DOCKET FILE COPY ORIGINAL

RECEIVED
OCT - 2 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

Comments of Time Warner Communications Holdings Inc.

Brian Conboy
Thomas Jones
David Goodfriend

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS INC.

No. of Copies rec'd 0+6
List A B C D E

October 2, 1997

No. of Copies rec'd
List A B C D E

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY 1

II. THE COMMISSION'S PROPOSAL WOULD VIOLATE THE CRITICAL LEGAL DISTINCTION BETWEEN ACCESS SERVICE AND UNES. 2

A. Permitting Purchase Of Unbundled Switching Solely for Interstate Access Would Contravene The Basis For Differential Pricing of UNEs and Interstate Access. 3

B. The Commission Could Effectively Abdicate Jurisdiction Over Interstate Access If It Permitted The Purchase Of Unbundled Switching Solely For Interstate Access. 5

C. Permitting Purchase Of Unbundled Switching Solely For Interstate Access Would Result In Double Recovery Of The Interstate Portion Of NTS Switching Costs. 7

III. THE COMMISSION'S RULES GOVERNING UNES REQUIRE CARRIERS TO WIN LOCAL EXCHANGE CUSTOMERS BEFORE PURCHASING UNBUNDLED END OFFICE SWITCHING IN CONJUNCTION WITH UNBUNDLED SHARED OR DEDICATED TRANSPORT. 8

A. The Commission Requires Carriers to Win Local Exchange Customers Before Purchasing Unbundled End Office Switching. 8

B. Carriers Should Be Required to Win Local Exchange Customers Before Purchasing Shared Transport UNEs. 9

C. Requesting Carriers Should Not Be Permitted To Purchase Unbundled End Office Switching In Combination With Dedicated Transport Unless They Provide Local Service To The End User. 11

IV. REQUIRING CARRIERS TO WIN THE LOCAL EXCHANGE CUSTOMER BEFORE PURCHASING LOCAL SWITCHING AS PART OF ANY UNE COMPORTS WITH THE COMMISSION'S MARKET-BASED APPROACH TO REDUCING INTERSTATE ACCESS CHARGES. 11

V. REQUIRING CARRIERS TO WIN LOCAL EXCHANGE CUSTOMERS BEFORE PURCHASING UNBUNDLED SWITCHING IS FULLY CONSISTENT WITH THE TERMS OF SECTION 251(c)(3). 13

VI. CONCLUSION 14

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

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

Comments of Time Warner Communications Holdings Inc.

Time Warner Communications Holdings Inc. ("TWComm"), by its attorneys, hereby files these comments in response to the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In the Further NPRM, the Commission has suggested a fundamental departure from its previous treatment of unbundled network elements ("UNEs"). Until now, UNEs have been treated as generally including all of the functionalities associated with a network element and as primarily designed to enable a requesting carrier to provide competitive local exchange service. The Commission has now suddenly proposed to eliminate the difference between UNEs and interstate access by permitting requesting carriers to purchase unbundled transport and local switching solely for the purpose of providing interstate access and without

---

1 See Implementation of the Local Exchange Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, Further Notice of Proposed Rulemaking (released August 18, 1997) ("Further NPRM").

having to be the local service provider. This proposal is unworkable and should be rejected.

First, the proposal would disrupt the carefully crafted relationship between UNEs and interstate access and would result in (1) the immediate elimination of price differences between transport and switching purchased on an unbundled basis and as interstate access service, (2) the possible abdication of FCC jurisdiction over interstate access prices, and (3) double recovery of the non-traffic-sensitive switching costs allocated to the interstate jurisdiction. Second, such a proposal is prohibited by the Commission's own rules governing UNEs. In addition, the Commission's proposal would undermine the market-based approach adopted by the Commission for reducing the level of interstate access charges.

II. THE COMMISSION'S PROPOSAL WOULD VIOLATE THE CRITICAL LEGAL DISTINCTION BETWEEN ACCESS SERVICE AND UNES.

If the Commission were to permit carriers to lease local switching (as part of shared transport or in combination with dedicated transport) solely for the purpose of interstate access, unbundled switching would differ from Part 69 switching service only in price. This result would undermine a carefully crafted set of rules and precedents that have treated UNEs and interstate access as fundamentally different.

A. Permitting Purchase Of Unbundled Switching Solely for Interstate Access Would Contravene The Basis For Differential Pricing of UNEs and Interstate Access.

In its Interconnection First Report and Order,[2] the Commission ruled that UNEs and access service are different. As the Commission explained,

> When interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are purchasing a different product, and that product is the right to exclusive access or use of an entire element. Along the same line of reasoning, we reject the argument that our conclusion would place the administration of interstate access charges under the authority of the states. When states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements, and also where new entrants resell local service.[3]

The Eighth Circuit adopted similar reasoning in Competitive Telecommunications Assoc. v. FCC.[4] In that case, the Court rejected CompTel's argument that the Commission's rules impermissibly require purchasers of access services to pay higher rates than UNE purchasers pay for the same network services. The Court found that purchasers of access and purchasers of UNEs "are

---

2 See Interconnection First Order on Reconsideration at ¶ 11 quoting Implementation of the Local Exchange Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order (released August 8, 1996) ("Interconnection First Report and Order").

3 Id. at ¶ 358.

4 1997 U.S. App. LEXIS 15398 (8th Cir. 1997) ("CompTel v. FCC").

not, in fact, seeking the same services."[5] As the Court explained, this difference justifies differential pricing:

> The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise), are distinct. And if the IXC wants access in order to offer local service (in other words, wants to become a LEC), then there is no rate differential.[6]

The Commission's proposal to permit requesting carriers to purchase unbundled switching solely for the purpose of interstate access is inconsistent with the distinction between access and UNE purchasers established by these precedents. Requesting carriers would no longer be required to purchase UNEs to "offer a competing local service," but instead could purchase UNEs solely for the purpose of routing long distance calls. Of course, UNEs that do not include a facility or functionality dedicated to a particular end user, such as stand-alone unbundled dedicated transport, can be purchased solely for transporting long distance calls. But this is not the case with unbundled end office switching, which, because it includes line cards and other facilities dedicated to individual end users, forms the basis for the Commission's and the Eighth Circuit's distinction between UNEs and resale.

To permit the purchase of unbundled switching solely for access would eliminate the basis for differential pricing of

---

5 Id. at *9.

6 Id. at **9-10.

access service switching (provided pursuant to Part 69 of the Commission's rules) and unbundled switching. The Commission has been careful to preserve this distinction so that market forces, rather than prescription, would drive down access prices.[7] But under the proposal in the Further NPRM, the logic the Interconnection First Report and Order and the CompTel v. FCC decision would seem to require that the Commission set the rate for interstate access switching service at the rate set by the relevant state for unbundled switching. Even if the Commission did not do this explicitly, long distance carriers would force this result by simply purchasing unbundled switching for interstate access only. Aside from the rules governing the purchase of unbundled loops,[8] the distinction between UNEs and interstate access would quickly disappear.

B. The Commission Could Effectively Abdicate Jurisdiction Over Interstate Access If It Permitted The Purchase Of Unbundled Switching Solely For Interstate Access.

Under the Eighth Circuit's decision in Iowa Utilities Bd. v. FCC,[9] the Commission has no authority to set prices for UNEs. Only the states have the authority to set prices under Section 252(d)(1),[10] and only states have the authority to enforce the

---

7 See section IV infra.

8 The Commission has not proposed in the Further NPRM to eliminate the requirement that a purchaser of an unbundled loop win the end user as a local customer.

9 1997 WL 403401 (8th Cir. 1997).

10 See id. at **4-9

provisions of interconnection agreements.[11] This is so, regardless of the fact that UNEs carry interstate traffic.

Any attempt by the Commission to permit the purchase of unbundled switching solely for the provision of interstate access could therefore be inconsistent with both the UNE/access service distinctions and with maintaining the jurisdictional boundaries between interstate and local services. If permitted, the purchase of unbundled switching and transport would grant the states either complete or significant jurisdiction over interstate access pricing. The Iowa Utilities Bd. decision could be read to require that the states set prices for the provision of UNEs in every case, even where they are used solely for the origination and termination of interstate traffic. Even if the Commission were to have the jurisdiction to set UNE prices for the purposes of interstate access, it probably would lack the authority to enforce prices adopted in interconnection agreements since only states (with federal court review) have the right to enforce such agreements. Such an abdication of Commission authority over interstate access pricing and the attendant abandonment of policies crafted in the access reform order cannot be what the Commission has in mind.

---

[11] See id. at **14-15.

C. Permitting Purchase Of Unbundled Switching Solely For Interstate Access Would Result In Double Recovery Of The Interstate Portion Of NTS Switching Costs.

In the Access Charge Reform Order, the Commission allocated the non-traffic sensitive ("NTS") portion of interstate end office switching costs (i.e., the line card, protector, and main distribution frame) to the common line interstate access rate elements.[12] In the Interconnection First Report and Order, however, the Commission defined unbundled switching to include those same NTS costs.[13]

Under the instant proposal, a carrier would be able to purchase unbundled end office switching as a UNE (which covers NTS switching costs) without serving the end user as a local exchange carrier. In order to originate and terminate interstate calls to the end user, such a carrier would also be required to pay the interstate access common line charges, which recover the interstate portion of NTS switching costs.

Such double-recovery of interstate NTS switching costs would be difficult to avoid. For example, the Commission could change its definition of unbundled switching to exclude NTS costs. However, this would require all of the states that have completed

---

12 Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order at ¶ 125 (released May 16, 1997) ("Access Charge Reform Order").

13 See Interconnection First Report and Order at ¶ 412 (defining unbundled switching to include "the connection between a loop termination at, for example, a main distribution frame (MDF), and a switch line card").

UNE ratemaking proceedings to reopen those costly and time-consuming proceedings to account for this change. Alternatively, the Commission could go back to recovering the NTS switching costs as part of the access switching element. But the Commission has already determined that this approach is inconsistent with cost-causation and optimal efficiency.[14]

III. THE COMMISSION'S RULES GOVERNING UNES REQUIRE CARRIERS TO WIN LOCAL EXCHANGE CUSTOMERS BEFORE PURCHASING UNBUNDLED END OFFICE SWITCHING IN CONJUNCTION WITH UNBUNDLED SHARED OR DEDICATED TRANSPORT.

The Proposal in the Further NPRM is also unworkable under the Commission's rules governing UNEs. On this basis alone it should be rejected.

A. The Commission Requires Carriers to Win Local Exchange Customers Before Purchasing Unbundled End Office Switching.

Under the Commission's interconnection regime, a carrier that purchases unbundled end office switching associated with an end user must provide local service to the end user.[15] In adopting this requirement, the Commission reasoned that a requesting carrier purchasing an unbundled local switching element "obtains all switching features in a single element on a

---

14 See Access Charge Reform Order at ¶ 125.

15 Implementation of the Local Exchange Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, Order on Reconsideration at ¶ 13 (released September 27, 1996) ("Interconnection First Order on Reconsideration").

per-line basis"[16] and, therefore, likely will provide all of that end user's services related to the switch.[17] The per-line definition of end office switching, the Commission reasoned, is consistent with the pro-competitive goals of the 1996 Act because it gives CLECs maximum flexibility in offering vertical switching functions and simplifies CLEC entry.[18]

B. Carriers Should Be Required to Win Local Exchange Customers Before Purchasing Shared Transport UNEs.

The unbundled end office switching element described above is inextricably linked to shared transport. As the Commission stated in the Interconnection Third Order on Reconsideration, access to interoffice links on a shared basis "effectively requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch."[19]

---

16 Interconnection First Report and Order at ¶ 412 (emphasis added).

17 See Interconnection First Order on Reconsideration at ¶ 11. In the Interconnection First Order on Reconsideration, the Commission established both a flat, non-traffic-sensitive rate for recovering line ports in addition to the usage-sensitive switching charge established in the Interconnection First Report and Order. While the FCC's pricing rules have been vacated on appeal, the states have generally followed this pricing methodology.

18 Interconnection First Report and Order at ¶ 423.

19 Implementation of the Local Exchange Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, Third Order on Reconsideration at ¶ 36 (released August 18, 1997) ("Interconnection Third Order on Reconsideration").

Moreover, the Commission made clear that a purchaser of shared transport must purchase exclusive control over the entire local switching UNE. Under the Commission's decision, a shared transport purchaser may not share end office switching with another carrier by purchasing only the routing capability of the end office switch. For example, the Commission stated that routing is "a critical and inseverable function of the local switch."[20] The Commission also stated that any carrier that purchases unbundled switching must purchase all the vertical capabilities of the switch, even if it is unable to sell all those features to its end user customers.[21]

Given the inextricable link between shared transport and end office switching, the Commission must apply to purchasers of the shared transport UNE the same requirements it imposes on purchasers of unbundled end office switching. It is simply impossible for two carriers simultaneously to have exclusive control over the switching associated with an end user. Yet this is exactly what the Commission has proposed in the Further Notice. Thus, just as carriers must win the local exchange end user before purchasing the end office switching associated with that end user, carriers must win the local exchange end user

---

20 Id. at ¶ 45.

21 Id. at ¶ 47. Indeed, the Commission expressly rejected suggestions that shared transport was indistinguishable from resale, reasoning that its broad definition of unbundled switching would require purchasers of the shared transport UNE to assume greater risks than resellers. See id.

associated with the switching capacity purchased in a shared transport UNE.

C. Requesting Carriers Should Not Be Permitted To Purchase Unbundled End Office Switching In Combination With Dedicated Transport Unless They Provide Local Service To The End User.

The same reasoning applies to the combination of unbundled switching and dedicated transport. As explained, a requesting carrier that purchases unbundled end office switching buys the switching functionality dedicated to a particular end user. Thus, to the extent that a requesting carrier seeks to use end office unbundled switching in combination with dedicated transport, the requesting carrier must provide local service to the end user in question.

IV. REQUIRING CARRIERS TO WIN THE LOCAL EXCHANGE CUSTOMER BEFORE PURCHASING LOCAL SWITCHING AS PART OF ANY UNE COMPORTS WITH THE COMMISSION'S MARKET-BASED APPROACH TO REDUCING INTERSTATE ACCESS CHARGES.

By requiring carriers to win local exchange customers before purchasing shared or dedicated transport elements, the Commission would ensure that such carriers actually enter the local exchange market rather than merely supplant their current access service with the shared transport UNE. Any other approach would undermine the Commission's decision to rely on market entry rather than prescription to bring interstate access charges closer to cost.

In its Access Charge Reform Order, the Commission decided to rely primarily on a market-based approach to drive access charge

levels toward forward-looking economic costs.[22] The Commission reasoned that the development of competitive entry into telecommunications markets would lead to interstate access services being priced at competitive levels without direct regulation by the Commission.[23] The Commission envisioned the market-based approach as follows:

> As competitive entry becomes increasingly possible, IXCs that now purchase interstate switched access services from incumbent LECs will be able to bypass those services where the prices (interstate access charges) do not reflect the economic costs of providing the underlying services. Those IXCs can do this by entering the local markets themselves as local exchange service providers, thereby self-providing interstate access services for their new local exchange service customers. They can also seek out competitive providers of comparable services.[24]

Thus, a major premise for adopting a market-based access charge regime was the anticipated entry into local exchange markets by IXCs and CLECs, who would in turn offer competitive access prices, thereby driving down access rate levels.

By requiring carriers to win local exchange customers before purchasing shared transport UNEs, the Commission would facilitate the development of the competitive markets upon which the access charge system is premised. By contrast, eliminating the end-user prerequisite would encourage IXCs to purchase UNEs solely for local access, thereby circumventing the access charge regime

---

22 See Access Charge Reform Order at ¶¶ 258-285.

23 Id. at ¶ 262.

24 Id. at ¶ 265 (emphasis added).

altogether without increasing competition in the local exchange market.

V. REQUIRING CARRIERS TO WIN LOCAL EXCHANGE CUSTOMERS BEFORE PURCHASING UNBUNDLED SWITCHING IS FULLY CONSISTENT WITH THE TERMS OF SECTION 251(c)(3).

Section 251(c)(3) of the Communications Act imposes on ILECs an obligation, among other things, to provide to requesting carriers "access to network elements on an unbundled basis" for the "provision of a telecommunications service" such that purchasers may "combine such elements in order to provide such telecommunications service."[25] In implementing this subsection, the Commission followed the broad statutory definition of UNEs and defined network elements to include physical facilities and accompanying features, functions, and capabilities.[26]

Requiring carriers to win local exchange customers before purchasing shared transport UNEs is fully consistent with the statute and the Commission's implementing rules. As explained, the statutory definition of a UNE contemplates the purchase of an entire element including all of its functionalities. Those functionalities in the case of end office switching effectively require the purchaser to serve the end user with local service.

Moreover, requiring a requesting carrier to purchase all of the functionalities of end office switching does not prevent the

---

[25] 47 U.S.C. § 251(c)(3).

[26] Interconnection First Report and Order at ¶ 261. The Eighth Circuit upheld this decision. See Iowa Utilities Bd. v. FCC, 1997 WL 403401 (8th Cir. 1997) at *19.

requesting carrier from providing a telecommunications service over that UNE. On the contrary, the UNE purchaser may provide access, local service or any other technically feasible service over the UNE.

Finally, as the Eighth Circuit held, the focus of the statutory provisions governing UNEs is the establishment of the preconditions for local competition. To define the switching element broadly to require the purchaser in all cases to win the end user as a local customer merely advances this statutory goal.

VI. CONCLUSION

For the reasons described above, the Commission should not adopt the proposal set forth in the Further NPRM.

Respectfully submitted,

Brian Conboy
Thomas Jones
David Goodfriend

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

ATTORNEYS FOR TIME WARNER
COMMUNICATIONS HOLDINGS INC.

October 2, 1997