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EX PARTE OR LATE FILED

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March 11, 1997

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Federal Communications Commission
Office of General Counsel

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

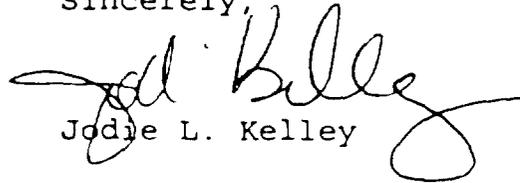
Re: In the matter of Petition of MCI for
Declaratory Ruling

Dear Mr. Caton:

Enclosed for filing please find an original and four copies of a Petition of MCI for Declaratory Ruling. "Further Additional Comments of MCI." Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Jodie L. Kelley

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

In the Matter of

)

) **File No.** _____

**Petition of MCI for
Declaratory Ruling**

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FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

MAR 11 '97

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Pursuant to 47 CFR § 1.2 and §§ 251 and 253 of the Communications Act of 1996, MCI hereby respectfully requests that the Commission issue a declaratory ruling that incumbent local exchange carriers (ILECs) cannot refuse to provide "just, reasonable and nondiscriminatory access" to unbundled network elements under the guise of protecting the intellectual property rights of third parties. As set out in more detail below, at least one ILEC is attempting to thwart local entry in multiple states by refusing to allow access to unbundled network elements, as required by the Act, unless competing local exchange carriers (CLECs) first obtain licenses from each and every outside vendor who the ILEC claims may have intellectual property embedded in that element.

Because this would undermine Congress' attempt to open up local markets to competition, require CLECs to incur enormous expense and, in some cases, render them unable to purchase network elements at all, this practice would violate both §§ 251 and 253 of the Communications Act of 1996. MCI respectfully requests, therefore, that the Commission declare that any requirement imposed by an ILEC or a state or local government that a new entrant obtain separate license or right-to-use agreements before they can purchase unbundled network elements violates §§ 251 and 253 of the Act, and that the Act's nondiscrimination requirement requires

ILECs to provide the same rights to use intellectual property to new entrants as the incumbent LECs themselves enjoy.

BACKGROUND

The Communications Act of 1996 requires, among other things, that incumbent LECs make available to requesting carriers access to unbundled network elements on terms that are just, reasonable and nondiscriminatory. As part of its rulemaking implementing the Act, the Commission expressly recognized that it was critical for new entrants to have access to unbundled ILEC network elements. See, e.g., First Report and Order at ¶ 411 (noting the "pervasive evidence of the entry barrier that would be created if new entrants were unable to obtain unbundled local switching from the incumbent LEC.").

The Commission thus promulgated rules to implement the Act's clear requirement that competitive local exchange carriers be allowed to access unbundled network elements. In those proceedings, LECs did not generally claim that the provision of unbundled network elements would impair third party property rights. They did assert, however, that the unbundling of the vertical features of the switch would have that effect. The Commission expressly considered and rejected that claim, noting that "incumbent LECs do not object to providing vertical switching functionalities to requesting carriers under the resale provision of section 251(c)(4)." Id. Moreover, the Commission found that, even if certain elements were proprietary in nature, access to those elements is still mandated by the Act unless "a new entrant could offer the proposed telecommunications service through the use

of other, nonproprietary elements in the incumbent ILEC's network."

Id.

Despite this, ILECs have continued to insist that their would-be competitors obtain licenses or right-to-use agreements associated with every network element to which a CLEC requests access. This requirement has been inserted in the Statements of Generally Available Terms (SGATs) filed by at least one ILEC. For example, Southwestern Bell's Oklahoma and Kansas SGATs expressly require competing local service providers to obtain licenses or agreements associated with network elements, and rejects the imposition of any obligation on itself to seek any necessary amendments to its licenses.¹ See, e.g., Statement of Terms and Conditions - Oklahoma at 18-19, ¶ 6. Indeed, Southwestern Bell's

¹ That provision reads in full:

LSP acknowledges that its rights under this contract to interconnect with SWBT's network and to unbundle and/or combine SWBT's network elements (including combining with LSP's network elements) may be subject to or limited by intellectual property (including, without limitation, patent, copyright and trade secret rights) and contract rights of third parties. It is the sole obligation of LSP to obtain any consents, authorizations, or licenses under intellectual property or proprietary rights held by third parties that may be necessary for its use of SWBT network facilities under this Agreement. SWBT hereby conveys no license to use such intellectual property rights and makes no warranties, express or implied, concerning LSP's (or any third party's) rights with respect to such intellectual property and contract rights, including, without limitation, whether such rights will be violated by such interconnection or unbundling and/or combining of elements (including combining with LSP's network elements) in SWBT's network. SWBT does not and shall not indemnify or defend, nor be responsible for indemnifying or defending, LSP for any liability losses, claims, costs, damages, demand, penalties or other expenses arising out of, caused by or relating to LSP's interconnection with SWBT's network and unbundling and/or combining with SWBT's network elements (including combining with the LSP's network elements).

SGAT is even more onerous than the arbitration provision cited below; SBT's SGAT purports to apply to interconnection as well as to purchase of unbundled network elements, and imposes no duty on SBT to even identify the intellectual property interests it believes are implicated.

At least one ILEC -- Southwestern Bell -- has also included this as an issue in the arbitration and negotiation process. And, at least one state commission has adopted this requirement. See Arbitration Award, Public Utility Commission of Texas, PUC Docket Nos. 16189, 16196, 16226, 16285 and 16290, Nov. 8, 1996, at ¶96.²

The competitive harm that these requirements impose can hardly be overstated. As the Commission found, "incumbent LECs have little incentive to facilitate the ability of new entrants . . . to compete against them and, thus, have little incentive to

² That provision reads:

LSP [the local service provider] understands that it is responsible for obtaining any license or right-to-use agreement associated with a network element purchased from SWBT, and further agrees to provide SWBT, prior to using any such network element, with either (1) a copy of the applicable license or right-to-use agreement (or letter from the licensor attesting as such); or (2) an affidavit signed by LSP attesting to the acquisition of any known and necessary licensing and right-to-use agreements. SWBT agrees to provide a list of all known and necessary licensing and right-to-use agreements applicable to the subject network element(s) within seven days of a request for such a list by LSP. SWBT agrees to use its best efforts to facilitate the obtaining of any necessary license or right-to-use agreement. In the event such an agreement is not forthcoming for a network element ordered by LSP, the parties commit to negotiate in good faith for the provision of alternative elements or services which shall be equivalent to or superior to the element for which LSP is unable to obtain such license or agreement.

Texas PUC Arbitration Award at ¶ 96.

provision unbundled elements in a manner that would provide efficient competitors with a meaningful opportunity to compete." Order at 307. Moreover, "incumbent LECs have the incentive and the ability to engage in many kinds of discrimination." Id. The licensing requirements provide a clear example of this incentive and ability to discriminate. Incumbent LECs have the incentive to assert that licenses or agreements are at issue when in fact they are not, for example, and the ability to discourage the holders of those licenses or agreements from extending them to the ILECs' potential competitors.

These are not merely theoretical concerns. Pursuant to the Texas arbitration provision, for example, AT&T asked SBT to provide a list of licenses or right-to-use agreements that SBT claimed were implicated by AT&T's request for access to certain of SBT's network elements. SBT identified 78 different contracts with approximately 42 different vendors. Under the Texas arbitration agreement, a competitor could not access the network elements it had ordered until it had obtained agreement with each of these forty-two vendors on each and every of the seventy-eight contracts at issue. MCI is certain to face identical impediments when it seeks to enter local markets in Texas, and other SBT states.

The cost associated with this endeavor, even if it could be accomplished, would be astronomical. A new entrant would have to bear the expense of delay while it attempted to negotiate with each and every license holder involved. There is a strong possibility that these license holders will be under pressure, explicit or implicit, from the ILEC to refuse to extend licenses to potential competitors altogether or, at a minimum, to delay the

grant of these licenses.

Even if the competitor were able to negotiate its own license or right-to-use agreement with each vendor, the cost of each network element would be vastly increased. And this increase would be born by the new competitors alone. The price the ILEC charges for access to a given element includes its cost of obtaining the initial license. The competitor, however, would be forced to pay not only for the initial license, but also for the additional cost of obtaining a second license. Because the ILEC would not share in the cost of obtaining the second license, its competitor would be put at a severe cost disadvantage which could easily preclude it from being able to effectively compete against the incumbent LEC.

I. The Commission Should Make Clear that Intellectual Property Concerns are not Typically Implicated in the Purchase of Unbundled Network Elements.

As the Commission correctly noted in its Order, ILECs have not claimed that reselling services implicate any intellectual property rights of third parties. See Order at ¶ 419. Indeed, during the decades that carriers and other customers have been purchasing access to the ILECs' facilities neither these incumbent carriers nor the owners of the intellectual property embedded in the facilities have ever raised intellectual property concerns. This is so presumably because intellectual property rights are simply not implicated -- the purchase of access to elements does not equate to the purchase of control over those elements. Thus, when competing carriers purchase telecommunications services for resale, no intellectual property concerns are at issue.

This is equally true, however, when competing carriers choose to provide service through the use of unbundled network elements. Regardless of whether competing LECs provide competitive service through resale, through the use of unbundled elements, or through a combination of the two, the incumbent LEC always retains physical control over its network. See Order at ¶ 258 ("This concept of network elements . . . does not alter the incumbent LEC's physical control"); Order at ¶ 415 (when selling unbundled access to its switch, "the incumbent LEC is not required to relinquish control over operations of the switch"); Order at ¶ 268, n. 573 ("title to unbundled network elements will not shift to requesting carriers"). Thus, there is typically no basis for distinguishing between resale and access to unbundled network elements. In neither case do competitors "control" the network elements that may contain intellectual property and thus in neither case are the intellectual property rights of third parties implicated. At least one incumbent LEC (SBT), however, has used this argument as a tactic to delay competitive entry into its market. Because the "intellectual property" argument is meritless and serves to delay or deny entry, the Commission should quickly and decisively hold that, as a general matter, intellectual property rights of third parties are not implicated in the sale of unbundled network elements.

II. The Commission Should Expressly Declare that, if Intellectual Property Rights are Implicated in the Sale of Unbundled Network Elements, it is the Incumbent LEC That Must Seek an Extension of its Existing License or Right-to-Use Agreement.

Although MCI believes that intellectual property rights are generally not implicated by the sale of unbundled network

elements, if in some rare case these rights are implicated, the Commission should make clear that it is the ILEC that bears the burden of negotiating an extension of the existing license.

There are at least two separate reasons that this burden must remain with the ILEC. First, Section 251(c)(3) requires incumbent LECs to provide access to network elements on terms that are "just, reasonable, and nondiscriminatory." The Commission found that to meet this requirement, ILECs must provide access on terms and conditions that are equal to those under which the ILEC provides those elements to itself. See Order at ¶ 315. Any requirement that CLECs obtain additional licensing or use agreements beyond those applicable to the incumbent clearly violates this requirement.

Moreover, such a requirement would also vitiate the rationale behind the Communications Act itself. As the Commission has noted, incumbent LECs control the essential facilities (including any intellectual property rights embedded in those facilities) needed to provide local phone service. See, e.g., Order at §§ 410-411. These ILECs have achieved economies of scale and scope while operating as regulated monopolies and have negotiated license agreements with vendors using those economies as leverage. Potential competitors simply do not possess this leverage and are therefore not in a position to negotiate similarly advantageous licensing and right-to-use agreements. A requirement that they do so would vitiate the Act's mandate that access to elements be provided on terms that are the same as those under which the ILEC provisions itself, and would perpetuate the economic barriers to competition which the Act was designed to eliminate.

A requirement that competitors separately negotiate their own licenses would also violate the Act's requirement that the rates for unbundled network elements be nondiscriminatory and based on cost. As discussed above, the price that new entrants pay for access to a given element already takes into account the cost of its component parts, including the cost of any license obtained for any embedded intellectual property. If potential competitors must negotiate separate licenses or agreements, that cost is in addition to the price already paid for access to the element, and, critically, that cost will not be shared by the incumbent LEC. Thus, even if competitors manage to obtain separate licenses or agreements, the price they pay for each element will be higher than that the ILEC pays to use the same element, in violation of the Act.

By contrast, if the burden is placed on the ILEC to negotiate any extension of a licensing agreement that would be required before competitors can access network elements, the cost of that extension could be factored into the cost of an element and all parties -- including the ILEC -- would bear the same costs for access to network elements.

This requirement would also go a long way toward forcing the incumbent LEC to accurately and honestly evaluate the extent to which intellectual property rights are accurately implicated in the sale of unbundled network elements. As discussed above, incumbent

LECs have every incentive to over-designate the number of licenses at issue if to do so would serve to delay the entry of potential competitors. They also have every incentive to discourage their vendors from extending these licenses to new competitors. Placing the burden on the ILEC to negotiate any required extensions will not eliminate these incentives or remove the possibilities of anti-competitive discrimination altogether, but it will serve to ameliorate this very serious problem.

CONCLUSION

For the reasons discussed above, the Commission should issue a declaratory ruling that new entrants need not obtain separate license or right-to-use agreements before they can purchase unbundled network elements, and that any requirement that they do so violates §§ 251 and 253 of the Act.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jodie L. Kelley, do hereby certify that copies of the foregoing Petition for Declaratory Ruling were sent via first class mail to the following on March 11, 1997.

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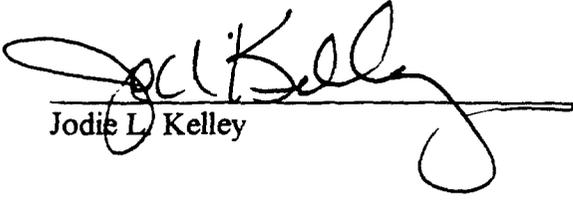
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