaking (NPRM) in CC Docket 96-98. Our commission recognizes the difficult task the Federal Communications Commission is undertaking in its attempt to establish rules that will implement the telecommunications policy embodied in the Telecommunications Act of 1996, and lauds the FCC's efforts to integrate the existing successes that have been achieved by the individual states into the rule making process. In an effort to assist the FCC in its rulemaking process, we submit the following comments. Each comment is preceded by a quote of the relevant paragraph of your April 19, 1996 NPRM to which the comment refers.

1. **Congress entrusted to this Agency the responsibility for establishing the rules that will implement most <u>quickly and effectively</u> the national telecommunications policy embodied in the 1996 Act. (par 2)**

   National standards may well prove to delay and be less effective in the implementation of the telecommunications policy embodied in the Act unless they are carefully constructed, particularly in those states and for those aspects of the telecommunications market where competitive forces have already produced effective processes for assuring competition.

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The Hawaii Public Utilities Commission, in conjunction with forty industry participants and other state agencies, has recently finalized and implemented Hawaii Administrative Rules (HAR) titled; "Competition in Telecommunications Services" (chapter 6-80, HAR) and the "Universal Service Fund" (chapter 6-81, HAR). These rules are consistent with, and effectively implement the Telecommunications Act of 1996, as well as Act 225, Session Laws of Hawaii 1995, relating to competition in intrastate telecommunications services and the universal service fund.

With the administrative rules as a framework, the industry participants have recently completed a collaborative process which identified the appropriate components and costing mechanisms for unbundling of the local exchange network. While certain issues remain to be addressed, the consensus of the parties is that the discussions have been more cooperative and have proceeded further than any others that have taken place in other jurisdictions. Some of these same participants have expressed concerns that federally mandated standards may very well stymie the progress achieved in Hawaii in the development of an effective unbundling process.

2. **Thus, we intend in this proceeding to adopt national rules that are designed to secure the full benefits of competition for consumers, with due regard to work already done by the states that is compatible with the terms and the pro-competitive intent of the 1996 Act. (par 26)**

The PUC is fully in support of the FCC's intent to give due regard to the existing work of the states, particularly since many of the state policies have been developed through the input of the industry participants in those specific markets. This is particularly critical in those instances where the unique features of a state's policy may be vitally important to small local carriers, who are otherwise unable to effectively participate in the development of a national mandatory policy. In this respect, national guidelines, rather than mandated national rules or standards, will prove to be more effective in allowing for the unique characteristics of each market.

3. **This approach would further a uniform, pro-competitive national policy framework, as envisioned by the statute, and yet still preserve broad discretion for states to resolve, consistent with the 1996 Act, the panoply of other individual issues that may be raised in arbitration proceedings. (par 27)**

   The NPRM apparently envisions the states' role as limited to those aspects of unbundling, interconnection and resale that cannot be achieved by any process other than arbitration. This limitation is clearly in conflict with the intent of the 1996 Act and the FCC's own stated policy of giving due consideration to state regulations which are not inconsistent with the 1996 Act.

   The collaborative unbundling process previously discussed in these comments could not have occurred if the state's authority had been limited to arbitration matters. Yet this process has advanced the unbundling of the local exchange network to a stage that is substantially ahead of that envisioned on a nationwide basis. It appears inappropriate to establish a national policy that will effectively cause the regression of competition in the Hawaii market.

4. **We see many benefits in adopting such rules to implement section 251. Such rules should minimize variations among states in implementing congress's national telecommunications policy and guide states that have not yet adopted the competitive paradigm of the 1996 Act. (par 28)**

   The NPRM appears to place a premium on minimizing variations between state policies, and somehow equating this to the efficient development of telecommunications policy that is suited to every state. A "one size fits all" philosophy is not effective, particularly when the diversity in size, locale, population density and other unique geographic features of states such as Hawaii, California and Alaska are considered.

   While the FCC has considerable expertise in telecommunications, it has limited knowledge about the specific characteristics and needs of each state. Moreover, the FCC no longer maintains an office in the state of Hawaii that can effectively monitor the progress of the competitive telecommunications market. Effective administration of the telecommunications network in Hawaii cannot be achieved from afar, regardless of the advances in technology.

5. **Throughout this item, we seek comment on the extent to which existing state initiatives are consistent with the new federal statute and, to the extent they are, the wisdom of using existing state approaches as guideposts or benchmarks for our national rules. (par 29)**

   State approaches to a given issue may be an appropriate guidepost for national policy, but should not preempt the policies of other states which may be consistent with the 1996 Act and which may be very effective for the specific state in which they are enacted.

6. **Such rules would also permit firms to configure their networks in the same manner in every market they seek to enter. Uniform network configurations could achieve significant cost efficiencies for new entrants; if new competitors were required to modify their networks in different markets solely to be compatible with a patchwork of different regulations, they would likely incur additional expense, thereby increasing the cost of entry, a result that would be inconsistent with the pro-competitive goals of the statute. (par 30)**

   A policy of minimal nationwide variation will serve to benefit the large carriers that provide service in several states, providing further economies of scale for these carriers, and further eroding the ability of the small local carrier to compete. In general, the minimal variation policy should eventually produce a market predominantly comprised of a few large, nation-wide companies, able to offer every service, and collectively able to control the prices of every service they offer.

7. **Section 252 provides that incumbent LECs and entrants initially will seek to arrive at interconnection and unbundling arrangements through voluntary negotiations. By narrowing the range of permissible results, concrete national standards would limit the effect of the incumbents's bargaining position on the outcome of the negotiations. (par 31)**

   Presumably, the RBOCs, GTE and the dominant interexchange carriers will have substantial input in the development of "concrete national standards", while the small carrier that serves a limited area will be obligated to fit their needs to the national standard.

8. **The case for permitting material variability among the states could be strengthened if there are substantial state-specific variations in technological, geographic, or demographic conditions in particular local markets that call for fundamentally different regulatory approaches. (par 33)**

The state of Hawaii consists of six primary islands, with approximately 80% of the population located on the island of Oahu. The state is a single-lata state, and one carrier, GTE Hawaiian Tel, has historically been the sole telecommunications carrier for the entire state. The relatively low cost of service on the heavily populated island of Oahu has effectively weighted the system-wide cost of service of Hawaiian Tel, and precluded it from receiving any federal universal service funds for substantial rural, high-cost areas, even though the state has provided considerable contribution to the universal service fund. "Universal Service" has reportedly been achieved by subsidy from other non-basic intrastate services.

In recognition of the unique features of the state, Hawaii has adopted a state-funded universal service program, and has appointed Tel-Hawaii (a small carrier based in Alaska) as the local exchange carrier for a high cost area located on the remote slopes of a volcano. Tel-Hawaii effectively displaces GTE Hawaiian Tel, although Hawaiian Tel would currently be considered the incumbent local exchange carrier under the provisions of the 1996 Act.

Although the state has approved carriers for many of the lucrative telecommunications services (e.g. interisland toll, private lines, etc.), there has been little interest by these competitive carriers in expanding service to the islands other than Oahu, particularly for those services that would require the placement of employees on the other islands.

The FCC formerly maintained an office in Hawaii to address consumer complaints, but closed the office earlier this year due to cost cutting measures. The nearest FCC office for complaint handling is now more than 1000 miles away, and consumers generally must wait 6-8 months to resolve interstate complaints.

Despite the FCC contention that wireless service is high-cost and cannot effectively compete with wireline services, Hawaii has a digital wireless carrier providing service to a substantial portion of Kauai consumers at less than $0.04 per minute, and effectively competing with the pricing of the local exchange carrier. The commission also received a very competitive bid from a PCS provider to displace GTE Hawaiian Tel as the local exchange carrier in the recent competitive bidding process. The PUC has been stymied to some extent in employing these wireless carriers as providers of essential service, due to federal preemptions of the states ability to control pricing of these potentially essential, monopoly services.

In general, federal policies and programs have been tremendously ineffective in addressing the unique telecommunications requirements of the people of Hawaii, and we are quite concerned with the inferred intent of the FCC to further centralize control over this vital service. We ask that you consider all of these unique features during the development of any federal policy.

9. **On a separate jurisdictional issue, we tentatively conclude that Congress intended sections 251 and 252 to apply to both interstate and intrastate aspects of interconnection, service, and network elements, and thus that our regulations implementing these provisions apply to both aspects as well. (par 37)**

In general, the FCC has been able to assume regulatory authority in those areas or for those issues where the impact of a policy on intrastate and interstate services are inseparable. The 1996 Act generally does not delegate any further authority to the FCC, except in those areas where the state does not act, or where state actions are clearly in violation of the act, and this remains true for all proposed conclusions of the FCC in the NPRM. As one particular example, the provision of local exchange service and the unbundling of the associated network elements is clearly separable from the provision of interstate service and remains jurisdictional to the state commissions.

As noted in the act; "In prescribing and enforcing regulations to implement the requirements of this section, the Commission 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 purposes of this part." (§251(d)(3))

Thus, the Act prohibits the FCC from establishing regulations that effectively preclude the intrastate enforcement of a state policy that is consistent with the Act.

10. **We understand that some states have found that the negotiation process between incumbent LECs and their potential competitors may move more smoothly if the arrangements offered by an incumbent LEC are made reciprocal. Under this approach, for example, a potential competitor would be required to make available to an incumbent LEC directory assistance information on the same basis that the LEC agreed to furnish the information. Some parties have alleged, however, that imposing on new entrants the obligations imposed on incumbent LECs would undermine the competitive goals of the 1996 Act. We seek comment on whether imposing on new entrants requirements that the 1996 Act imposes on incumbent LECs would be consistent with the Act's distinction between the obligations of all telecommunications carriers, all LECs and the additional obligations of all incumbent LECs. (par 45)**

There are certain instances in which equivalent obligations are appropriate, and these typically occur when the non-incumbent competitor exhibits many of the characteristics of an incumbent LEC. Even though the competitor is new and may not be classifiable as an incumbent under the provisions of the Act, the new competitor may well control a fairly sophisticated network.

In Hawaii, an affiliate of the cable television company utilizes and controls portions of the fairly ubiquitous fiber optic network of the cable television company, and is currently the only telecommunications company that has access to this network. Once the technical aspects of utilizing a fiber/coax hybrid network are resolved, this carrier may well operate a telecommunications network that rivals or exceeds that of the existing incumbent carrier, even though it may remain classified as a non-incumbent LEC. Applying certain incumbent carrier obligations to the cable television affiliate may eventually prove to be essential to the development or preservation of a competitive telecommunications market in Hawaii.

11. **For these reasons we tentatively conclude that uniform interconnection rules would facilitate entry by competitors in multiple states by removing the need to comply with a multiplicity of state variations in technical and procedural requirements. (par 50)**

As noted previously, general interconnection guidelines may be appropriate, provided that the guidelines allow for the enforcement of state policy that is consistent with the Act. Otherwise, interconnection rules adopted by the FCC will be in conflict with the intent and directives of the Act.

12. **In particular, we seek comment on whether we should adopt uniform national guidelines governing installation, maintenance, and repair of the incumbent LEC's portion of interconnection facilities. We also seek comment on whether we should adopt standards for the terms and conditions concerning the payments of the non-recurring costs associated with installation. (par 61)**

Hawaii Administrative Rules (HAR) §6-80-49(8) reads; "The cost of constructing, operating, or maintaining any interconnecting network or facility shall be incurred by, and shared between, the interconnecting carriers on an equitable, cost-based basis;" We recommend similar generic language for any federal standards or guidelines. The Hawaii PUC has found that unless an impasse is reached, it is better to allow the carriers the flexibility to tailor a given interconnection agreement to meet the specific needs of the two parties.

The prevailing assumption is that mandatory standards will constrain the incumbent LEC and benefit the newer entrants in the market. The needs of new entrants differ, however, and across-the-board mandatory requirements may serve as a detriment to the entry of a new carrier. As an example, a new carrier may want to cover the interconnection costs up front, or may seek to negotiate a payment schedule for the costs, essentially having the incumbent carry the charges over a period of time. These types of issues should be left as negotiable between the carriers.

13. **We seek comment on the various state requirements concerning methods for interconnection. (par 65)**

HAR §6-80-49(7) reads; "Telecommunications carriers shall make their networks and facilities available for access and interconnection to other carriers at:

(A) Central offices;
(B) Tandem offices;
(C) Any other switching points; or
(D) Any mutually agreed upon or technically feasible meet-point;"

The state's administrative rules allows the carriers the flexibility to negotiate the methods of interconnection, but provides new carriers with the option of selecting from a list of interconnection points, should they choose not to enter into negotiations on this issue. We believe this is the most appropriate way of addressing the interconnection needs of both smaller and more dominant new entrants.

14. **Section 251(d)2 provides that the Commission will "determin[e] what network elements should be made available for purposes of subsection (c)(3)." As a result of this provision, and the obligation created by section 251(d)(1), we tentatively conclude that section 251 obligates the Commission to identify network elements that incumbent LECs should unbundle and make available to requesting carriers under subsection (c)(3). (par 77)**

This statement is somewhat taken out of context from the statute. The intent of Section 251(d)(2) is to require that the Commission; "In determining what network element should be made available for purposes of subsections (c)(3)" shall, as a minimum, consider whether access to such network elements as are proprietary in nature is

necessary, and whether the failure to provide access to such network elements would impair the ability of the new carrier to provide service. Thus, Section 251(d)(2) sets the conditions the Commission must consider, rather than mandating that the Commission determine the specific network elements that should be unbundled.

As noted previously, industry members have met in Hawaii to discuss the appropriate network elements for unbundling. Interestingly, even the major interexchange carriers were not always in agreement with respect to what specific unbundled elements were needed, indicating that the carriers need the flexibility to negotiate some of these factors.

The Hawaii PUC has refrained from setting a fixed list of unbundled network elements, and will refrain from doing so until, and unless, there is demonstrated industry consensus that this is necessary. Again, we have deferred to the industry, rather than attempting to impose our regulatory oversight, and believe this is the appropriate means of achieving a competitive market.

In conclusion, we recognize the difficult task the Federal Communications Commission has undertaken, and appreciate the Commission's willingness to consider the input of the individual states. Our predominant concern with the proposed rules is that they should not be preemptive of workable state solutions that have proven effective and which are consistent with the 1996 Telecom Act.

In developing the state's administrative rules, the Hawaii Public Utilities Commission has attempted to let the industry set the standards, and has refrained from imposing unnecessary regulatory oversight. We suggest a similar policy for the FCC during its own rulemaking process.

Thank you again for this opportunity to comment on the proposed rules.

Very truly yours,

Yukio Naito
Chairman

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