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NOTICE OF EX PARTE PRESENTATION

February 23, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 96-149

Dear Ms. Roman Salas:

Attached please find two copies of a written ex parte presentation that was delivered to A. Richard Metzger, Jr., Common Carrier Bureau Chief, and Carol Matthey, Craig Brown, Andrea Kearney and Joe Welch of the CCB's Policy and Program Planning Division on Friday, February 20. Pursuant to Commission Rule 1.1206(b)(1), copies of the presentation are being provided to you for inclusion in the record of the above-referenced proceeding. Please contact me if you any questions.

Sincerely,

Lawrence E. Sarjeant
Senior Counsel

CC: A. Richard Metzger, Jr.
Carol Matthey
Craig Brown
Andrea Kearney
Joe Welch

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EX PARTE PRESENTATION

February 20, 1998

A. Richard Metzger, Jr.
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, D.C. 20554

Re: CC Docket No. 96-149

Dear Mr. Metzger:

On August 4, 1997, the United States Telephone Association (USTA) filed a Petition for Reconsideration (PFR) concerning the Commission's Second Report and Order in CC Docket No. 96-149.¹ The focus of USTA's PFR is the Commission's decision to require that independent incumbent local exchange carriers (ILECs) provide interstate, domestic, interexchange services that originate in their local exchange service areas, and international services that originate in their local exchange service areas, through separate legal entities. USTA believes that the Commission's structural separation requirement: is unlawful; creates a regulatory burden that is inconsistent with Congressional intent; is unnecessary in light of other applicable or available safeguards; and ignores practical considerations. Accordingly, USTA has asked that the Commission reconsider its decision to require structural separation and instead, rely on nonstructural safeguards to address cost misallocation and discrimination concerns.

It is axiomatic that before a rule imposing a new requirement upon regulated entities is promulgated, there be notice of the proposed rule and an opportunity to comment on it. In the Second Report and Order, the Commission, referencing its Competitive Carrier Fifth Report and

¹ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket Nos. 96-149 and 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (rel. April 18, 1997) (Second Report and Order).

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Order,² directed that independent ILECs provide domestic, interstate, interexchange services and international services that originate in their local exchange service areas through a separate legal entity. The Commission suggested that it was simply retaining a requirement (separate legal entity) previously imposed on independent ILECs by its Competitive Carrier Fifth Report and Order. USTA respectfully disagrees. In the Competitive Carrier Fifth Report and Order, the Commission stated that its separate affiliate requirement entailed primarily separate books of account but not structural separation.³ The provision of domestic interstate interexchange and international services through a separate legal entity is structural separation, and the separate legal entity requirement is a new requirement that was imposed without prior notice and the opportunity for comment.

The separate legal entity requirement imposed by the Second Report and Order is not required by the Telecommunications Act of 1996. Congress demonstrated by singling out the Regional Bell Operating Companies (RBOCs) for special treatment for their in-region, interLATA services that it gave consideration to structural separation requirements and when they needed to be imposed. Congress did not impose a structural separation requirement on independent ILECs with respect to their provision of interstate interexchange and international services that originate in their local exchange service areas, or elsewhere. By imposing this requirement on independent ILECs, the Commission has saddled them with a regulatory burden that Congress elected to refrain from imposing upon them. Deference should be given to Congressional intent.

The Commission's experience with nonstructural safeguards evidences the fact that they are an effective deterrent to cost misallocation and discrimination by ILECs. There is every reason to believe that nonstructural safeguards will work with respect to ILEC provision of interstate interexchange and international service that originates in an ILEC's local service area. The Commission should forgo the separate legal entity requirement, and it should allow independent ILECs to separate and allocate the costs of providing these services from the regulated costs of their local exchange operations, pursuant to 47 C F R Part 64 Subpart I, as if their interstate interexchange and international services originating from within their local exchange service areas were nonregulated services. As to concerns of discriminatory conduct in the provision of access services, existing equal access requirements, the prohibition against jointly owned transmission or

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (Competitive Carrier Fifth Report and Order).

³ Id. at p. 1198, ¶ 9, fn. 23.

switching facilities, and the requirement that the ILEC's long distance operations purchase access at tariffed rates provide sufficient protection to competing long distance service providers.

The notion that independent ILECs could in any material way harm the long distance market or competing long distance service providers is theoretically conceivable, but as a practical matter, is remote if not impossible. Whether an ILEC is a price cap company, a rate of return company or an average schedule company, its ability to manipulate access rates to its advantage is severely constrained by regulatory oversight. The great preponderance of independent ILECs that provide long distance service do so as either pure resellers or through a combination of resale and their own facilities. In order to harm competing long distance service providers, these ILECs would have to identify a way to pass higher access rates on to their competitors without having them flow back to them in their resale contracts. If an ILEC could manipulate its access rates and insulate itself from the access rate increases, then it would have to determine how to increase competitors' costs on a large enough scale (over 800 USTA members serve 5000 or fewer access lines) to have any impact on the competitors' long distance operations. It seems clear when one examines the operational realities for virtually all independent ILECs that even if they have the motivation to disadvantage long distance competitors, they lack any real opportunity to do so.

The Commission should also clarify the distinction between interLATA long distance and interexchange long distance. LATAs are boundaries that are unique to RBOCs and are inapplicable to independent telephone companies. Generally, interexchange long distance calls are calls that go between local calling areas. A local calling area consists of one or more telephone exchanges and is usually established by a state regulatory commission.

Finally, the Second Report and Order mandates compliance with the separate legal entity requirement by April 8, 1998, for those ILECs providing interstate interexchange and international services in their local exchange service areas, on an integrated basis, at the time of its

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release. USTA urges the Commission to act on its PFR as soon as possible so that independent ILECs that are faced with complying with the Second Report and Order will know whether they must proceed forward and commit time and resources to achieve compliance or whether favorable consideration has been given to USTA's PFR.

Sincerely,

A handwritten signature in cursive script that reads "Larry Sarjeant".

Lawrence E. Sarjeant
for the
United States Telephone Association

cc: Carol Matthey
Craig Brown
Andrea Kearney
Joe Welch