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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
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Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission	)	CC Docket No. 97-163
	)	
Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission	)	CC Docket No. 97-164
	)	
Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina	)	CC Docket No. 97-165

PETITION FOR RECONSIDERATION

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I. INTRODUCTION, SUMMARY AND HISTORY OF THE PROCEEDINGS

A. Introduction and Summary

Mutual ***good faith negotiations***, leading to an interconnection agreement between requesting telecommunications carriers and incumbent LECs, represents the ideal and preferred goal of voluntary interconnection agreements under Section 252(a)(1) of the Telecommunications Act of 1996. Unfortunately, the contentious arbitrations that were actually required before state commissions now extends to the Section 271 process, leaving participants questioning the good faith of their competitors and the meaning of the Act itself. Federal court decisions have left the FCC with little authority to dictate many rules of competition, but certain FCC authority sits undisturbed, namely under Section 252(e)(5) of the Act.

Two key goals of the Act mandated the development of competitive markets and the removal of barriers to entry. The Congress and the President both hoped for the "Berlin Wall" of restraining regulation to be thrown down, with free markets in telecommunications services ruling the day. Innovation and creativity were to spring forth, with new entrants encouraged to make their contributions in this fascinating, changing, and confusing marketplace.

In the spirit of this landmark opening of the local exchange to competition, Low Tech Designs, Inc. (LTD) engaged three ILECs in serious and good faith negotiations under the Act. LTD delayed entering into these negotiations until after the August 1996 release of the FCC's *First Report and Order* implementing the competitive markets provisions of the Act. The FCC rules were like an official invitation for LTD to engage ILECs in good faith interconnection agreement negotiations, as LTD had already entered into Advanced Intelligent Network (AIN) negotiations with GTE and BellSouth prior to the passage of the Act.

LTD specifically selected Ameritech and BellSouth for their acknowledged leadership in AIN technology, and the Georgia and Illinois Commissions by virtue of their previous rulings authorizing third party interconnection of AIN SCP's [1]. GTE is LTD's local service provider in South Carolina, where LTD has obvious reasons to offer competitive telecommunications services.

A specific FCC rule (47 C.F.R. § 51.301(c)(4)) had the effect of encouraging LTD to immediately pursue interconnection agreements with GTE, BellSouth and Ameritech. This rule required these incumbent carriers to conduct good faith negotiations with requesting telecommunications carriers, without the requesting carrier first obtaining state certifications.

For a new entrant requesting telecommunications carrier such as LTD, this rule provided welcomed legal authority for LTD to enter into negotiations at will, with any ILEC, for the purposes of achieving an interconnection agreement. LTD realized that good faith negotiations would only have 135 days to materialize, after which LTD would be required to file for arbitration within 25 days before state commissions.

Since the ILEC was required to negotiate with LTD without LTD first obtaining state certification, LTD also had good reason to believe that good faith negotiations with the ILECs would include LTD's arbitration request being accepted in good faith by the state commissions assigned federal responsibility for resolving failed negotiations. LTD also expected the ILEC's to transition from their required good faith negotiation into good faith arbitration.

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[1] SCP's are Service Control Points, special telecommunications computers that use SS7 signaling to incorporate programmable logic into incoming and outgoing telecommunications services.

LTD was understandably disappointed and disillusioned when the all states found reason to deny or dismiss LTD's properly filed petitions for arbitration. LTD was also highly perturbed that all the ILEC's turned tail and ran away from arbitration, suddenly arguing against LTD being given its day in court. LTD sees this ILEC action as a refusal to negotiate in good faith, since good faith negotiations are also required by law during arbitrations. That the state commissions went along with the incumbent is obvious, since both had no desire to conduct another arbitration (albeit a much more focused one), after having just gone through the AT&T/MCI process.

Also, the ILEC's had no desire to arbitrate on the issues LTD brought to the table, because the *XX abbreviated dialing arrangement telephone numbering resources sought by LTD were considered to be too valuable a resource to be given to anyone, much less to some small start-up carrier with "different" ideas about what constituted telecommunications. In short, LTD was a small company that represented a big threat to the incumbent. It still does, but this is no reason for the law requiring arbitrations to be ignored.

LTD was a requesting telecommunications carrier under the Act, had been involved in negotiations with ILECs for the minimal 135 day period, filed properly documented and formatted petitions, and had every expectation that the states would resolve LTD's negotiation impasse with the ILECs, just like they had done for other telecommunications carriers, such as AT&T and MCI [2].

[2] The fact that an AT&T or MCI, or any other telecommunications carrier, was certificated by a state commission at the time of bringing an arbitration request to that commission, has no bearing on that carrier's standing for obtaining arbitration before that state commission. Arbitration is afforded to telecommunications carriers as that term is defined in the Act. LTD is a telecommunications carrier that has been denied arbitration and an interconnection agreement, both being rights under the Act.

LTD still does not understand why it would be given the authority to negotiate with an ILEC, by the Act and FCC rules, and yet be denied the ability to arbitrate with that same ILEC. It is particularly confusing to see the FCC issue rules that have the effect of encouraging uncertificated requesting telecommunications carriers to immediately engage ILEC's in good faith negotiations, and then see the same FCC shy away from rectifying the obvious outcome of this rulemaking in a good faith manner themselves. Surely the FCC foresaw uncertificated requesting telecommunications carriers, acting under authority of federal law and FCC rules, taking the FCC at its word, by engaging ILEC's in negotiations and then expecting the states to fulfill their Federal responsibility to arbitrate failed negotiations.

If new entrants like LTD cannot see their good faith negotiations resolved, in the manner prescribed by the law, then the FCC should strike down 47 C.F.R. § 51.301(c)(4), for it becomes devoid of all meaning after LTD's experience with the law. The outcome LTD has suffered is the cruelest form of "bait and switch" anyone attempting to enter the telecommunications market should ever be expected to endure.

This refusal by state commissions makes no sense, when the Act clearly anticipated that parties to a negotiation would be able to rely upon state conducted arbitration as a means of resolving their differences, so that the sought after interconnection agreement could become a reality. It is particularly disappointing for a small, self represented, new entrant telecommunications carrier, such as LTD, exercising the purest form of entrepreneurial activity in our free market society, to have its efforts dashed on the ILEC scattered rocks of legal and regulatory confusion and conflict.

Small entrants such as LTD can ill afford the delay associated with the legal denials LTD is experiencing. If LTD had been forced to hire legal counsel to defend its rights, it would have given up long ago, due to an inability to afford the high fees that telecommunications attorneys command these days. Because LTD's President is attempting to represent the company on a pro se basis, LTD can possibly recover from these unwarranted setbacks, but not without a great deal of effort and continued delay. LTD simply wishes for the law to be upheld, and for its arbitrations to be conducted, so it may get on with its business of providing telecommunications services to the public.

B. History of the Proceedings

1. LTD's First Denial of Arbitration

LTD's first denial came from the Public Service Commission of South Carolina (PSCSC). LTD was aware of a state law that defined a new entrant local exchange carrier as an entity already certificated with the PSC. This state law was passed after the Act, but prior to the issuance of the FCC rules that required good faith negotiations between ILEC's and uncertificated requesting telecommunications carriers.

In its petition for arbitration, LTD requested, only for purposes of arbitration with GTE, that this state legal definition not be used to deny LTD arbitration before the PSCSC. LTD has every hope of becoming certificated by the PSCSC, but only after it is first able to obtain the arbitrated interconnection agreement it seeks with GTE. The refusal of the PSCSC to break the impasse between LTD and GTE has had the effect of creating a new impasse between LTD and the PSCSC, and deepening the impasse between LTD and GTE. LTD feels strongly that it must be respected, by the PSCSC, GTE, and the FCC, as a requesting telecommunications carrier

entitled to arbitration, prior to certification by the PSCSC. As such, LTD now refuses to request certification from the PSCSC until its arbitration is heard, either by the FCC or by the SCPSC. Any other action by LTD would have the effect of condoning a state commission refusal to accept LTD as a federally defined telecommunications carrier.

Requiring certification before arbitration, in any state, is a case of putting the cart before the horse. New entrants, particularly small entity new entrants such as LTD, are simply not able to complete business plans prior to obtaining an arbitrated agreement, particularly when they are asking for network elements that require state determinations. Without arbitration and a completed business plan, LTD is not able to attract the capital it requires to actually obtain state certification and authority to offer services to the public. As LTD indicated in its original petition for FCC assumption, without arbitration, LTD is not actually certain that is will be able to offer a full range of planned services in South Carolina.

Requiring certification in this type of environment delays entry, lets ILEC's off the arbitration hook, and was not the intended effect of the FCC's no-certification rule. If the states were truly interested in new entrants providing innovative services to their consumers, they would gladly arbitrate so that creative telecommunications carriers, like LTD, can take the first steps towards actually offering the services they wish.

The FCC could properly decide to reverse their previous determination that the PSCSC did not fail to act under Section 252(e)(5), without requiring a Section 253 ruling on the SC State law defining new entrant local exchange carriers as entities already certificated by the PSCSC. This state law is not offensive in itself. It is only when this SC law is used to deny arbitration to Federally defined telecommunications carriers, and results in a failure to act, that the FCC should

be responsible for completing the arbitration responsibility for a state and affirming the right of a new entrant requesting telecommunications carrier to obtain arbitration.

It is not necessary or lawful for a Federal District Court to make any Section 252(e)(6) determinations in LTD's case. The only determination needed is for the FCC to confirm LTD's federal standing as a telecommunications carrier under the Act. Since the FCC is responsible for the interpretation of this section of the law, one would think they would have the authority and expertise to make determinations of this type. If the FCC cannot declare LTD to be a telecommunications carrier, eligible to negotiate and arbitrate with ILEC's, then LTD wishes the FCC to advise it what type of activities, pray tell, it entered into with BellSouth, GTE and Ameritech, back in August of 1996.

2. The Illinois "Deception"

At least the PSCSC has a law on the books that allowed them to immediately reject LTD's arbitration request with clean hearts and minds. In Illinois, LTD's petition was assigned a hearing officer, with the appearance of the beginnings of a real arbitration. Soon, it was obvious that Ameritech was going to play hardball as they moved to dismiss the arbitration, once again an example of a failure of their duty to negotiate in good faith.

Without going through all the legal history, the bottom line in Illinois was a requirement that LTD be offering telecommunications services "somewhere" in the United States. By reason, this also implies state certification. The Hearing Officer's recommended order, which was actually almost entirely written by Ameritech, contained a fatal error. Because there wasn't a state law on the books, as in SC, the Illinois Commission had to come up with another reason to

dismiss LTD's arbitration petition, without making reference to the fact that LTD was a telecommunications carrier under the Act.

The Illinois Commission did this by misquoting the FCC rule at 47 C.F.R. § 51.301(c)(4) that supports LTD's federal standing. The Illinois Commission said, on page 2 of its *Arbitration Decision,* that an ***entity*** (rather than ***a requesting telecommunications carrier*** as the FCC rule states) did not need to be certificated by a state to obtain ***arbitration***[3], but insisted on LTD showing that it was already actively offering telecommunications services somewhere to qualify as a telecommunications carrier in Illinois.

The Illinois Commission knew that to quote the truth of 47 C.F.R. § 51.301(c)(4) would instantly invalidate their denial of LTD's status as a telecommunications carrier, and that their "offering services anywhere" argument would hold no water. Armed with a fresh PSCSC denial of LTD's petition for arbitration in SC, the Hearing Officer, at the urging of Ameritech, invalidated LTD's months of attempted negotiation with Ameritech and sent LTD packing.

3. BellSouth's Coattails Attempt and the Continued Inability of all Parties to Quote FCC Rules

After these two slaps in LTD's face, BellSouth, who had previously admitted that LTD was in fact a telecommunications carrier in their response to LTD's Petition for Arbitration, turned and ran like the rest of their monopolist brethren. Showing a serious lack of original thought, BellSouth attempted to copy the successful "deception" used in Illinois. They declared LTD had changed from being an acknowledged telecommunications carrier, to now, not being a telecommunications carrier at all, proudly providing the SC and Illinois decisions as proof.

[3] The Illinois Commission was on the right track with this opinion regarding certification and arbitration, but still found a way to weasel out of their responsibilities.

BellSouth argued, in parrot-like manner, that LTD must be offering telecommunications services somewhere outside of Georgia before it could be considered a telecommunications carrier eligible for arbitration.

Unfortunately for BellSouth, the Georgia Public Service Commission (GPSC), in a showing of actual independent thought, rejected the same arguments that Ameritech had successfully railroaded through the Illinois Commission. Correctly finding that a requirement of currently offering telecommunications services outside of Georgia would preclude new entrants from ever entering the market, the GPSC decided that anyone seeking arbitration in Georgia must first be certificated by the GPSC to be considered a telecommunications carrier.

After LTD filed for Section 252(e)(5) preemption, the GPSC and BellSouth both ***knowingly*** fell into the same trap as the Illinois Commission by misquoting 47 C.F.R. § 51.301(c)(4). As a review of the record will indicate, BellSouth used the word "person", while the GPSC uses the words "requesting company", instead of the correct "requesting telecommunications carrier", in their *Comments* and *Opposition* to LTD's preemption petition. As they both clearly knew ***beforehand***, if they had only honestly and dutifully quoted the above FCC rule, their arguments regarding the dismissal of LTD's arbitration petition by the GPSC would have immediately been invalidated.

LTD has not provided the above legal and negotiation histories in order for any determinations of illegal state ***actions*** to be made. Instead, LTD is arguing that ***illegal in-action's*** are obvious, for whatever reason justified by the states, and that these failures to act by the states constitute reason for FCC assumption of jurisdiction under the Act. If LTD must prove illegal state ***actions*** under Section 253, prior to bringing action under Section 252(e)(5), then

Section 252(e)(5) would have no meaning and would be reduced to excessive legal verbiage. This is not what Congress intended, but what the FCC obviously interprets 252(e)(5) to mean.

The FCC must defend the definition of the word "arbitration", and give it the meaning intended in the Act. This does not require an "expansive view" of the meaning of 252(e)(5), as the FCC has indicated it would not take. All that is necessary is for the FCC to take a reasoned view, with the plain language of the Act being interpreted as the Congress intended.

II. LTD IS A FEDERALLY DEFINED TELECOMMUNICATIONS CARRIER

Telecommunications carriers, or requesting telecommunications carriers ("RTC") as new entrants are frequently called in the Act and FCC rules, are the entities specified in Sections 251 and 252 of the Telecommunications Act of 1996 as having the right to negotiate, mediate and arbitrate with incumbent local exchange carriers ("ILEC"). In their denial [4] of the above captioned Assumption Petitions, the FCC has erred greatly by refusing to directly acknowledge and confirm the unquestionable legal basis of LTD's standing as a telecommunications carrier or RTC under the 1934 Act as amended, and the corresponding unquestionable legal right of LTD to have it's failed negotiations arbitrated by state commissions.

Instead, the FCC has taken an approach that denies the plain language of the Act, and its expectation that the parties to an arbitration would have an interconnection agreement to show for their good faith negotiations. The FCC would have been better served if it had declared that LTD was not a requesting telecommunications carrier under the Act, and that LTD's negotiations

[4] See FCC 97-362, Memorandum Opinion and Order, Rel. October 8, 1997, hereinafter referred to as the FCC *Order*.

with the ILEC's were examples of a sham request. This of course is absurd, but the FCC determinations make this outcome plausible.

The FCC concluded, in paragraph 33 of its *Order*, that "[U]nder our current rules, a state commission does not "fail to act" when it dismisses or denies an arbitration petition on the ground that it is procedurally defective, the petitioner lacks standing to arbitrate, or the state commission lacks jurisdiction over the proceeding". The FCC reached this conclusion without ever addressing LTD's claimed status as a telecommunications carrier under the 1996 Act. This makes for blind decision making.

By refusing to address the issue of LTD's standing under federal law, the FCC has purposefully attempted to leave LTD in a state of legal limbo, refusing to formally acknowledge the necessary and obvious standing of LTD under the law. This is clearly an abdication of FCC responsibility and authority. This FCC "failure to act" also shows an unreasonable and unexplained refusal by the Commission to unequivocally confirm their previous pro-competition interpretation of the Act. The erroneous FCC decisions in these Dockets have had an immediate and undesirable effect of chilling competitive entry into the local exchange market [5]. These decisions have also had the unexpected and illegal effect of invalidating previous Commission Rules that established the right of uncertificated telecommunications carriers to negotiate, and if necessary (by reason), arbitrate in good faith, with ILEC's [6]. All three ILECs, after the dismissal

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[5] LTD has been denied the ability to negotiate with New York Telephone (NYTel/Bell Atlantic) as a requesting telecommunication carrier under the 1996 Act, even though NYTel acknowledged LTD as a requesting telecommunications carrier in their letter confirming LTD's request to negotiate an interconnection agreement. NYTel bases their denial on the state decisions that are at the center of these instant petitions for assumption, and their own new determination that LTD is not a telecommunications carrier.

[6] See 47 C.F.R. § 51.301(c)(4) "51.301 Duty to negotiate. (c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following

or denial of LTD's arbitration petitions, have taken a position that LTD is not a requesting telecommunications carrier, and ***all negotiations have ceased***. The FCC *Order* has only bolstered these ILEC arguments.

Rather than clearly finding a state failure to act and complete their arbitration responsibilities, as was proven by LTD, the FCC has insisted that LTD jump over additional burdensome and unnecessary legal hurdles, in the form of federal district court review of the state orders, in order to obtain the arbitrations to which it is entitled [7]. These additional hurdles are not required by the Act, and show a continued refusal by the FCC to apply a plain reading and interpretation of the law.

The Act and its associated legislative history clearly establishes the new competitive-world definition of a "telecommunications carrier", and correspondingly, a "requesting telecommunications carrier". These are the entities that are given the right to arbitration before

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actions or practices, among others, violate the duty to negotiate in good faith: .... (4) ***conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;***..." (emphasis added). This FCC Rule clearly shows, without a doubt, that the possession of state certifications has nothing to do with the legal status of an entity, such as LTD, as a "telecommunications carrier" under the Act.

[7] 47 U.S.C. 252(e)(6) states: "REVIEW OF STATE COMMISSION ACTIONS- In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court ***to determine whether the agreement or statement*** meets the requirements of section 251 and this section." (emphasis added)

Clearly, the "determinations" referred to by this statute only ***include actual interconnections agreements*** arbitrated by the state commission, or a Statement of Generally Available Terms, as contemplated by the following 47 U.S.C. 252(f). Any other interpretation by the FCC is merely wishful thinking and an excuse to avoid living up to its responsibilities under the Act. LTD never obtained an ***arbitrated interconnection agreement***, precisely the reason this legal remedy is not available to it. LTD simply does not have standing before a Federal district court to pursue this erroneous FCC recommended method of resolving LTD's lack of arbitration.

state commissions, or before the FCC if the states fail to act in resolving unsuccessful negotiations between RTC's and ILEC's. As shown in footnote number 6, the FCC has already established that state certification is not a prerequisite to an entity's standing as a telecommunications carrier or a RTC under the 1996 Act.

This begs the question of how a new entrant becomes a telecommunications carrier eligible to negotiate and arbitrate under the Act? Certainly not by going to a state commission and asking to be certificated. Since state certification is not the determining factor in obtaining federal standing as a requesting telecommunications carrier, any state decision that relies upon state certification as a prerequisite to invoke arbitration as a federally acknowledged requesting telecommunications carrier under Section 252(b), is on its face illegal. The FCC should have acknowledged LTD as a requesting telecommunications carrier, and then found that any action by a state commission to deny arbitration to a federally defined telecommunications carrier constitutes a 252(e)(5) "failure to act". This does not require a Section 253 showing by LTD.

Apparently, the FCC wants LTD to file a Section 253 request to potentially find that the state commissions' pre-arbitration requirement that LTD be certificated in their states, or offering telecommunications services somewhere, be declared a barrier to entry. If this could be established, then the FCC would presumably preempt the state commissions, and require them to arbitrate LTD's failed negotiations. This is not necessary, as a determination by the FCC of LTD's right to arbitration as a federally defined telecommunications carrier is all that is required.

LTD has always acknowledged state certification as a necessary step to be taken before a telecommunications carrier actually offers telecommunication services in a state. However, the Act is clear regarding the duties of the parties to voluntary negotiations, and the inevitable

responsibilities of state commissions, should those voluntary negotiations fail. By allowing these grossly conflicting state commission legal determinations to stand - each requiring certification, in one form or another, to determine the status of entity as telecommunications carrier or a RTC - the FCC has violated its own rules, and in the process, has dealt a major setback to the creative, entrepreneurial and spontaneous spirit of the American free enterprise system. These determinations must not be allowed to prevail and will be conclusively shown, in this filing, to constitute an illegal "failure to act" under Section 252(e)(5) of the Act, as originally claimed in LTD's Assumption Petitions.

LTD is also of the opinion that the FCC, by accepting LTD's Assumption Petitions as valid and worthy of a Commission ruling or determination, has in the process acknowledged LTD as a telecommunications carrier under the Act, albeit in an inadvertent manner. All of the provisions of Section 252, including the ability to file a petition with this Commission for assumption under Sec. 252(e)(5), apply to telecommunications carriers. By the very act of ruling on LTD's Assumption Petitions, the FCC has in effect acknowledged LTD as a telecommunications carrier. If the FCC had dismissed LTD's Assumption Petitions for a lack of standing or jurisdiction, the FCC would have acted in concert with the state rulings that denied LTD's Arbitration Petitions for a lack of state standing as a telecommunications carrier due to their requirement of state certification.

The FCC did not, and has therefore acknowledged LTD's standing, in light of federal law, as a telecommunications carriers in the process. This acknowledgment in turn invalidates the FCC denials of LTD's Assumption Petitions, since telecommunications carriers are entitled, under federal law, to have their arbitrations heard by state commissions, or by the FCC if the

state commissions fail to act. By effectively acknowledging LTD's standing as a telecommunications carriers, but refusing to arbitrate LTD's failed negotiations, the FCC has placed themselves in violation of Section 252(e)(5) of the Act and of the FCC Rules implementing this Section of the Act.

LTD rejects the FCC determination that the three state commissions' dismissal or denial of LTD's arbitration petitions does not constitute a failure to act under the FCC Rules implementing Section 252(e)(5) of the Act (i.e. 47 C.F.R. § 51.801(b)). It goes without saying that all three state commissions failed to complete an arbitration, such as those afforded to AT&T and MCI in each state, within the time limits established in section 252(b)(4)(C) of the Act. LTD did not obtain an arbitrated agreement from any of the state commissions, and therefore the state responsibility to act was not fulfilled at all, and certainly not within the statutory timeframes. The FCC determination that the states' dismissals or denials of LTD's petitions constitutes a completed arbitration is absurd and turns the plain language concerning arbitration and interconnection agreements, contained in Section 252 of the Act, on its head.

LTD has always maintained that if it has the legal right to negotiate with an ILEC, it has the legal right to arbitrate with an ILEC, without regard to its state certification status. The FCC must first deny LTD its legal status as a requesting telecommunications carrier in order to deny LTD its right to arbitrate before state commissions, or before the FCC, as LTD has now requested. The FCC has not done so, and in fact has unwittingly accepted LTD's status. Therefore, LTD's right to arbitrate has been illegally denied by this Commission, and the determination that produced this injustice must be reconsidered and overturned.

III. Background and Legislative History of the Act

It was the intent of Congress, in passing the Act, to open the local exchange to anyone wishing to compete with ILECs. H.R. 1555, 104th Cong. (1995), the House version of the Telecommunications Act, specifically anticipated anyone entering the telecommunications business for the purpose of offering telecommunications or information services using unbundled network elements. The following language from H.R. 1555 made the roots of this intention clear.

> Sec 242 (b) (3) Equal Access - A local exchange carrier shall afford, to ***any other carrier or person offering (or seeking to offer) a telecommunications service*** or an information service, reasonable and nondiscriminatory access on an unbundled basis ... to databases, signaling systems, poles, ducts, conduits, and rights-of-way owned or controlled by a local exchange carrier, or other facilities, functions, or information (including subscriber numbers) integral to the efficient transmission, routing, or other provision of telephone exchange access ... that is sufficient to ensure the full interoperability of the equipment and facilities or the carrier and of the person seeking such access." (emphasis added)

The Senate version of the Act ultimately prevailed, and the "any other person" language was replaced with the current "telecommunications carrier" and "requesting telecommunications carrier" wording. However, in order to keep an open door to new entrant requesting telecommunications carriers that were just establishing themselves as providers of telecommunications services (such as LTD), two key provisions were included in the legislative history of the Act and in the Act itself.

First, the House Senate Conference Committee, still recognizing the need for anyone (including existing telecommunications carriers such as AT&T, and new entrants, such as LTD)

being able to enter the local telecommunications market, specifically stated the following in their Conference Report language [8].

> New section 251(b) imposes several duties on all local exchange carriers, including the 'new entrants' into the local exchange market. These include the duties: (1) not to prohibit resale of their service; (2) to provide number portability; (3) to provide dialing parity; (4) to afford access to poles, ducts, conduits, and rights-of-way consistent with the pole attachment provisions in section 224 of the Communications Act; and (5) to establish reciprocal compensation arrangements for the transport and termination of traffic. ***The conferees note that the duties imposed under new section 251(b) make sense only in the context of a specific request from another telecommunications carrier or any other person who actually seeks to connect with or provide services using the LEC's network***. (emphasis added)

The other "new entrant friendly" provision of Congress was in the new definition of a "telecommunications carrier".

> 47 U.S.C. § 153(44) TELECOMMUNICATIONS CARRIER.--The term "telecommunications carrier" means ***any*** provider of telecommunications services... (emphasis added)

By defining a telecommunications carrier as "***any*** provider of telecommunications services" (emphasis added), the Congress made their intent clear. In order to make sense of the Act, and its intent to provide a market entry mechanism for new entrant telecommunications carriers, the term "any provider" must actually mean ***any provider***, at ***any*** stage of their business plans, at ***any*** point in negotiations with a LEC or ILEC, and at ***any*** point in the process of actively beginning to provide telecommunications services to the public. This must be true if the Act is to be open to new entrant competitors, regardless of their certificated status at the state level. In this regard, LTD qualifies as "***any*** provider of telecommunications services", and

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[8] See Joint Statement of Managers S. Conf. Rep. No. 104-230, 104th Cong.2d Sess. 121 (1996)

certainly qualifies, as the Conference Committee anticipated, as "***any*** other person who actually seeks to connect with or provide services using the LEC's network".

Therefore, with this understanding of the intent of Congress and the law, LTD clearly has the inalienable right to engage ILEC's in good faith interconnection agreement negotiations, and to expect those negotiations, if not fruitful, to be arbitrated by a state commission, without regard to LTD's status as a certificated entity in that state. If certification by a state commission does not make an entity a telecommunications carrier or RTC, then any refusal to arbitrate by a state commission, using state certification as a prerequisite, is on its face an abridgment of LTD's federal rights. The FCC refusal to assume jurisdiction, and in the process, their backhanded establishment of LTD as a telecommunications carrier or RTC with a right to arbitration, has also placed the FCC in violation of Section 252(e)(5) and its implementing rules, and is a further abridgment of LTD's federal rights as a telecommunications carrier.

IV. The FCC Rules Implementing Sections 251 and 252

The FCC issued many comments and associated rules implementing Sections 251 and 252 of the Act. Most notable is the one below [9].

> Paragraph 154. We agree with parties contending that actions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith. The Commission will not condone any actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals. We agree with SCBA that small entities seeking to enter the market may be particularly disadvantaged by delay. However, whether a party has failed to negotiate in good faith by employing unreasonable delaying tactics must be determined on a specific, case-by-case basis. For example, a party may not refuse to negotiate with a requesting telecommunications carrier, and a party may not condition negotiation on a

[9] See First Report and Order (In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 96-325, Rel. Aug. 8, 1996)

carrier first obtaining state certification [10]. (original footnote 289 included below, footnote 288 not included)

47 C.F.R. 51.301(c)(4) was the result of these FCC comments in para. 154 above, and has been quoted previously in footnote number 6. However, because of this Commission's denial of LTD's Assumption Petitions, and their refusal to directly acknowledge LTD as a telecommunications carrier, the FCC has allowed 47 C.F.R. § 51.301(c)(4) to lose all meaning, and therefore to be illegally violated. The FCC, by their refusal to assume state responsibility, has also "condone[d] ... actions that are deliberately intended to delay competitive entry, in contravention of the statute's goals".

Because an ILEC's duty to negotiate in good faith, as required by Section 251(c)(1), is tied directly to an ILEC's section 252 negotiation and arbitration requirements, any actions by an ILEC to encourage a state commission to deny a requesting telecommunications carrier arbitration under Section 252, due to a lack of state certification, would be a *per se* violation of an ILECs duty to negotiate in good faith under 47 C.F.R. § 51.301(c)(4) and (c)(6). All ILECs involved urged the state commissions to dismiss or deny LTD's arbitration petitions, and in the process, were "intentionally obstructing or delaying negotiations or resolutions of disputes".

LTD believes that the individual state commissions, if they had been urged by a good faith negotiating ILEC, would have proceeded with the arbitrations and fulfilled their responsibilities under Section 252. LTD raised failure to negotiate issues in each of its

[10] Original FCC footnote 289 quoted included here. "*See, e.g.*, ALTS comment at 12-13 (contending that U S West has refused to start negotiations until it formed its positions regarding section 251, and that SBC has attempted to interpret and "enforce" state certification requirements)."

arbitration petitions, and also accused each ILEC of a failure to negotiate in good faith in the assumption petitions filed with the FCC. This failure to negotiate is still continuing.

LTD has conclusively shown that it must be legally considered a telecommunications carrier under the Act. Additionally, in LTD's Petition for Arbitration before the Georgia PSC, it claimed to be a new entrant telecommunications carrier, and was correctly acknowledged as such by BellSouth in their Answer to LTD's Petition [11]. This admission by BellSouth adds weight to LTD's assertion that any legal opinion by an ILEC of LTD's inability to arbitrate absent state certification is a per se violation of their duty to negotiate with telecommunications carriers or RTC's without conditioning negotiations on the RTC first obtaining state certifications.

V. The FCC's and Eighth Circuit's View of the Negotiation and Arbitration Process

The FCC's First Report and Order [12] is replete with references to the FCC's expectations regarding the negotiation and arbitration process. The following paragraphs from the First Report and Order clearly show that these FCC expectations have been mysteriously abandoned in LTD's case.

> 15. Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial

[11] Contrary to footnote number 48 on page 8 of the FCC's *Order*, evidence was introduced by the Georgia Commission itself that confirmed the fact that BellSouth initially acknowledged LTD as a telecommunications carrier under the Act. *See* Appendix A to GPSC Comments filed 7/28/97 in FCC CC Docket No. 97-164, page 8 of 8, Dissent of Commissioner Mac Barber, where para. 2 states: "Low Tech filed its Petition on January 16, 1997. BellSouth's initial Answer and Motion to Dismiss did not put forward the argument that Low Tech was not a telecommunications carrier, and indeed, BellSouth's Answer admitted that Low Tech ***is*** a telecommunications carrier." (emphasis added)

[12] *See* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 96-325, Rel. Aug. 8, 1996

negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. ***The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights***, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory." We adopt rules herein to implement these requirements of section 251(c)(3). (footnote deleted, emphasis added)

60. We disagree with those parties that claim we are trying to impose a uniformity that Congress did not intend. Variations among interconnection agreements will exist, because parties may negotiate their own terms, states may impose additional requirements that differ from state to state, and some terms are beyond the scope of this Report and Order. ***We conclude, however, that establishing certain rights that are available, through arbitration, to all requesting carriers, will help advise parties of their minimum rights and obligations, and will help speed the negotiation process...*** (emphasis added)

141. ***We conclude that establishing some national standards regarding the duty to negotiate in good faith could help to reduce areas of dispute and expedite fair and successful negotiations, and thereby realize Congress's goal of enabling swift market entry by new competitors...*** (emphasis added, footnote deleted)

149. Because section 252 permits parties to seek mediation "at any point in the negotiation," and also allows parties to seek arbitration as early as 135 days after an incumbent LEC receives a request for negotiation under section 252, we conclude that Congress specifically contemplated that one or more of the parties may fail to negotiate in good faith, and created at least one remedy in the arbitration process. ***The possibility of arbitration itself will facilitate good faith negotiation.*** (emphasis added, footnotes deleted)

1024. ***As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers, including CMRS providers.*** ..... Thus, we believe that sections 251 and 252 will facilitate consistent resolution of interconnection issues for CMRS providers and other carriers requesting interconnection. (emphasis added)

1293. .....***We conclude that it would be inconsistent with the 1996 Act to require incumbent LECs to provide interconnection, services, and unbundled elements, impose a duty to negotiate in good faith and a right to arbitration, and then permit incumbent LECs to not be bound by an arbitrated determination.*** ..... (emphasis added, footnote deleted)

All of above paragraphs confirm that arbitration is a ***"right"*** of new entrant requesting telecommunications carriers such as LTD. This truth has escaped the state commissions and the FCC, in their denial of LTD's various requests for arbitration.

The July 18, 1997 decision from the Eighth Circuit Court of Appeals has found many FCC Rules implementing the Act to be in violation of FCC statutory authority [13]. However, this same decision has actually reinforced LTD's standing and legal arguments in this case.

This Eighth Circuit decision conclusively shows that negotiation and arbitration are distinct "phases" of a greater process that results in an interconnection agreement [14]. This greater process is critical to the new entrants ability to enter as competitors to ILECs. Also, in Section II.B of this same Eighth Circuit decision, the Court stated the following.

> The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements. Voluntary negotiation is the first method listed under section 252, and ***the Act indicates that the parties may begin negotiations as soon as an entrant submits a request to an incumbent LEC.*** 47 U.S.C.A. § 252(a)(1). Meanwhile, the parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. Id. § 252(b)(1). These provisions reveal that the Act establishes a preference for incumbent LECs and requesting carriers to reach agreements independently and that ***the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations***. (emphasis added)

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[13] *Iowa Utils. Bd., 120 F.3d*

[14] Id. Footnote 9. Quoting in part "While we have no way of quantifying the indirect effect the existence of these rules had or may have on the positions taken by the incumbent LECs and their new competitor during the ***negotiation phase***, we believe the mutual knowledge that a state commission would be required to abide by these rules during the ***arbitration phase*** (absent our stay) had or would have some impact on the negotiations" (emphasis added).

This paragraph first affirms good faith voluntary negotiations as the Act's preference. It then affirms that the parties may begin their negotiations as soon as the [new] entrant submits a request to an ILEC (without regard to state certification), and that the Act established state-run arbitrations as an "impasse-resolving mechanism" for failed negotiations [15]. Nowhere in this Eighth Circuit discussion of the structure of the Act does it indicate that states have the option of not resolving failed negotiations between ILECs and their competitors, the [new] entrant, and then, as the Eighth circuit confirms, the requesting [telecommunications] carrier.

It is precisely this "impasse-resolving mechanism" required by law, that has been denied to LTD, first by state commissions, and now by the FCC. As the Act indicates, in Section 252(e)(5) below, this "impasse-resolving mechanism" is the "***responsibility***" of the state commissions, and if not carried out, this "impasse-resolving" responsibility ***shall*** be assumed by the FCC.

> COMMISSION TO ACT IF STATE WILL NOT ACT- If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

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[15] State certification approval cycles vary anywhere from 7 to 180 days (180 in Georgia and South Carolina). Since the arbitration filing window is between the 135th and 160th days, the introduction of certification timing issues introduce unwarranted and illegal restrictions on engaging ILEC's in good faith negotiations as an uncertificated telecommunications carrier or RTC.

These voluntary negotiations were found by the Eighth Circuit to be the Acts preferred method of achieving interconnection agreements. Any inhibition on the part of a requesting telecommunications carrier to initiating negotiations with an ILEC will have the effect of delaying competitive entry. This is not the intent of the Act, but the effect of the FCC's Order.

VI. Conclusion

LTD has a federally mandated and protected right to obtain an arbitrated interconnection agreement with the ILEC's that LTD engages in good faith negotiations. LTD's rights to arbitration for the purpose of obtaining an interconnection agreement have been abridged, first by the state commissions, and now by the FCC itself. The FCC should immediately confirm and declare LTD to be a telecommunications carrier under the Act, determine that the state commissions did fail to act under Section 252(e)(5), and correct its previous mistake in this proceeding by immediately assuming arbitration responsibilities from all three states. The FCC should also find that each state commission failed to act to complete arbitration's within the statutory required timeframes established by the Act in Section 252(b)(4)(C).

Respectfully submitted, this 6th day of November, 1997.

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