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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Implementation of the Local) CC Docket No. 96-98
Competition Provisions in the)
Telecommunications Act of 1996)

PETITION FOR RECONSIDERATION

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SUMMARY

Beehive Telephone Company, Inc. ("Beehive") requests reconsideration of the *Second Report and Order and Memorandum Opinion and Order* in this proceeding on the grounds that the Commission failed to implement Section 251(e) of the Telecommunications Act of 1996 ("1996 Act") with respect to the administration of 800 numbering.

I

Beehive asked the Commission to rule that Section 251(e) of the 1996 Act prohibits Database Service Management, Inc. ("DSMI") from administering the assignment of 800 numbers under the 800 Service Management System Functions Tariff ("SMS Tariff"). Beehive directed its comments to three matters arising from Section 251(e) of the 1996 Act: that 800 number administration must be addressed in this proceeding; that DSMI does not qualify as an "impartial" administrator; and that the cost of 800 number administration can no longer be recovered under the SMS Tariff.

The Commission expressly disagreed with Beehive's contention that Section 251(e)(1) obligated it to address 800 number administration in this proceeding. The Commission otherwise did not respond to Beehive's comments. That was clear error. The Commission must provide a reasoned explanation for rejecting Beehive's comments.

II

The Commission simultaneously issued two orders in this proceeding containing contrasting interpretations of Section 251(d)(1)

of the 1996 Act. When it implemented the local competition provisions of Section 251, the Commission emphasized that "[S]ection 251(d)(1) affirmatively requires Commission rules, stating that 'the Commission shall complete all actions necessary to implement the requirements of this section'". In its *Second Report and Order*, however, the Commission disregarded despite the heading of Section 251(d) the "implementation" requirement of Section 251(d)(1). The Commission claimed that it was required only to "have taken 'action necessary to establish regulations' leading to the designation of an impartial number administrator as required by [S]ection 251(e)(1)." That claim defies Section 251(d)(1) both facially and as applied to Beehive's comments.

Sections 251(d)(1) and 251(e)(1) provide that the Commission "shall comply with their requirements". By using the word "shall", Congress employed the "language of command". And Congress commanded compliance by August 8, 1996. The Commission simply failed to do as it was directed -- to "adopt rules" to implement Section 251(e)(1).

III

Section 251(e)(1) explicitly demands an "impartial" 800 number administrator. Nevertheless, DSMI continues as that administrator even though it is not impartial and never has been.

To be impartial, the 800 number administrator must be "unaligned with any particular segment of the telecommunications industry." DSMI is aligned with the seven Regional Bell Operating Companies ("RBOCs").

Despite its lack of impartiality, DSMI has been allowed to continue as the 800 number administrator until Section 251(e)(1) is implemented "in the ongoing toll free proceeding, CC Docket No. 95-155." Apparently, the Commission saw "no alternative" to allowing DSMI to administer 800 numbers on a "transitional basis". Beehive submits, however, that the Commission had only one alternative -- to "create or designate" an impartial 800 number administrator by August 8, 1996 as directed by Congress.

Whether it considered DSMI's role as the 800 number here or in the toll free proceeding, the Commission had to adopt a rule by August 8, 1996, that either specified DSMI as the 800 number administrator or designated (or created) some other entity to perform that role. By refusing to adopt a rule designating an impartial administrator, despite the unambiguous directive of Congress, the Commission acted unlawfully.

Congress provided that by August 8, 1996, telecommunications numbering administration was to be performed by impartial entities created or designated by Commission regulation. DSMI is not impartial and it has not been designated by rule to administer 800 numbering. Consequently, DSMI is administering 800 numbers in violation of the 1996 Act.

IV

Section 251(e)(2) of the 1996 Act commands that the "cost of establishing telecommunications numbering administration . . . shall be borne by all telecommunications carriers on competitively neutral basis as determined by the Commission." The Commission

failed to implement Section 251(e)(2) by establishing a regulation requiring that the cost of 800 number administration be recovered using the state-approval procedures and pricing methodologies applied to network elements under the *First Report and Order*.

The Commission has determined that access to network elements, such as the SMS/800 database, must be provided at rates established by state commissions using a "cost-based pricing methodology based on forward-looking economic costs." That determination could apply to cost recovery for 800 number administration under Section 251(e)(2), so long as the SMS/800 database is used for that purpose.

By not implementing Section 251(e)(2), the Commission has permitted the costs (including historical costs) for 800 number administration to continue to be recovered under the SMS Tariff, principally through the recurring 70 cents per month per 800 number charge for "Customer Record Administration". Such recovery is unlawful. The 1996 Act requires access to network elements to be provided under inter-carrier agreements filed with, and approved by, state commissions. Because access to the SMS/800 database cannot be offered on a common carrier basis, SMS/800 access cannot be provided under a tariff on file with the Commission.

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PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. ("Beehive"), by its attorneys, and pursuant to Section 1.429(a) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.429(a), hereby petitions the Commission to reconsider its *Second Report and Order and Memorandum Opinion and Order*, FCC 96-333 (Aug. 8, 1996) in the above-captioned rulemaking. In support thereof, the following is respectfully submitted:

Standing

Beehive filed comments in this proceeding asking the Commission to rule that Section 251(e) of the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 251(e), prohibits Database Service Management, Inc. ("DSMI") from administering the assignment of 800 numbers under the 800 Service Management System Functions Tariff ("SMS Tariff"). See Comments, at 1 (May 20, 1996). Beehive directed its comments to three matters arising from Section 251(e) of the 1996 Act: that 800 number administration must be addressed in this proceeding, see *id.* at 2-3; that DSMI does not qualify as an "impartial" administrator, see *id.* at 3-4; and that the cost of 800 number administration can no longer be recovered under the SMS Tariff, see *id.* at 4-6.

The Commission expressly disagreed with Beehive's contention that Section 251(e)(1) obligated it to address 800 number admini-

stration in this proceeding. See *Second Report and Order*, at 113 (¶ 266). The Commission otherwise did not respond to Beehive's comments. Accordingly, Beehive has standing to request reconsideration. It does so to permit the Commission to correct its failure to comply with Section 251(e). See, e.g., *Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620, 629 (10th Cir. 1983).

Beehive will also challenge the Commission's inaction with respect to 800 number administration as wholly inconsistent with its regulation of signaling links, toll free calling databases, service management systems ("SMS"), and operations support systems as network elements under Section 251(c) of the 1996 Act and Part 51 of the Rules. See *First Report and Order* in CC Docket No. 96-98, FCC 96-325 (Aug. 8, 1996). That new matter is presented in part for exhaustion purposes. See *Northwestern Indiana Telephone Co., Inc. v. FCC*, 872 F.2d 465, 470-71 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).

Argument

I. The Commission Must Provide A Reasoned Response To Beehive's Comments

Notice and comment rulemaking procedures obligate the Commission to respond to all significant comments. *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). See 5 U.S.C. § 553(c); 47 C.F.R. § 1.425. Thus, the Commission must respond to those "'comments which, if true, . . . would require a change in [its] proposed rule.'" *ACLU*, 823 F.2d at 1581 (emphasis omitted) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.8

(D.C. Cir. 1987)). Beehive's comments on 800 number administration were significant under that test.

Beehive's fundamental claim is that the enactment of Section 251(e) mandates the Commission to discharge DSMI as the 800 number administrator, and to replace the SMS Tariff as the means to collect the costs of 800 number administration. Had Beehive prevailed on its claim, the Commission would have taken some action to implement Section 251(e). As it is, the Commission simply maintained the status quo on a "transitional basis". See *Second Report and Order*, at 8 (¶ 18), 140 (¶ 330).

Beehive essentially relied on the clear and unambiguous language of Section 251(e) which the Commission was required to implement no later than August 8, 1996. *Id.* at 1 (¶ 1). That statutory duty adds to the Commission's usual obligation to engage in reasoned decisionmaking. Therefore, the Commission was required to provide a reasoned explanation for its failure to implement Section 251(e) as requested by Beehive. See *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission gave no explanation and that constitutes clear error. See, e.g., *Action for Children's Television v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

II. The Commission Violated The 1996 Act By Allowing DSMI To Administer 800 Numbers

A. The Commission Did Not Implement Section 251(e) (1)

The Commission simultaneously issued two orders in this proceeding containing contrasting interpretations of Section 251(d) (1)

of the 1996 Act, 47 U.S.C. § 251(d)(1). When it implemented the local competition provisions of Section 251, the Commission emphasized that "[S]ection 251(d)(1) affirmatively requires Commission rules, stating that 'the Commission *shall* complete *all* actions necessary to implement the requirements of *this section*'". *First Report and Order*, at 49 (¶ 96) (emphasis original). In its *Second Report and Order*, however, the Commission disregarded (despite the heading of Section 251(d)) the "implementation" requirement of Section 251(d)(i).

When it purported to implement Section 251(e)(1), the Commission gave no effect to the "shall complete all actions . . . to implement the requirements of this section" language of Section 251(d)(1). The Commission claimed that it was required only to "have taken 'action necessary to establish regulations' *leading* to the designation of an impartial number administrator as required by [S]ection 251(e)(1)." *Second Report and Order*, at 113 (¶ 261) (emphasis added). That claim defies Section 251(d)(1) both facially and as applied to Beehive's comments.

The Commission's curious reading of Section 251(d)(1) in its *Second Report and Order* clashes with the clear understanding of the provision expressed in its *First Report and Order*. There it was recognized that Section 251(d)(1) "expressly directs the Commission, without limitation, to 'complete all actions necessary to implement the requirements of [section 251]'" . *First Report and Order*, at 59 (¶ 115). That view correctly reflects the unambiguous language of Section 251(d)(1).

The plain meaning of "implement" is "to fulfill; perform; carry out" or "to put into effect according or by means of a definite plan or procedure." *The Random House Dictionary of the English Language* 961 (2d ed. 1987). *Ergo*, to implement Section 251(e), the Commission was obliged first to complete all actions necessary to establish regulations to fulfill, perform, carry out, or put into effect the requirement that it "create or designate one or more impartial entities to administer telecommunications numbering." 47 U.S.C. § 251(e)(1).

The Commission claims that it satisfied Section 251(e) in July 1995, when it released its *Report and Order* in CC Docket No. 92-237, 11 FCC Rcd 2588 (1995) ("*NANP Order*"). (That claim begs the question why Congress found it necessary to enact Section 251(e) in February 1996). However, in the *NANP Order*, the Commission did not "create or designate" any impartial numbering administrator. Rather, it "articulated its intention to undertake the necessary procedural steps to create" the North American Numbering Council ("*NANC*") which will recommend an impartial administrator for the North American Numbering Plan ("*NANP*"). *Second Report and Order*, at 113 (¶ 264). See 47 C.F.R. §§ 52.11, 52.13. As of this date, there is no *NANP* Administrator. ^{1/} And the fact of the matter is that there is no regulation that "creates or designates" an *NANP* Administrator or any other impartial numbering administrator.

Sections 251(d)(1) and 251(e)(1) provide that the Commission

^{1/} Beehive understands that the first meeting of the *NANC* is scheduled for October 1, 1996.

"shall comply with their requirements". See 47 U.S.C. §§ 251(d)(1), 251(e)(1). By using the word "shall", Congress employed the "language of command". E.g., *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). And Congress commanded compliance by August 8, 1996. The Commission simply failed to do as it was directed -- to "adopt rules" to implement Section 251(e)(1). See *Second Report and Order*, at 1 (¶ 1).

B. DSMI Is Unlawfully
Administering 800 Numbering

The Commission did not implement Section 251(e)(1) by its *NANP Order* or by promulgating the administrative provisions of Subpart B of Part 52 of the Rules. See 47 C.F.R. §§ 52.7-52.19. Even if it complied with the Section 251(e)(1) requirement with respect to the NANP, the Commission did not do so with respect to 800 numbers, which are not under NANP administration. See *NANP Order*, 11 FCC Rcd at 2594, 2596 n.25, 2629 n.207. They are administered separately by DSMI under the SMS Tariff. See *id.* at 2596 n.25, 2629.

Section 251(e)(1) explicitly demands an "impartial" 800 number administrator. Nevertheless, DSMI continues as that administrator even though it is not impartial and never has been.

To be impartial, the 800 number administrator must be "unaligned with any particular segment of the telecommunications industry." *Second Report and Order*, at 112 (¶ 262). See *NANP Order*, 11 FCC Rcd 2613. DSMI is aligned with the seven Regional Bell Operating Companies ("RBOCs"). See *Beehive Telephone, Inc. v.*

The Bell Operating Companies, 10 FCC Rcd 10562 (1995), petition for review filed, *Beehive Telephone, Inc. v. FCC*, No. 95-1479 (D.C. Cir. filed Sept. 15, 1995) (motion for remand pending).

Day-to-day control over DSMI is exercised by the SMS/800 Management Team ("SMT"), which is comprised of representatives from each of the RBOCs. DSMI's President, Michael J. Wade, testified recently in a federal court that DSMI operates as an agent for the RBOCs under a contract with the RBOCs. ^{2/} Mr. Wade also testified that he actually works for the RBOCs under the direction of the SMT. ^{3/} Indeed, it appears that DSMI has little or no autonomy. ^{4/}

Despite its lack of impartiality, DSMI has been allowed to continue as the 800 number administrator until Section 251(e)(1) is implemented "in the ongoing toll free proceeding, CC Docket No. 95-155." *Second Report and Order*, at 113-14 (¶ 266). Apparently, the Commission saw "no alternative" to allowing DSMI to administer 800 numbers on a "transitional basis". See *id.* at 140 (¶ 330). Beehive submits, however, that the Commission had only one alternative -- to "create or designate" an impartial 800 number administrator by

^{2/} Transcript of Motion for Temporary Restraining Order at 68, *Database Service Management, Inc. v. Beehive Telephone Co., Inc.*, No. 2:96CV 0188C (D. Utah June 13, 1996).

^{3/} See *id.* at 99, 108.

^{4/} For example, at the suggestion of a United States District Court Judge, see *id.* at 152, DSMI (Mr. Wade and counsel) agreed to meet with Beehive to discuss the resolution of the litigation between them. Apparently at the direction of the SMT, DSMI subsequently declined to meet with Beehive.

August 8, 1996 as directed by Congress.

The Section 251(d)(1) directive applies "without limitation" to all the requirements of that section. *First Report and Order*, at 59 (¶ 115). Thus, whether it considered DSMI's role as the 800 number here or in the toll free proceeding, the Commission had to adopt a rule by August 8, 1996, that either specified DSMI as the 800 number administrator or designated (or created) some other entity to perform that role. And the Commission had more than enough time to do as Congress directed. ^{5/}

The Commission had the duty to "execute" the provisions of Sections 251(d)(1) and 251(e)(1). See 47 U.S.C. § 151. It could not execute those provisions by taking some action "leading" to the designation of an impartial 800 number administrator. That interpretation "goes beyond the meaning that the statute can bear". *MCI Telecommunications Corp. v. AT&T Co.*, 114 S.Ct. 2223, 2231 (1994). By refusing to adopt a rule designating an impartial administrator, despite the unambiguous directive of Congress, the Commission acted unlawfully. See, e.g., *ACLU*, 823 F.2d at 1568-70. And by its inaction, the Commission effectively placed DSMI in violation of law.

Congress provided that by August 8, 1996, telecommunications

^{5/} When it instituted its toll free proceeding on October 5, 1995, the Commission solicited comments on whether DSMI or some "neutral party" should administer the toll free databases. *Notice of Proposed Rulemaking* in CC Docket No. 95-155, 10 FCC Rcd 13692, 13705 (1995) ("*Toll Free Proceeding*"). Consequently, the Commission had ten months to consider the issue before the August 8, 1996 deadline. Congress only intended to give the Commission six months to complete the implementation of Section 251(e)(1).

numbering administration was to be performed by impartial entities created or designated by Commission regulation. DSMI is not impartial and it has not been designated by rule to administer 800 numbering. Consequently, DSMI is administering 800 numbers in violation of the 1996 Act. To allow this to continue amounts to "gratuitous administrative largesse" which cannot be upheld. *ACLU*, 823 F.2d at 1571.

III. The Commission Violated The 1996 Act By
Allowing The SMS Tariff To Remain In Effect

Section 251(e)(2) of the 1996 Act commands that the "cost of establishing telecommunications numbering administration . . . shall be borne by all telecommunications carriers on competitively neutral basis as determined by the Commission." 47 U.S.C. § 251(e)(2) (emphasis added). Ignoring Beehive's comments on the issue, the Commission failed to implement Section 251(e)(2) by establishing a regulation requiring that the cost of 800 number administration be recovered as determined by the Commission in its *First Report and Order*.

DSMI provides access to the 800 Service Management System ("SMS/800") database for the purpose of administering 800 numbers. See *NANP Order*, 11 FCC Rcd at 2629 n.207. See also *Toll Free Rule-making*, 10 FCC Rcd at 13705. The SMS/800 database is a type of network support database, see *NANP Order*, 11 FCC Rcd at 2596 n.25, which is operated under the control of the RBOCs, see *Beehive*, 10 FCC Rcd at 10586. The SMS/800 is a "network element" under the 1996 Act, see 47 U.S.C. § 153(45), as the Commission confirmed, see *First*

Report and Order, at 236-40. Accordingly, access to the SMS/800 is subject to Section 251(c)(3) of the 1996 Act, and must be provided to requesting telecommunications carriers on a nondiscriminatory, unbundled basis at any technically feasible point on nondiscriminatory rates. See 47 U.S.C. § 251(c)(3); *First Report and Order*, at 16 (¶ 27).

The rates telecommunications carriers must pay for unbundled access to the SMS/800 database must be established in accordance with the requirements of Section 252 of the Act. See 47 U.S.C. § 251(c)(3). As the agent of the RBOCs, DSMI must provide access to the SMS/800 under the rates, terms and conditions of inter-carrier agreements (arrived at through voluntary negotiation, state mediation, or compulsory state arbitration) filed with state commissions and subject to their approval. See 47 U.S.C. § 252(a)-(c). Obviously, therefore, access to the SMS/800 cannot be provided under the SMS Tariff on file with the Commission.

The Commission has determined that access to network elements, such as the SMS/800 database, must be provided at rates established by state commissions using a "cost-based pricing methodology based on forward-looking economic costs." *First Report and Order*, at 299 (¶ 620). That determination could apply to cost recovery for 800 number administration under Section 251(e)(2), so long as the SMS/800 database is used for that purpose.

By not implementing Section 251(e)(2), the Commission has permitted the costs (including historical costs) for 800 number administration to continue to be recovered under the SMS Tariff,

principally through the recurring 70 cents per month per 800 number charge for "Customer Record Administration". Such recovery is unlawful under the 1996 Act, which settled the question of whether SMS/800 access is a common carrier service subject to tariffing under Section 203(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 203(a). See *Beehive*, 10 FCC Rcd at 10564-66.

The SMS/800 database is now a network element "used in the provision of telecommunications service." 47 U.S.C. § 153(45). The 1996 Act requires access to network elements to be provided under inter-carrier agreements filed with, and approved by, state commissions. Because access to the SMS/800 database cannot be offered on a common carrier basis, SMS/800 access cannot be provided under a tariff on file with the Commission. See *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481-82 (D.C. Cir. 1994).

Beehive submits that the Commission must implement the cost-recovery requirement of Section 252(e)(2). If 800 number administration is to continue to be provided through the SMS/800 database system under the control of the RBOCs, the Commission should implement Section 252(e)(2) using the same state-approval procedures and pricing methodologies that are employed to determine rates for network elements generally. However, if it adopts another means to recover 800 administrative costs, the Commission must provide a reasoned explanation for its departure from the procedures adopted in the *First Report and Order*. See, e.g., *WLOS TV, Inc. v. FCC*, 932 F.3d 993, 995-96 (D.C. Cir. 1991).

For all the foregoing reasons, Beehive respectfully requests

the Commission to reconsider its *Second Report and Order* and to implement the requirements of Section 252(e) of the 1996 Act with respect to 800 number administration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katherine A. Baer, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 30th day of September, 1996, sent by first class United States mail, copies of the foregoing PETITION FOR RECONSIDERATION to the following:

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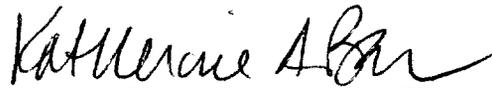
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