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

In the Matter of	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	CC Docket No. 95-185
Administration of the North American Numbering Plan	CC Docket No. 92-237

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To: The Commission

PETITION FOR CLARIFICATION OR RECONSIDERATION

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Dated: October 7, 1996

TABLE OF CONTENTS

SUMMARY i

I. The Commission Should Recognize That the Section 251(b)(3) Local Dialing Parity Requirement Extends Only to Competing Local Exchange Carriers Providing Both Telephone Exchange Service and Telephone Toll Service 3

II. Congress Did Not Intend to Require That A Local Exchange Carrier Provide Requesting Carriers Treatment Equal to That Which It Provides Itself . . 7

III. The Commission Should Clarify that the Automatic Processing of Incoming Calls To Operator and Directory Assistance Platforms on a First Come, First Served Basis is *Per Se* Nondiscriminatory . . . 11

CONCLUSION 14

SUMMARY

The Commission should clarify or reconsider several facets of its *Second Interconnection Order*. Specifically, it should reconsider its decision to interpret Section 251(b)(3) of the Telecommunications Act of 1996 ("1996 Act") as imposing an obligation on local exchange carriers to provide dialing parity to those competitors who provide either telephone exchange service or telephone toll service, and not just to competing local exchange carriers that provide *both* telephone toll and exchange service. Congress clearly intended to address dialing parity only as between competing local exchange carriers and would have used the conjunction "or" had it intended to impose an either/or requirement.

In addition, the Commission should reconsider its decision to interpret the "nondiscriminatory access" requirement of Section 251(b)(3) as mandating that access provided to competing providers be at least equal in quality to that which a local exchange carrier provides to itself. Indeed, when Congress in the 1996 Act imposed this extraordinary requirement on incumbent local exchange carriers, it did so explicitly. In the absence of such statutory language, the Commission should only mandate access that is nondiscriminatory among telecommunications carriers.

Finally, the Commission should clarify how local exchange carriers can meet their burden of demonstrating that they have not discriminated in the processing of incoming

calls. If a local exchange carrier has equipment that automatically places directory assistance and operator services calls into queue on a first come, first served basis, then it should not be required to develop further proof of nondiscrimination. The Commission should therefore clarify that such automatic processing of calls is *per se* nondiscriminatory and fully meets the burden placed on a local exchange carrier by Section 51.217(e)(2) of the rules.

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To: The Commission

PETITION FOR CLARIFICATION OR RECONSIDERATION

Pursuant to Part 1.106 of the Commission's rules, Ameritech submits this Petition for Clarification or Reconsideration of certain issues decided by the Commission in its Second Report and Order ("*Second Order*") released in the above-captioned docket on August 8, 1996 and published in the Federal Register on September 6, 1996 (61 Fed. Reg. 47284). The *Second Order* addresses the Commission's implementation of dialing parity, number administration and notice of technical

changes under the Telecommunications Act of 1996 (the "1996 Act").[1]

Ameritech requests that the Commission clarify or reconsider its decision in the *Second Order* to

- interpret Section 251(b)(3) as imposing an obligation on local exchange carriers to provide dialing parity to those competitors who provide either telephone exchange service or telephone toll service, and not just to competing local exchange carriers that provide *both* telephone toll and exchange service;
- interpret the "nondiscriminatory access" requirement of Section 251(b)(3) as mandating that access provided to competing providers be at least equal in quality to that which a local exchange carrier provides to itself; and
- require local exchange carriers to demonstrate with specificity that they have not discriminated in the processing of incoming directory assistance and operator services calls.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 151).

I. The Commission Should Recognize That the Section 251(b)(3) Local Dialing Parity Requirement Extends Only to Competing Local Exchange Carriers Providing Both Telephone Exchange Service and Telephone Toll Service

Section 251(b)(3) of the 1996 Act imposes an obligation on local exchange carriers to provide dialing parity and nondiscriminatory access to telephone numbers, operator services, directory assistance and directory listings to "competing providers of telephone exchange service and telephone toll service."[2] Both the applicable principles of statutory construction and the legislative history require that the Commission reconsider its conclusion to interpret the term "and" as meaning "or" in this context. This is necessary since clearly Congress intended in Section 251(b)(3) to address dialing parity between competing local exchange providers, not dialing parity between local exchange providers and toll carriers.

A fundamental canon of statutory construction is that an agency charged with interpreting a statute should look first to the plain language of the statute to determine its meaning.[3] The Commission ignored the plain language of the

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[2] 47 U.S.C. § 251(b)(3) (emphasis added).

[3] See, e.g., Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985); Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 368 (1986). "If the statute is clear and unambiguous, 'that is the end of the matter, for . . . the agency must give effect to the unambiguously expressed intent of Congress.'" Id. (quoting Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984)); see also Richards Medical Co. v. United States, 910 F.2d 828, 830 (Fed. Cir. 1990) (continued...)

1996 Act when it adopted a broad rule requiring that local exchange carriers provide dialing parity to competing providers of either telephone exchange service *or* telephone toll service.[4] The language of Section 251(b)(3) could hardly be more plain: a local exchange carrier's duty under this section is explicitly limited to ensuring nondiscriminatory access by local exchange competitors that provide both "telephone exchange service *and* telephone toll service."[5] This approach makes sense. Section 251(b)(3) addresses local dialing parity between local exchange carriers, and the functions enumerated in this section are related to the provision of local exchange service. Access to these functions facilitates local dialing parity and the exchange of traffic between competing local exchange carriers, and has traditionally been an integral part of end office integration interconnection arrangements between those carriers.

It is also a well-established principle of statutory interpretation that use of the conjunction "and" in a statute requires that *both* standards joined by the conjunction be

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[3](...continued)
(in questions of statutory construction, the Court starts first with the plain meaning of the statute).

[4] 47 C.F.R. § 51.205.

[5] 47 U.S.C. § 251 (b)(3) (emphasis added).

satisfied.[6] In this case, "[b]y using the conjunction 'and,' Congress intended for all of the requirements of the statute to be fulfilled."[7] That is, Congress intended to require that a requesting carrier providing both telephone exchange *and* telephone toll service in order to be entitled to non-discriminatory access under Section 251(b)(3). The Commission's interpretation simply ignores not only the plain meaning of the statute and elemental principles of statutory construction, but also the demonstrated Congressional intent.

The error in the Commission's interpretation is confirmed by the legislative history of Section 251(b)(3). The Senate version of the dialing parity provision required local exchange carriers to provide dialing parity to customers of carriers "providing telephone exchange *or* exchange access service."[8] The House version, in contrast, defined dialing parity as the "duty to provide . . . dialing parity to competing providers of telephone exchange service and telephone toll service."[9] In Conference, the Senate language was rejected in favor of the House language containing the "and" requirement.

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6 See, e.g., New Hampshire Auto. Dealers Ass'n v. General Motors Corp., 620 F. Supp. 1150, 1157-58 (D.N.H. 1985) (use of the conjunction "and" requires all elements to be present); Sutherlands Statutory Construction § 21.14 (5th Ed.).

7 Comtec, Inc. v. Nat'l Technical Schools, 711 F. Supp. 522, 524 (D. Ariz. 1989).

8 S. Rep. No. 23, 104th Cong., 1st Sess. 89-90 (1995).

9 H.R. 1555, 104th Cong., 2d Sess., § 242(a)(5) (1995).

This change represents a deliberate decision by Congress that incumbent local exchange carriers need only make local dialing parity available to those new local exchange carriers seeking to compete fully with the incumbent by providing both competing telephone exchange service *and* competing telephone toll service.[10]

If, as the Commission concluded, Congress had intended to impose an "either/or" type of requirement, then it could simply have left the statutory language as originally proposed in the Senate bill. In fact, there are numerous examples in the 1996 Act where Congress used the conjunctive "or" to impose precisely such an either/or requirement.[11] In accordance with Congressional intent, therefore, the Commission's Rules should be amended to reflect that a local exchange carrier's duty with respect to these functions extends only to those other local exchange carriers that provide both telephone exchange service and telephone toll service.

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[10] 47 U.S.C. § 251(b)(3) (emphasis added).

[11] Indeed, Congress created precisely such an "either/or" distinction in the definition section, when it defined a local exchange carrier as "any person that is engaged in the provision of telephone exchange service <u>or</u> exchange access." Section 3 of the 1996 Act, amending 47 U.S.C. § 153(26).

II. Congress Did Not Intend to Require That A Local Exchange Carrier Provide Requesting Carriers Treatment Equal to That Which It Provides Itself

The plain language of Section 251(b)(3) imposes a limited duty on local exchange carriers to provide competing providers with "nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing[s]." The Commission, however, concluded that it should stretch the interpretation of the "nondiscriminatory access" requirement of Section 251(b)(3) to also incorporate a duty to provide "the same access that the local exchange carrier receives with respect to such services."[12] The Commission's interpretation ignores the canons of statutory interpretation and clear congressional intent in favor of an unduly expansive and unwarranted reading.

It is a well established principle of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[13] Therefore, differing language in two

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[12] *Second Order* at ¶ 101.

[13] Gozlon-Peretz v. U.S., 498 U.S. 395, 404 (1991); see also INS v. Cardozo-Fonseca, 480 U.S. 421, 432 (1987); Marshall v. Western Union Tel. Co., 621 F.2d 1246, 1251 (3d Cir. 1980).

subsections of the same act should be given different meanings.[14]

Section 251(b)(3), as noted above, requires only "nondiscriminatory access." In contrast, when Congress in the 1996 Act imposed upon an incumbent local exchange carrier the extraordinary requirement that it provide a service or function on the same basis to unaffiliated carriers as it provides to itself, Congress did so in clear and unambiguous language. For example, Section 251(c)(2) explicitly requires an incumbent local exchange carrier to provide interconnection that is not only "nondiscriminatory,"[15] but also "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides service."[16] Similarly, in four paragraphs of Section 272 Congress imposed the same requirement upon Bell Operating Companies ("BOCs") by requiring that they provide telephone exchange service, access exchange service and telecommunications facilities to unaffiliated telecommunications providers at rates and quality levels equal to those at which the BOC and its affiliates provide such services to themselves and to each other.[17]

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[14] Russello v. U.S., 464 U.S. 16, 23 (1983).

[15] 47 U.S.C. § 251(c)(2)(D).

[16] 47 U.S.C. § 251(c)(2)(C).

[17] 47 U.S.C. §§ 272(c)(1), (e)(1), (e)(3) and (e)(4).

At several points in the 1996 Act, therefore, Congress drew a clear distinction between nondiscriminatory treatment, and treatment that is equal in quality to what the carrier provides to itself. Thus, Congress indisputably knew how to require that a carrier provide a service or function on the same basis to unaffiliated carriers as it does to itself. Congress could have included such a requirement in Section 251(b)(3), but it chose not to do so. "That silence is deafening for purposes of [the Commission's] analysis."[18] Since Congress failed to include such language in Section 251(b)(3), the only logical interpretation is that it did not intend to require local exchange carriers to provide competitors with access to telephone numbers, operator services, directory assistance and directory listings that is equal to that which the local exchange carrier provides to itself.

Moreover, it is axiomatic that the Commission's authority to adopt rules is limited to that which is authorized by statute.[19] The Commission's requirement that an incumbent local exchange carrier must provide competitors with treatment equal to that which it provides itself is neither authorized by nor consistent with the 1996 Act.[20] By promul-

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[18] Garcia v. U.S., 88 F.3d 318, 324 (5th Cir. 1996).

[19] FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954).

[20] K.R. v. Anderson Community Sch. Corp., 81 F.3d 673, 679 (7th Cir. 1996).

gating regulations that contravene the 1996 Act, the Commission has "overstepped the boundaries of interpretation and hence has exceeded its rulemaking power."[21] Thus, in accordance with obvious congressional intent, the Commission should amend the rule so as to require local exchange carriers only to provide access that is nondiscriminatory among telecommunications carriers and in accordance with state requirements.

In the context of access to numbers, operator services, directory assistance and directory listing, it makes perfect sense that Congress did not impose an equal-in-quality requirement, but rather imposed a duty to provide nondiscriminatory access as among other carriers. First, local exchange carriers do not provide access to telephone numbers, operator services, directory assistance, and directory listings to themselves. Rather, the functions are an integral part of the service that the local exchange carrier provides to its customers. Second, the Commission and the state commissions already have extensive rules governing the quality of these services, and those rules adequately protect the quality of these services for all customers, including competing carriers. These quality standards can be revised by the states as necessary to address functions provided to competing local exchange carriers. Third, the markets for operator services, directory assistance and directory services are competitive

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[21] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

and therefore the marketplace can govern the level of quality for these services. Moreover, since the Commission has interpreted the 1996 Act as providing access to these functions as network elements, competing local exchange carriers may choose to offer their own competing services if they are dissatisfied with the quality of the service they are receiving from another carrier. Fourth, an equal-in-quality standard creates severe disincentives against local exchange carriers making the investments necessary to enhance the services in a competitive marketplace, since they will have to immediately make those enhancements available to their competitors.

III. The Commission Should Clarify that the Automatic Processing of Incoming Calls To Operator and Directory Assistance Platforms on a First Come, First Served Basis is *Per Se* Nondiscriminatory

In the *Second Order*, the Commission found that local exchange carriers can measure the time that calls to directory assistance and operator services are in queue.[22] The Commission also stated that the time of arrival of a telephone call can be "recorded (1) at the originating LEC's switch, (2) upon entering the operator services or directory assistance queue, and (3) at the time of answering by the providing LEC's operators . . . ."[23] Ameritech agrees that it can measure the time that these calls are in queue before they are answered, which

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[22] *Second Order* at ¶ 160.

[23] Id.

is called the "speed of answer." In fact, Ameritech currently measures the average speed of answer per operator services switch, and is responsible for demonstrating that it meets state commission speed of answer targets in each state.

The Commission, however, also believes that it is "possible to compare treatment of calls by customers of the competing provider with those originating from the providing local exchange carrier's customers, and thus determine if unreasonable dialing delays are occurring."[24] Based on this conclusion, the Commission held that, if a dispute arises, the burden is on a local exchange carrier to prove that it has processed the call "on terms equal to that of similar calls originating from its own customers."[25]

The factual basis for the Commission's conclusion in the *Second Order* and the resulting language in the rule is not universally true. For example, the equipment currently used by Ameritech and many other local exchange carriers does *not* have the capability of identifying the source of a call for purposes of placing it in queue or measuring the comparative speed of answer between classes of calls. Rather, the equipment automatically places directory assistance and operator services calls into queue on a "first come, first served" basis without knowledge of the source. Under these circum-

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[24] Id.

[25] Id. at 161; 47 C.F.R. §§ 51.217(b), (e).

stances, discrimination is not technically feasible and no constructive purpose would be served by requiring Ameritech to identify the source of the calls that are being placed in queue so that any differences can be measured. In fact, developing or installing the capability to differentiate would seem to be counter-productive because of the expense involved and because it could lead to allegations that local exchange carriers now have the capability to practice the very discrimination which the rule seeks to prevent.

For these reasons, the Commission should clarify that if a local exchange carrier has equipment that automatically places directory assistance and operator services calls into queue on a first come, first served basis, then it is not required to develop further proof of nondiscrimination by also comparing the speed of answer time on calls from a requesting carrier's customers and calls from the local exchange carrier's customers. The Commission should further clarify that proof that the local exchange carrier's equipment automatically places calls in queue on a first come, first served basis without knowledge of the source is *per se* nondiscriminatory and fully meets the burden placed on a local exchange carrier by Section 51.217(e)(2) of the rules.

CONCLUSION

For the foregoing reasons, the Commission should clarify and amend the *Second Order* and its rules in order to implement the dialing parity and nondiscrimination requirements in a manner that is consistent with the language and intent of the 1996 Act.

Respectfully submitted,

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Dated: October 7, 1996

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