

KELLEY DRYE & WARREN LLP

A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D. C. 20036

(202) 955-9600

RECEIVED
AUG 11 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FACSIMILE

(202) 955-9792

DOCKET FILE COPY ORIGINAL

NEW YORK, N.Y.
LOS ANGELES, CA.
MIAMI, FL.
CHICAGO, IL.
STAMFORD, CT.
PARSIPPANY, N.J.
BRUSSELS, BELGIUM
HONG KONG
AFFILIATED OFFICES
NEW DELHI, INDIA
TOKYO, JAPAN

WRITER'S DIRECT LINE
(202) 955-9608

August 11, 1997

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

Re: *Implementation of the Local Competition Provisions in the
Telecommunications Act of 1996, CC Docket No. 96-98
LCI/CompTel Joint Petition for Expedited Rulemaking, RM 9101
Application by Ameritech Corp., CC Docket No. 97-137*

Dear Mr. Caton:

Under separate cover today, Cable & Wireless, Inc. ("CWI") is filing a recommendation in response to the Commission's *Public Notice*, DA 97-1519, seeking comment on actions the Commission could take to promote competition in local exchange markets.¹ CWI's recommendation includes discussion of the merits of the above-referenced docketed proceedings. Therefore, in accordance with the Commission's *ex parte* rules, 47 C.F.R. § 1.1206, *et seq.*, CWI submits two additional copies of its Recommendation for inclusion in each of the above dockets. Please feel free to contact the undersigned if you have any questions concerning this filing.

Sincerely,

Steven A. Augustino

Attachments

¹ Common Carrier Bureau Seeks Recommendations on Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, *Public Notice*, DA 97-1519 (rel. July 18, 1997). CWI's Recommendation was submitted in the proceeding identified with the Commission's internal reference number, CCBPol. 97-9.

No. of Copies rec'd 014
List ABCDE

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

RECEIVED
AUG 11 1997

In the Matter of)
)
Commission Actions Critical to the) CCBPol. 97-9
Promotion of Efficient Local)
Exchange Competition)

RECOMMENDATION OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc. ("CWI"), by its attorneys, respectfully submits the following response to the Common Carrier Bureau's *Public Notice* seeking "any recommendations regarding the key actions that the Commission reasonably can and should take, and their relative priority, to speed the development of competition in local exchange markets."¹ CWI describes below the key actions that it believes should be assigned the highest priority by the Commission. In so doing, CWI does not mean to suggest that additional actions beyond those described herein will not also promote the development of local exchange competition or that it would not support additional measures to enhance competitive entry in local exchange markets. CWI simply believes that the following items are those which, due to their importance to a CLEC's ability to enter local exchange markets or their impact on the actions of industry participants, are most likely to have an immediate effect on the progress and pace of competition in local exchange services. As requested by the Bureau, CWI will not provide detailed argumentation regarding these action items, but would be happy to provide additional information or analysis upon request.²

¹ *Public Notice*, DA 97-1519 (rel. July 18, 1997). The Common Carrier Bureau extended the filing date for these recommendations to August 11, 1997. *Public Notice*, DA 97-1568 (rel. July 24, 1997).

² See DA 97-1519, at 2.

I. INTRODUCTION

CWI is a full-service telecommunications carrier primarily serving business customers throughout the United States. CWI provides a full range of telecommunications services to its customers, including switched and private line data and voice communications, 800 services, prepaid calling cards, Internet access and, increasingly, basic local exchange service. With revenues of nearly \$1 billion in 1996, CWI is one of the largest domestic interexchange carriers in the nation. The company has experienced double-digit growth for the last five years. In the past 18 months, CWI has engaged in negotiations pursuant to Sections 251 and 252 of the Communications Act with most major incumbent LECs ("ILECs"). CWI currently provides resold local exchange services in four states, and has plans to begin provisioning local services through the use of unbundled network elements in the near future.

CWI thus has first-hand experience with the slow process of bringing competition to consumers of local exchange services. The FCC's leadership in defining the requirements of the Act, including Section 251, have gone a long way toward promoting progress in the development of local exchange competition. However, as the Commission well knows, the ILECs have ubiquitous networks in place, funded by a century-long position as government-sanctioned monopolies, and, absent strong regulatory oversight, little incentive to provide access to competitors. The Commission can and should do more to ensure that new entrants can use the tools provided by the Act to offer competing services to consumers. Of primary importance, competitors such as CWI need more certainty regarding the requirements of the 1996 Act and need the backing of an FCC ready and willing to enforce such rules. The actions described below will assist in providing these assurances.

II. THE COMMISSION SHOULD ACT TO PROTECT THE ABILITY OF CLECs TO COMBINE UNBUNDLED NETWORK ELEMENTS IN ANY MANNER THEY CHOOSE TO PROVIDE A TELECOMMUNICATIONS SERVICE

First and foremost, the Commission should act decisively in favor of new entrants seeking to exercise their rights under Section 251(c)(3), which gives requesting carriers an unconditional right to combine unbundled network elements ("UNEs") in order to provide any telecommunications services. In the wake of the decision by the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, Nos. 96-3321, et al. (slip op. July 18, 1997) ("*Iowa Utilities Board*"), CWI recommends that the FCC immediately reaffirm that the ILECs are obligated to allow such combinations and that the Commission promulgate rules governing the means by which CLECs may do so.

Iowa Utilities Board upheld the FCC's rules requiring ILECs to provide UNEs "in any manner that allows requesting carriers to combine such elements in order to provide [any] telecommunications service." See 47 C.F.R. §§ 51.307(c) & 51.315(a)-(b); *Iowa Utilities Board*, slip op. at 141. The FCC rules implementing this statutory requirement continue in effect, including the requirement that ILECs "not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). Thus, ILECs remain obligated to define and provision unbundled network elements in a manner that permits CLECs to combine them in any manner, and they may not impose physical or technological roadblocks to such combinations. In order to avoid any possible confusion, the FCC should issue an order reminding ILECs of these obligations, and stating that carriers may file complaints at the FCC for any such violations.

In addition, the Commission should ensure that ILECs do not impede such combinations through restrictions on a CLEC's physical access the ILEC facilities in order to combine unbundled network elements. The Eighth Circuit stated that, although Section 251(c)(3) did not impose an undifferentiated obligation on ILECs to perform such combinations themselves, they "must allow entrants access to their networks" to do so. *Iowa Utilities Board*, slip op. at 141. Moreover, the Court contemplated that ILECs may have to modify their own facilities in order to enable CLECs to combine elements to provide end user services. *Id.* at 140 n.33. CLECs clearly have a right to enter ILEC facilities, if necessary, to perform such combinations, and ILECs have a duty not to impede such access. The FCC should promulgate rules governing this access, so that CLECs may combine network elements they purchase.³ Such rules should include a requirement that ILECs provide access to all necessary equipment, locations and personnel upon reasonable request and include specific procedures permitting emergency access to the ILEC network 24 hours/day, 7 days/week.

Further, the Commission should consider defining unbundled network elements in additional detail, so that CLECs may combine such elements most efficiently in the provision of telecommunications services. Absent additional detail, some ILECs may attempt to manipulate network elements to make it more difficult for CLECs to combine them. For example, CWI is concerned that some ILECs may seek to define unbundled loops and unbundled switching in such a way that significant modifications and/or cabling are necessary

³ Such rules should include rules governing the rates, terms and conditions upon which an ILEC may perform such actions on the CLEC's behalf.

to combine such elements. The Commission should examine its rules to ensure they provide sufficient detail that combinations of the elements are feasible.

An essential element to each of these recommended actions is the FCC's willingness to enforce its rules. As the Eighth Circuit made clear, whenever the FCC has authority to prescribe rules, it *also* has authority to enforce such rules. *Iowa Utilities Board*, slip op. at 127 (the FCC has "authority to prescribe *and enforce* regulations to implement the requirements of [those portions of Section 251 enumerated by the Court]") (emphasis added). Therefore, the Commission should make clear that it will hear Section 208 complaints (and will address them on an expedited basis) regarding violations of its rules, irrespective of whatever additional rights a carrier may have pursuant to its interconnection agreement. A strong statement by the Commission of its willingness to exercise its enforcement power can have a tremendous impact on an ILEC's negotiating posture and implementation actions, and may deter many dilatory tactics by ILECs. Accordingly, clarification of the Commission's enforcement power can produce substantial benefits toward the progress of competition in local exchange markets.

III. THE COMMISSION SHOULD PROMPTLY RESOLVE PENDING ISSUES REGARDING THE CONTENT AND SCOPE OF INCUMBENT LECs' OBLIGATIONS

Interconnection negotiations and attempts by carriers to implement interconnection agreements have identified a number of issues on which the parties' interpretation of the Act differs significantly. Many of these issues are now pending before the Commission in the *Local Competition* and other dockets. Resolution of them by the FCC is necessary because issues of statutory interpretation are not effectively resolved in

negotiations between the parties, and require clarification by the regulators instead. The issues to which CWI assigns the highest priority are listed below.⁴

Operations Support Systems. CWI and other potential local competitors cannot compete effectively unless the ILECs provide them with non-discriminatory access to operations support systems ("OSS") for pre-ordering, ordering, provisioning, billing, maintenance and repair, and other critical functions associated with unbundled network elements and resale. Although the FCC adopted OSS as an unbundled network element -- and the Eighth Circuit upheld the Commission's decision -- not one ILEC has come close to complying with that requirement. Based on CWI's experience with OSS offered by Pacific Bell and other ILECs, ILECs are not providing access in a manner that enables new entrants to respond to customer inquiries and to fill customer orders promptly, and at parity with the ILEC's own retail operations. On May 30, 1997, the Competitive Telecommunications Association ("CompTel") and LCI International Telecom Corp. ("LCI") jointly filed a Petition for Expedited Rulemaking (RM 9101) which asked the FCC to adopt the rules, timetables and enforcement procedures necessary for non-discriminatory OSS to become an industry reality as quickly as possible. In particular, CompTel and LCI asked the FCC to initiate a negotiated rulemaking to adopt performance standards, measurement criteria, reporting requirements, specific timetables for developing uniform OSS standards, and remedial provisions for non-compliance. The FCC now has a complete record of comments and reply comments on the petition, and CWI urges the FCC to grant the petition expeditiously.

⁴ In accordance with the Commission's *ex parte* rules, CWI is submitting (under separate cover) two copies of this recommendation in each of the pending dockets discussed below.

Unbundled Local Switching and Common Interoffice Transport. Despite the FCC's current rules and policies stating that a purchaser of unbundled local switching is the exclusive provider of originating exchange access, terminating exchange access, and local and toll calling for the end-user consumer, some ILECs continue to impose restrictions on the ability of CLECs to provide exchange access through unbundled local switching. Under the FCC's rules, however, not only must ILECs refrain from imposing access charges upon network element purchasers, they must supply new entrants with sufficient information so that they can bill originating and terminating exchange access.⁵ This requirement is both clear from the FCC's rules, and also a necessary prerequisite for full-service carriers to put pressure on inflated exchange access rates charges by ILECs.

Similarly, the FCC's rules require ILECs to provide both dedicated and shared interoffice transport as network elements. 47 U.S.C. § 51.319(d). The FCC should immediately clarify that ILECs must offer shared transport to requesting telecommunications carriers at a single, usage-based rate pursuant to Section 251(c)(3). Under shared transport, an ILEC routes the interoffice traffic of all carriers, including itself, over the same shared transport facilities. Shared transport is not limited to tandem-switched transport, but includes the routing functionality between any two ILEC end offices over shared facilities. Despite the FCC's requirements, Ameritech and a few other ILECs have refused to provide shared transport on a network element basis to new entrants.

⁵ Although the States, not the FCC, have the authority to prohibit ILECs from imposing intrastate access charges upon network elements, the FCC has authority under its grant of jurisdiction to implement Section 251(c)(3) to require ILECs to include within the unbundled switching element the information necessary to bill both interstate and intrastate exchange access.

Both of these issues currently are pending before the FCC on reconsideration in CC Docket No. 96-98 and also in Ameritech's Section 271 application for authority to enter the in-region interLATA market in Michigan (CC Docket No. 97-137). The FCC should act promptly to address these issues in either or both of these dockets.

IV. THE COMMISSION SHOULD VIGOROUSLY EXERCISE ITS POWERS PURSUANT TO SECTION 271 OF THE ACT

Iowa Utilities Board did not address the FCC's powers under Section 271 of the Communications Act. That section requires *the FCC*, in the context of an application by a Bell Operating Company ("BOC") for authority to provide interLATA services, to make a number of findings regarding the state of local competition, including, *inter alia*, the BOC's compliance with various provisions of Section 251.⁶ In the context of its consideration of Ameritech's pending Section 271 application (CC Docket 97-137), the Commission should make clear that Section 271 is an independent grant of authority to the Commission over intrastate services, for the purpose of assessing BOC interLATA authority. Therefore, the decision in *Iowa Utilities Board* in no way precludes the Commission from considering a BOC's compliance with Section 251, including the rates at which it makes interconnection and unbundled network elements available.

Second, the Commission should require through its "public interest" authority under Section 271 that a petitioning BOC agree, at a minimum, to the commitments agreed

⁶ See, e.g., 47 U.S.C. §§ 271(d)(3), 271(c)(2)(B). The Commission also has authority under the "public interest" test of Section 271(d)(3) to assess the state of local competition.

to by Bell Atlantic/NYNEX in the Commission's review of their proposed merger.⁷ CWI urges the Commission to use the Bell Atlantic/NYNEX commitments as a *starting point* for its public interest assessment of all BOCs' applications for in-region interLATA authority made pursuant to section 271. The commitments made by Bell Atlantic/NYNEX are both in the public interest and feasible for all BOCs. Surely, if Bell Atlantic/NYNEX is capable of providing: (1) UNEs at rates (including both recurring and non-recurring charges) based on forward-looking, economic costs; (2) performance monitoring reports; (3) uniform interfaces for access to OSS and operational testing of such interfaces; (4) options to reduce the (daunting) one-time, non-recurring charges associated with interconnection and unbundled network elements; and (5) can commit to establishing performance standards for pre-ordering, ordering, provisioning (including resale, number portability and UNEs), billing, maintenance and repair functions, network performance and blockage, as well as appropriate enforcement mechanisms to ensure compliance with each standard, then it would be in the public interest to hold other BOCs to no lower standard.

The *Iowa Utilities Board* decision does not address the Commission's power under Section 271, and thus is not a barrier to this level of public interest review. In fact, the *Iowa Utilities Board* reading of Section 251 leaves open the possibility that a state PUC may approve a non-TELRIC pricing scheme for local interconnection while the FCC finds it inconsistent with Section 271 for purposes of interLATA entry. Nothing in Section 271's requirements compels the FCC to accept the state's interpretation of the Act; indeed, Section

⁷ See Letter to Kathleen Levitz, Deputy Bureau Chief, FCC from Thomas J. Tauke and Edward D. Young, III, Bell Atlantic/NYNEX dated July 19, 1997, *Application of Bell Atlantic Corporation and NYNEX Corporation for Consent to Transfer*, NSD-L-96-10 (Tracking No. 96-0221) ("*Bell Atlantic/NYNEX Letter*").

271 affirmatively requires the FCC to make its own independent determination of a BOC's compliance with Section 251. The FCC should make clear now that any RBOC seeking approval for a Section 271 application for a state where TELRIC pricing is not used will be held to a strict standard in showing that the grant of the application will be in the public interest.

V. CONCLUSION

CWI recommends that the FCC act promptly to clarify the requirements of the Act in the areas discussed above. Absent clarification by the Commission, ILECs and new entrants will be forced to "negotiate" the statutory requirements, rather than negotiate issues unique to the requesting carrier's need for interconnection, access to unbundled network elements, and resale services. Therefore, if the Commission addresses the issues described above, it will provide new entrants with at least some certainty in negotiations and will promote additional entry in local exchange markets.

Respectfully submitted,

CABLE & WIRELESS, INC



Rachel J. Rothstein
Director, Regulatory & International Affairs
CABLE & WIRELESS
8219 Leesburg Pike
Vienna, Virginia 22182
(703) 734-4439

Danny E. Adams
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Dated: August 11, 1997

##DC01/AUGUS/47190.41

CERTIFICATE OF SERVICE

I, Steven A. Augustino, hereby certify that I have caused a copy of the foregoing "Recommendation of Cable & Wireless, Inc." to be served on this 11th day of August, 1997, by U.S. mail, first class postage, upon the following:

Claudia Pabo*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Susan L. Fox*
Enforcement Task Force
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Regina Keeney, Chief*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Barbara Esbin*
Associate Bureau Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

A. Richard Metzger, Jr.*
Deputy Bureau Chief, Operations
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Mary Beth Richards*
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

James Schlichting, Chief*
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

John B. Muleta*
Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6008
Washington, D.C. 20554

Janice Myles*
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, D.C. 20554

Jeanine Poltronieri*
Associate Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

* Hand Delivered

ITS, Inc.*
2100 M Street, N.W.
Room 140
Washington, D.C. 20037



Steven A. Augustino