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Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

May 5, 1997

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William Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
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; FCC 96-325

Dear Mr. Caton:

Enclosed for filing in the above-referenced proceeding are the original and four copies
of the Public Utility Commission of Texas' Reply Comments Filed in Related Commission
Docket DA 97-557/CCBP01 97-4. I am also enclosing an additional copy of this document,
which I ask you to file stamp and return to me in the enclosed self-addressed, postage prepaid
envelope. Thank you for your assistance.

Sincerely,

Liz Bills
Liz Bills

Assistant Attorney General
Natural Resources Division
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Encl.

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Before the
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Washington, D.C. 20554

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In the Matter of §
§
Implementation of the Local Competition §
Provisions in the Telecommunications Act §
of 1996 §

CC Docket No. 96-98

**PUBLIC UTILITY COMMISSION OF TEXAS' REPLY COMMENTS FILED IN
RELATED COMMISSION DOCKET DA 97-557/CCBPol 97-4**

The Public Utility Commission of Texas ("PUCT"), through the Office of the Attorney General of Texas, respectfully submits the attached Reply Comments that were filed in Commission Docket DA 97-557/CCBPol 97-4, In the Matter of Petition of MCI for Declaratory Ruling That New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements ("MCI Docket").

As stated in its March 14, 1997, Public Notice in the MCI Docket, MCI seeks "a declaratory ruling that any requirement imposed by an incumbent local exchange carrier (LEC) or by a state or local government that a requesting telecommunications carrier obtain separate license or right-to-use agreements before the requesting carrier may purchase access to unbundled network elements violates sections 251 and 253 of the Communications Act of 1934, as amended (the Act)." In that Public Notice the Commission notes that the same issue was raised in the Petition for Reconsideration of the First Report and Order filed by the Local Exchange Carrier Coalition in this docket and asks that any comments to the MCI Petition also

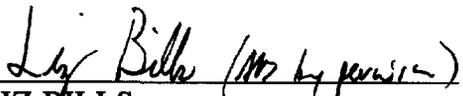
be filed in this docket. Attached to this document is a true and correct copy of the Reply Comments of the Public Utility Commission of Texas on the Petition of MCI filed in the MCI Docket contemporaneously with the filing of this document in the present docket.

Respectfully submitted,

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ATTORNEYS FOR PUBLIC UTILITY
COMMISSION OF TEXAS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Reply Comments Filed in Related Commission Docket DA 97-557/CCBPol 97-4 was sent U.S. mail this 5th day of May, 1997, to the following:

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LIZ BILLS

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

In the Matter of	§	
	§	
Petition of MCI for Declaratory Ruling That	§	DA 97-557
New Entrants Need Not Obtain Separate	§	
License or Right-to-Use Agreements	§	CCBPol 97-4
Before Purchasing Unbundled Elements	§	

**REPLY COMMENTS OF
THE PUBLIC UTILITY COMMISSION OF TEXAS**

The Public Utility Commission of Texas (“PUCT”), through the Office of the Attorney General of Texas, respectfully submits this Reply to certain comments filed in this proceeding.

Summary

MCI seeks a declaratory ruling that Sections 251 and 253 of the Telecommunications Act of 1996¹ prohibit an incumbent local exchange carrier (“incumbent”) or a state or local government from imposing a condition that a new entrant obtain separate license or right-to-use agreements before it purchases unbundled network elements (“UNEs”). The arguments of those parties filing comments in support of this request are essentially:

- No such condition need be imposed because few, if any, third party intellectual property rights are implicated by an incumbent’s providing a new entrant with access to UNEs.
- Even where intellectual property rights are implicated, section 251(c)(3) of the 1996 Act, which requires that access be provided on terms that are just, reasonable and nondiscriminatory, imposes an obligation on incumbents to obtain any necessary licenses on behalf of any new entrants seeking to use UNEs.

¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), 47 U.S.C. § 251 *et seq.* (“1996 Act”).

- Requiring new entrants to obtain any necessary licenses or right-to-use agreements will permit incumbents to delay if not prevent the advent of competition and also will cause new entrants to pay excess charges for access to UNEs.

As discussed in the PUCT's Comments filed April 15, 1997, the PUCT believes it has fashioned an approach that addresses these parties' concerns. Adopted in an order approving an interconnection agreement, the PUCT's approach is designed to prevent anticompetitive and discriminatory actions by incumbents while preserving the integrity of bona fide third party intellectual property rights. Several parties filing comments in this proceeding agree that the PUCT's approach is reasonable.² If this Commission decides to issue a declaratory ruling in this proceeding, the PUCT encourages the Commission to follow this approach. However, this Commission should decline to undertake any direct review of the Texas commission's arbitration decision. Such review is left to the federal courts, not to this Commission, under the 1996 Act.

Reply

- I. **Prior to issuing any declaratory ruling, this Commission should carefully examine the extent to which third party intellectual property rights are truly implicated.**

To a great extent the parties filing comments in support of MCI suggest that the intellectual property rights of third parties are not implicated when an incumbent provides a new entrant access to its UNEs. Some parties further suggest that this argument is a

²See Comments of Ad Hoc Coalition of Telecommunications Manufacturing Companies pp. 5-6; BellSouth Comments pp. 6-7; Comments of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SBC Comments") pp. 19-20.

smokescreen concocted by incumbents to thwart the introduction of competition.³ All of these comments reinforce the wisdom of “carefully evaluat[ing] the extent to which third party intellectual property rights are truly implicated” before issuing any broad declaratory ruling. (PUCT Comments p. 6). To the extent such rights do exist, the PUCT continues to believe, after reviewing all of the arguments made in the various comments, that its approach to this issue is reasonable.

II. The PUCT’s approach addresses the commentors’ concerns.

As explained in the PUCT’s Comments, the PUCT approved a requirement that new entrants wishing to obtain access to UNEs from Southwestern Bell Telephone Company (“Southwestern Bell”) are responsible for obtaining any licenses or right-to-use agreements from third parties.⁴ Southwestern Bell, however, has obligations imposed upon it to assist new entrants in this process. First, Southwestern Bell is required to provide to a requesting new entrant “a list of all known and necessary licenses or right-to-use agreements applicable to the subject Network Element(s) within seven days of a request for such a list.” This requirement addresses the concern of certain commentors that the incumbents should have the initial burden of disclosing the identity of third parties whose intellectual property rights may be implicated if an incumbent provides access to UNEs. (LCI Comments p. 7; Sprint Comments p. 7).

³Comments of the Competitive Telecommunications Association [“CompTel Comments”] p. 4; Comments of LCI International Telecom Corp. [“LCI Comments”] pp. 2-3; Comments of AT&T Corp. [“AT&T Comments”] pp. 2 and 18-28; Comments of Sprint pp. 4-6; Comments of the Telecommunications Resellers Association in Support of Petition of MCI for Declaratory Ruling [“TRA Comments”] p. 9.

⁴As noted in the PUCT’s Comments, the PUCT approved such a provision in interconnection agreements between Southwestern Bell and AT&T and between Southwestern Bell and MCI.

Next, Southwestern Bell is obligated “to use its best efforts to facilitate the obtaining of any necessary license or right to use agreement.” This requirement addresses the concerns voiced by several commentors that they will not share in the leverage enjoyed by incumbents by virtue of the incumbent’s past relationships with such third parties. (LCI Comments pp. 4-5; TRA Comments p. 9; AT&T Comments pp. 12-13). The PUCT’s approach allows new entrants, including those smaller companies whose relationships with vendors of telecommunications equipment are not established, to utilize the incumbent’s experience and expertise in obtaining any requisite licenses or right-to-use agreements.

Several commentors supporting MCI’s request, however, would have this Commission impose the full responsibility for obtaining any necessary licenses or right-to-use agreements on the incumbents.⁵ The PUCT recognizes that an incumbent’s obligation to provide nondiscriminatory access under § 251(c)(3) of the 1996 Act may well obligate an incumbent in negotiating any future licenses or right-to-use agreements to make provision for new entrants to have equal access to a network element. The PUCT disagrees, however, with the argument that incumbents are required to provide access to the property of third parties from whom the incumbent does not have legal permission or to obtain such legal permission on a new entrant’s behalf. Nothing in § 251(c)(3) leads to such a conclusion.

In its comments, the Competitive Telecommunications Association asserts that this

⁵See AT&T Comments pp. 3, 11-16; LCI Comments pp. 7-8; Sprint Comments p. 7; TRA Comments pp. 9-10.

Commission's Rules 51.309⁶ and 51.313(b)⁷ prohibit a requirement that new entrants obtain any license or right-to-use agreements from third party vendors. Nothing in those rules (or any other Commission rules) suggests that this Commission has required incumbents to provide new entrants with access to a third party's property in providing access to UNEs. In fact, this Commission has not addressed this issue to date in any rulemaking proceedings involving the 1996 Act, as stated by this Commission in its briefing to the Eighth Circuit Court of Appeals in *Iowa Utilities Bd. v. Federal Communications Comm'n.*⁸

By requiring an incumbent to use its best efforts to facilitate a new entrant's obtaining any necessary license or right-to-use agreements, as the PUCT has done, this Commission can further the goals expressed throughout the 1996 Act of fostering competition. Moreover, it can do so in a manner consistent with Congress' approach which was to impose on incumbents a duty to negotiate and work with new entrants in good faith to finalize the terms and conditions for interconnection. 1996 Act § 251(c)(1).

Several potential new entrants raise concerns about being required to obtain any licenses or right-to-use agreements for themselves. Some suggest that incumbents will "over-

⁶Rule 51.309 prohibits an incumbent from imposing "limitations, restrictions, or requirements on request for, or the use of, [UNEs] that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting . . . carrier intends."

⁷Commission Rule 51.313(b) provides: "Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to [UNEs], including but not limited to, the time within which an incumbent LEC provisions such access to [UNEs], shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself."

⁸See Brief of FCC, *Iowa Util. Bd. v. FCC*, No. 96-3321 (8th Cir.), pp. 97-99, (filed Dec. 23, 1996).

identify” potential third party vendors when the incumbent has no good faith belief that such vendor has property rights implicated by an incumbent’s provisioning of access to its UNEs. (LCI Comments p. 4; AT&T Comments pp. 8, 15-16). AT&T points to its particular experience where Southwestern Bell has identified dozens of potential vendors pursuant to a request for a list by AT&T. (AT&T Comments pp. 8, 15-16). In its comments Southwestern Bell all but admits that it failed to properly respond to AT&T’s request. Instead of identifying only those known and necessary licenses or right-to-use agreements applicable to the requested UNEs, Southwestern Bell provided a “comprehensive” list “covering all known licenses associated with network elements, rather than being limited to a particular CLEC’s particular purchase or [UNEs].” (SBC Comments p. 20). Southwestern Bell included in its list numerous licenses that it concedes would not be implicated in AT&T’s needs. (*Id.*). If Southwestern Bell failed to comply with the provision in its approved interconnection agreement, then AT&T may have a breach of contract action against Southwestern Bell. Regardless, the provision approved by the PUCT, if followed, would prevent the “over-identification” fears of certain new entrants.

Some potential new entrants also argue that third party vendors will be disinclined to negotiate with them to provide them with access to their property or will take advantage of the captive nature of new entrants to overcharge them for any license or right-to-use agreements. (AT&T Comments pp. 13-14; LCI Comments pp. 5-6). The argument that these third parties will not want this increased income from other parties utilizing their equipment is counterintuitive. Moreover, the PUCT’s approach addresses this potential problem by

providing that, where the incumbent and new entrant are unable to obtain the necessary license or right-to-use agreement for an existing network element, the parties are obligated to negotiate in good faith for the provision of alternative elements or services equivalent to or superior to the element for which a license could not be obtained.

Some of the commentators assert that it is necessary to require the incumbent to negotiate any needed license or right-to-use agreements on behalf of new entrants to avoid overcharging or excess charging for access to UNEs or to prevent new entrants from incurring unnecessary transaction costs. (LCI Comments p. 9; AT&T Comments p. 14). Not one commentator provides any compelling argument for this assertion. In the first place, if an incumbent negotiates such licenses, it is entitled to recover the additional costs associated with that element from the new entrant. Thus, it should make no difference to the incumbent what type of deal it can strike on behalf of its potential competitor. Moreover, it is nonsensical to assume that an incumbent would work to negotiate a better possible financial arrangement on behalf of its potential competitor than the potential competitor could negotiate for itself. That new entrants would genuinely want this Commission to appoint the incumbent as the new entrant's agent in this negotiation process is mystifying, particularly given the palpable level of mistrust between the two parties. Under these circumstances, the PUCT's approach, which requires the incumbents to provide their assistance to facilitate new entrants under "best efforts" standards while leaving the ultimate responsibility on new entrants to obtain any necessary licenses or right-to-use agreements, is eminently sensible.

III. In no event should this Commission attempt to preempt the PUCT's arbitration decision under section 253 of the 1996 Act.

AT&T, CompTel, and Sprint ask this Commission to preempt any "state-imposed requirement" that a new entrant must obtain its own license or right-to-use agreement before obtaining access to a UNE.⁹ In support of this request, they rely on section 253 of the 1996 Act, which provides that, "[n]o State or local statute or regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(d).

Assuming, *arguendo*, that requiring a new entrant to obtain its own license or right-to-use agreement is a barrier to entry, nonetheless section 253 of the Act does not authorize this Commission to review a state commission's arbitration determination. Congress has made explicit provision for such review, and that review is to be undertaken solely by the federal courts. 1996 Act § 252(e)(6). Federal court review of the PUCT's arbitration determination is already under way. *Southwestern Bell Telephone Co., et al. v. AT&T Communications of the Southwest, Inc., et al.*, Civil Action No. A-97-CA-132-SS, United States District Court, Western District of Texas, Austin Division.

Section 253 does not provide a duplicate forum for review of a state commission's arbitration decision. That section instead was clearly intended to give this Commission the authority to preempt a state or local statute, rule, regulation, or ordinance, or other similar state or local regulatory requirement, if the state or local provision acts as a barrier to an entity seeking to enter the interstate or intrastate telecommunications market. A state commission

⁹AT&T Comments pp. 17-18; CompTel Comments pp. 4-5; Sprint Comments pp. 9-10.

arbitration decision is not a provision of state or local law, but rather is a determination made pursuant to federal law and is expressly subject to federal court review under section 252(e)(6) of the 1996 Act. This Commission should thus decline any invitation to act as an additional or substitute forum for review of the PUCT's arbitration decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Reply of the Public Utility Commission of Texas to Certain Comments Filed in this Proceeding was sent U.S. mail this 5th day of May, 1997, to the following:

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