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April 28, 1998

VIA HAND DELIVERY

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

Re: Ex Parte Submission in CC Docket No. 97-231; CC Docket No. 97-121; CC Docket No. 97-208; CC Docket No. 97-137

Dear Ms. Salas:

On Tuesday April 28, 1998, MCI submitted the attached document entitled "MCI's Response to Questions on Section 271 Legal Analysis" to Carol Mattey of the Common Carrier Bureau in response to legal issues relating to section 271 that were raised by staff.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(2) of the Commission's rules.

Sincerely,

Keith L. Seat

Attachment

cc: Carol Mattey

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FEDERAL COMMUNICATIONS COMMISSION
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MCI'S RESPONSE TO QUESTIONS ON SECTION 271 LEGAL ISSUES

Federal Communications Commission staff has asked MCI for its perspective on a series of legal questions relating to section 271 of the Telecommunications Act of 1996. In what follows MCI sets out its views.

As a general matter, many of the questions have to do with the Commission's authority to enforce the terms of section 271 relating to interconnection and to the provision of service through unbundled network elements in the aftermath of the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S.Ct. 879 (1998). The BOCs' strategy after the Eighth Circuit decision has been to suggest that virtually all Commission action relating to the 1996 Act is suspect, and that the Commission must act gingerly, or not at all, whenever it seeks to bring competition to local markets. They rely principally on the Eighth Circuit's conclusion that section 2(b) of the Communications Act creates a rebuttable presumption that, absent clear legislative direction, Congress did not give the Commission the authority to implement the Act's provisions.

While MCI has joined the Commission in challenging that conclusion (among others) at the Supreme Court, for present purposes it bears emphasis that the Eighth Circuit also concluded that, as to most of the provisions of the Act, Congress expressly granted the Commission the requisite authority. Particularly, with only a very few exceptions, that court rejected BOC claims that the Commission lacked jurisdiction over the Act's unbundling and interconnection requirements, and so upheld virtually all of the Commission's unbundling and interconnection regulations. In saying this we do not minimize the impact of the court's decision striking down the Commission's pricing jurisdiction or its "combination" rule. But the fact remains that most

of the Commission's regulations were sustained, leaving it ample authority to implement most of the pro-competitive provisions of the 1996 Act, even as interpreted by the Eighth Circuit.

This is a critical matter, because unless the Commission acts vigorously to enforce the 1996 Act, the prospects for local competition will be at best dim and uncertain. As the Commission has noted, the incumbent monopolists have no incentive to open their monopoly markets, and, to the contrary, have every incentive to preserve their monopoly status. Acknowledging this fact, in section 271 Congress created a special incentive for the BOCs -- the prospect of in-region long-distance entry if they irreversibly open their local markets. But the lesson of the last two years is that unless the Commission insists on real market-opening measures as a precondition for BOC long-distance entry, local telephone consumers will never see the benefits of competition.

Many of the BOCs' legal arguments prove only their continued resistance to opening their networks to competitive forces. Indeed, BOCs continue to challenge the most fundamental principles of the Act -- including their obligation to take the necessary steps to interconnect their network with the networks of would-be competitors, or to lease their network elements to these competitors. In what follows we demonstrate that the Commission has ample authority to insist that the Act's provisions be enforced. If local markets are to become competitive, the Commission must fully exercise its authority.

Track A/Track B.

a) The need for residential facilities-based service. Under section 271, Track A requires the existence of carriers providing exclusively or predominantly facilities-based service to business subscribers and the existence of carriers providing exclusively or predominantly

facilities-based service to residential subscribers. Congress viewed the existence of competitors for both residential and business service as a prerequisite of BOC entry into long distance, see H.R. Rep. No. 204, 104th Cong., 1st Sess., at 77 (House Report). Indeed, this Commission has already rejected SWBT's Oklahoma section 271 application based on the absence of competitors providing residential service. In Congress' eyes, competition is not sufficient in the absence of predominantly facilities-based competitors. See House Report at 76-77 (the requirement of a facilities based competitor "is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition").

Consequently, Congress required a BOC to show the existence of a predominantly facilities-based competitor for both business and residential services as a precondition of entry into long distance under Track A.[1] By requiring that there be at least one predominately facilities-based carrier for both business and residential customers, the Commission assures that the BOCs are not discriminating against one or the other class of service, and that different hurdles for the two segments do not frustrate facilities-based competition in either. As recent experience in New York shows, BOCs might well desire to impose different burdens on one class of customers than another, because they wish to discourage facilities-based competition for one group of customers. Thus BA-NY has stated it will impose non cost-based charges on facilities-based business customers that it will not charge to residential customers. By requiring

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[1]Congress wrote the predominance requirement in section 271(c)(1)(A) to apply "for purposes of this subparagraph" -- *i.e.*, the entire section (c)(1)(A), which expressly concerns service both "to residential and business subscribers" (emphasis added). And, in discussing that requirement, Congress took care to point out that facilities-based competition for residential customers was possible, see H.R. Rep. 104-458, 104th Cong., 2d Sess., at 148 (Conference Report); House Report at 77, thus emphasizing that the facilities-based requirement applies to residential as well as business service.

the existence of competitors offering predominantly facilities-based service to both classes of customers, the Commission has at least some minimal assurance that such differential treatment has not made facilities-based competition in either the business or residential market impossible.

b) The meaning of "predominantly" facilities-based. The term "predominantly" should be interpreted consistent with its ordinary definition to mean that the "majority" or "most" of the facilities used by a CLEC are its own. The number of access lines used by the CLEC that are its own is one measure of the predominance of the CLEC's own facilities but it is not the exclusive one. Other relevant measures include whether a predominant share of the new entrant's operating costs involve its own facilities. Neither the text of section 271 nor the legislative history directs the Commission to employ one of these measures to the exclusion of others. Each of these measures is important, because each is, to some extent, a measure of the independence of the CLEC from the BOC and its ability to define its own services and control its own costs.

A carrier is predominantly facilities-based if a majority of all of its local telephone business is facilities-based. It is irrelevant that the carrier may have a department, location or subsidiary engaged in providing predominantly or exclusively facilities-based service. This internal allocation of responsibility does not establish the existence of a predominantly facilities-based provider of telephone service. None of these sub-components are what is commonly meant by a "provider." To hold otherwise would render the predominance requirement meaningless because any company that is providing even the smallest amount of facilities-based service is likely to have a division or group responsible for that service. This is an area where a

simple, bright-line rule adopting a literal understanding of the plain statutory text will preclude manipulation of the regulatory process that could result from a less straightforward rule.

c) The importance of geographic dispersion. Track A requires the existence of a competing provider that "must be an actual commercial alternative to the BOC." Okla. Order ¶ 14. The Commission has "recognize[d] that there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC." Mich. Order ¶ 77. Accordingly, the Commission could fairly conclude that Track A requires the existence of CLECs that serve customers geographically dispersed throughout a state. A CLEC that only provides service in one small area within a state is not an actual commercial alternative to the BOC as a practical matter. The fundamental purposes of Track A -- to permit in-region BOC entry only when the BOC faces meaningful competition, and to promote such competition -- would be thwarted if a BOC could satisfy Track A when a competing provider serves only a narrow geographic area. As Congress explained in addressing the meaning of Track A, "[i]t is also the Committee's intent that the competitor offer a true 'dialtone' alternative within the State, and not merely offer service in one business location that has an incidental, insignificant residential presence." House Report at 77. Of course, the converse is also true: Track A does not require that a predominantly facilities-based provider offer service to every customer in every geographic area.

d) Treatment of multiple dwelling units. A CLEC's provision of service to the owner of a multiple unit dwelling who resells the service to residents of the building is provision to a business subscriber, not a residential subscriber. The subscriber, the owner of the building, is not purchasing the service for his personal use but in order to use the service in the course of

his business -- in this case by reselling it. See Okla. Order at 12 n. 63 (defining subscriber as one who agrees to take and pay for something). That is how such service typically is treated in state tariffs. It also is consistent with the goal of section 271(c)(1)(A) by ensuring the existence of a competitive alternative for a broad range of residential customers -- not just for those in large apartment buildings who purchase resold telephone service from the owners of the buildings. On the other hand, when a tenant purchases home phone service directly from a BOC or a CLEC, that tenant should be counted as a residential customer.

e) Implementation schedules. The statutory language is clear; the implementation schedule provision in Track B applies only if the state commission certifies that each CLEC has "violated the terms of an agreement approved under section 252 by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." (emphasis added). In order for the "implementation schedule" provisions of Track B to take effect, the implementation schedule must be part of an approved interconnection agreement. An implementation schedule imposed by a state commission that is not incorporated into an interconnection agreement, and thereby subject to judicial review pursuant to section 252, could not trigger Track B. If a state commission properly concluded that all requesting CLECs violated the terms of their interconnection agreements approved under section 252, by failing to comply, within a reasonable period of time, with the agreements' implementation schedule, Track B would apply. Even when an implementation schedule is in the agreement, Track B would apply only when CLECs have failed "to comply, within a reasonable period of time," with that schedule. Section 251(c)(1)(B). When an implementation schedule is negotiated and is placed into an agreement, it is subject to district court review. Moreover, the requirement that

implementation schedules be included in interconnection agreements ensures that CLECs' obligations are linked to ILEC performance.

Combinations.

While the Eighth Circuit decision vacated a Commission regulation that had prohibited ILECs from discriminatorily separating network elements that were already combined in its network, it did not compel ILECs to engage in such discrimination. The surest method for ILECs to assure nondiscriminatory access to combinations of elements is simply for them not to pointlessly break existing combinations apart. That being so, it is not surprising that most state commissions who have decided the matter have found, either as a matter of state law or as a result of binding interconnection agreements, that ILECs may not engage in this blatantly discriminatory conduct. While the FCC is currently without authority to prohibit this discrimination, it of course must take into account its marketplace effects in evaluating whether the local market is "irreversibly open to competition" in the course of a public interest inquiry in a section 271 application. That is, if a BOC voluntarily chooses to engage in discrimination so that there is no way in most markets for CLECs to offer ubiquitous residential or even small business competition, the local markets will not be irreversibly open as required by the 1996 Act.

In the alternative, the 1996 Act expressly provides that CLECs have a right to combine elements at "any technically feasible point." Section 251(c)(3) (emphasis added). An ILEC does not satisfy its obligation to provide access at "any technically feasible point" by offering access only at one technically feasible point. Addressing the combination of the key elements of loop and switch, the Commission has properly identified at least three technically feasible points of interconnection between the loop and the switch: CLEC collocated space, the main distribution

frame, and "logical" combination whereby these elements are connected electronically. Since each of these interconnections is indisputably "technically feasible," CLECs have a right to demand access at any of these points of interconnection, and the Commission should require ILECs to provide access at all of these points.

Access directly at the main distribution frame conceptually is the most straight-forward kind of access, and does not merit lengthy analysis here. The BOCs should provide such access to CLECs who request it.

Collocation is highly discriminatory and unlikely to be used by CLECs (at least if they have no other reason to collocate). In the real world, telephone companies do not pointlessly introduce multiple points of failure into their network by interposing couplers and jumpers and additional hardware that serve no functional purpose. The unnecessary added cost of paying for the construction and maintenance of a collocation cage also renders this choice uneconomical. Collocation is also unpredictable: collocation costs vary greatly from end office to end office, as does availability. The BOCs propose to "solve" this problem of their own creation by offering different kinds of collocation: shared collocation, "mini" collocation, "cageless" collocation, and so on. But none of these alternatives address the fundamental problem caused by imposing excessive costs and network complexities that serve no useful function.

Logical combination is another technically feasible method of combining loop and switch. The Eighth Circuit did not specify that "separating" had to be physical separation. Indeed, given that some network elements, such as signaling or IDLC loops, cannot be physically separated, as the agency responsible for making sense of that court's ruling, the Commission should not assume that the court was requiring physical separation. The Commission should

require logical combination under its existing (post-Eighth Circuit) legal authority for CLECs who request it.[2]

OSS.

a) The Proper Role of Manual Processes. As both the Commission and the Justice Department have repeatedly acknowledged, electronic flow-through is perhaps the most critical aspect of effective OSS. Such flow-through is critical for all of the relevant OSS functions: pre-ordering, ordering, provisioning, billing, and repair and maintenance. Wherever the standards-setting bodies have provided an electronic OSS solution, and wherever it is clear that they will provide such a solution, the BOCs should make electronic OSS available. To date, almost a year and a half after the Commission ordered the BOCs to have these OSS in place, not a single BOC has satisfactorily implemented these electronic, industry standard, systems.

The BOCs' response to this has been to demand that the Commission engage in entirely hypothetical speculation about whether there may be some OSS that properly involves some amount of manual processing. This demand is intended solely to divert attention from the BOCs' failure to provide industry-standard OSS, a roadblock that has contributed greatly to the absence of meaningful local competition some two years after the Act's passage. The proper answer to the question about manual processing is that both the Commission and the Justice Department have set out detailed OSS requirements that the BOCs have not met. The BOCs should meet them. If and when the BOCs honor their contractual and regulatory commitments, there will be time enough then to consider whether at the margins there are OSS subsystems or fields that are so little used and so complex as to make electronic OSS unnecessary.

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[2]MCI is continuing to evaluate this matter. If and when we develop any further analysis of this option, we would be happy to share our analysis with the Commission.

b) BOC Responsibilities Related to OSS Integration with CLEC Back-End Systems. The BOCs are required to provide OSS that enables CLECs to integrate the OSS with their backend systems at least as well as the BOCs' own backend systems are integrated. Thus, the BOCs must provide system to system interfaces, not interfaces that only allow CLECs to create a far inferior form of integration through, for example, some sort of screen scraping process.

Once the BOC has created a system to system interface (which should be done after obtaining input from CLECs and should be based on industry standards), the BOC must provide accurate documentation to enable CLECs to integrate the interface with their backend systems in a manner that will enable the systems to function smoothly. Once accurate documentation is provided, MCI agrees that it is the CLEC's responsibility to perform the actual integration, although the BOC must provide knowledgeable experts who can answer CLEC questions as the development process occurs. The CLECs, of course, need a reasonable period of time in which to perform the development and integration taking into account the fact that national CLECs like MCI may be undertaking development efforts in many regions simultaneously. So long as CLECs are undertaking reasonable efforts, the OSS interfaces cannot be judged operational until they have been shown to work effectively to process commercial orders all the way from the CLEC's back-end systems through to the BOC's back-end systems.

This is the very test set forth by this Commission in its Michigan Order. Under this test, the BOC must generally rely on evidence of successful commercial usage to prove operational readiness unless the absence of commercial usage is attributable to the competing carriers' business decisions. Mich. Order ¶ 138. In other words, where the absence of commercial usage results from the fact that OSS development by the CLECs necessarily requires time or where the

CLECs' OSS development has been delayed by impediments created by the BOCs, the BOC must wait to show the readiness of its OSS until there has been sufficient time for the CLECs to overcome those obstacles and for commercial usage to arise.

Unbundled Local Switching.

a) Standards for Complying With Checklist Requirements. Both in its First Report and Order, ¶¶ 397-427, see 47 C.F.R. § 51.319(c), and in its Michigan Order at ¶¶ 319-331, the Commission described in some detail what the BOC must do to satisfy the statutory requirement that it provide unbundled local switching ("ULS") as a precondition for long-distance entry. Nothing in the subsequent decision of the Eighth Circuit raised any questions about these now-settled rules, and we are aware of no recent technological developments that require that the rules be revised. The BOCs are fairly on notice of what they must do to satisfy this checklist requirement, and there is no need for the Commission to revisit this area.

Checklist item four requires applicants to provide unbundled local switching, and checklist item two requires nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3). The First Report and Order defines unbundled local switching to be a network element, a conclusion that was not challenged in the Eighth Circuit. 47 C.F.R. § 51.319(c). Consequently, as the Commission found, "to fully implement items (ii) and (iv) of the competitive checklist, an incumbent LEC must provide nondiscriminatory access to unbundled local switching." Mich. Order ¶ 319.

To meet this requirement, a BOC must show that it can make available to a CLEC the line port, the trunk port, and all of the "features, functions and capabilities of the switch," which the regulations define to include the basic switching functions as well as all other features,

including but not limited to dial tone, telephone number, white page listing, custom calling, customized routing, and features such as Centrex. 47 C.F.R. § 51.319(c). Critically, the regulations also require that these functions be made available to CLECs at parity, defined to require that a transfer of a customer through service by unbundled local switching should take no longer "than the interval within which the incumbent LEC currently transfers end users between interexchange carriers." Id. at 51.319(c)(1)(ii).

More particularly, a BOC at a minimum must have in place OSS sufficient to allow nondiscriminatory access to functions enabling a CLEC to preorder, order and provision the various functionalities that make up ULS. Moreover, the BOC must be able to bill the CLEC accurately for the various switching components, and to provide to the CLEC the necessary information to bill its retail customers, and to use ULS to provide exchange access service. Finally, in this regard, the BOC must provide the CLEC with the necessary OSS to repair and maintain the switching functions it leases.

Additionally, there are a host of issues that have arisen in the places MCI has ordered ULS that need to be resolved before this checklist item is fully implemented. Chief among them is price: NRCs associated with ordering switching typically are so high as to make this element for all practical purposes unavailable. The BOCs must also resolve on reasonable and nondiscriminatory terms other fundamental questions such as where to locate the point of interconnection between the local and long-distance network when the local network uses ULS, how termination of long-distance traffic is measured in such a network, and how signals can be routed to the CLECs' own OS/DA platforms.

b) FCC's Authority to Require ILEC Interconnection with CLEC OS/DA Platforms. The Commission has ample authority to require BOCs to make the software changes necessary to allow them to use their Feature Group D ("FGD") trunks to enable CLECs to interconnect their OS/DA platforms with the BOCs' switches. The Act requires BOCs to provide interconnection on terms that are "just, reasonable, and nondiscriminatory." Section 251(c)(2). In its First Report and Order, the Commission specified "that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." ¶ 198. That understanding of the Act was expressly "endorsed" by the Eighth Circuit, Iowa Utilities Board v. FCC, 120 F.3d at 813 n.33. The Eighth Circuit drew a sharp distinction between this statutory obligation to modify the existing network, and what it determined to be an unlawful rule requiring BOCs to provide interconnection "at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves." Id. at 812. The court interpreted the statutory phrase "at least equal in quality" to mean only that the quality be equal, so that CLECs may not order ILECs to build "a yet unbuilt superior" network. Id. at 813.

A rule requiring BOCs to make software changes so that they can interconnect with OS/DA platforms that use FGD signaling is squarely within the rule stated in paragraph 198 of the First Report and Order and endorsed by the Eighth Circuit. Nothing in the Eighth Circuit's ruling striking down the FCC's "superior quality" rules is to the contrary. CLECs do not want FGD signaling as opposed to MOSS signaling because they want some superior service the BOCs are not providing to themselves. The question here has nothing to do with quality at all -- it is simply a matter of two incompatible systems that need to be able to "speak" to each other if

the interconnection required by the Act is to take place. The need for such a rule is plain: unless the BOCs are required to take the necessary steps to condition their networks, there will be insurmountable obstacles to interconnection, and one of the central requirements of the Act will be frustrated. As the Commission ruled, in findings that have not been challenged, the "incumbent LEC networks were not designed to accommodate third-party interconnection or use of network elements at all or even most points within the network. If incumbent LECs were not required, at least to some extent, to adapt their facilities to interconnection or use by other carriers, the purposes of sections 251(c)(2) and 251(c)(3) would often be frustrated." First Report and Order, ¶ 202.

Not only does the Commission have the authority to require BOCs to modify their networks so that CLECs can make use of their OS/DA databases, it should exercise that authority. Virtually all CLECs use FGD, while the BOCs use MOSS. It is technically feasible for either the BOCs or the CLECs to deploy a system to translate between MOSS and FGD. The only question is how this translation can be most efficiently accomplished. Obviously it is more reasonable and efficient to have the translation done once by the BOC, so that all CLECs can receive FGD signaling, than to have each CLEC separately purchase and install translation equipment. In fact, the only reason the BOCs object to making this modification is that they would rather have each CLEC go to the expense of purchasing, installing, and operating its own translation equipment. The result of such inefficient interconnection could well be that CLECs will as a practical matter be unable to use their own OS/DA platforms. The Act, and the Commission's regulations, give the Commission ample authority to insist that interconnection be

facilitated in a reasonable and efficient manner, with costs borne in a competitively neutral fashion.

c) FCC's Authority to Make Findings Related to Technical Feasibility.

In reviewing an application under section 271, the Commission is obliged to consider whether the BOC has met its obligation to provide interconnection and access to network elements "at any technically feasible point." In an aberrant decision, the North Carolina state commission has held that it is not technically feasible for a BOC to unbundle customized routing, a critical component of unbundled local switching. BOCs apparently have suggested that the FCC must accept without independent review this finding in passing on a subsequent section 271 application. This is not so.

The FCC indisputably has authority to implement the Act's provisions involving "technical feasibility." The BOCs challenged the substance of these Commission rules, and the Eighth Circuit upheld the Commission's definition. 120 F.3d at 810. At the same time, no party before that court challenged the Commission's definition of customized routing as a "feature[], function[], and capabilit[y]" of a switch, 47 U.S.C. § 153(29), and therefore a "network element" that must be unbundled.

The BOCs nevertheless argue that the FCC ceded its authority on this point to the states, such that it now is bound by whatever judgment the states make on this question. This is simply not the case. Instead, in its definition of "technically feasible" enforced by the Eighth Circuit, the FCC gave substance to this requirement by determining, for example, that "feasible" means "capable of being accomplished," and not merely "currently possible," ¶ 202, and that factors such as economic concerns and space limitations should not be considered in evaluating

technical feasibility. Id. The Commission then went on to identify many particular points of interconnection that it found to be technically feasible, and, as to others, determined that "incumbent LECs must prove to the appropriate state commissions that a particular interconnection or access point is not technically feasible." Id. 198.

By setting standards and then directing state commissions to resolve disputes that arise in negotiating interconnection agreements by imposing on the BOCs the burden of proving that those standards have been met, the FCC says nothing at all about its own authority to review state judgments in the context of section 271 applications. In this context, a comparison to the FCC's authority independently to assess BOC prices in section 271 proceedings that was the subject of the Eighth Circuit's mandamus order is instructive. In that order the court found determinative the fact that "the FCC has no valid pricing authority over these areas of new localized competition," and that the FCC could not "participate" in determining prices. Slip Op. 4. The court found that the FCC's assertion of jurisdiction to determine BOC compliance with the checklist's pricing requirements was a back-door method "which will coerce state commissions to adopt its vacated pricing rules," and as such an elicit attempt by the FCC to "reassert its authority to establish prices." Id. at 5.

In contrast, in reviewing in the context of a section 271 application a state determination that a particular point of interconnection is technically infeasible, the Commission frequently would be doing no more than assuring that its own rules have been complied with. Thus in North Carolina, the state commission ruled that customized routing is technically infeasible on the theory that customized routing might lead to exhaustion of line class codes, which are necessary for one kind of customized routing. MCI v. BellSouth, Complaint filed May 28, 1997,

No. 5:97-CV-425-BR-2(E.D. N.C.). As MCI is currently arguing in a complaint in federal district court, this ruling is predicated on a definition of "technical feasibility" that is directly contrary to the FCC's definition, pursuant to which capacity concerns are not an appropriate ground for finding something technically infeasible. There is no merit to the suggestion that in a section 271 proceeding the Commission lacks the authority to review a state commission judgment to ensure the state's fidelity to the FCC's own, lawful, regulation.

Section 271 "does not require the FCC to give the state commissions' views any particular weight. Unless the Commission concludes to its own satisfaction that the applying BOC has satisfied . . . the statutory requirements, it 'shall not approve the authorization.'" SBC v. FCC, __ F.3d __ (D.C. Cir. 1998), slip op. at 12-13. If the FCC concludes that a state commission has misapplied the law or its rules, or that events subsequent to the state commission ruling compel a different conclusion than that reached by the state,[3] nothing in section 271, the FCC's rules, or any decision of the Eighth Circuit can fairly be read to strip the FCC of its authority to make an independent judgment as to whether the BOC has satisfied its obligations under the checklist with respect to customized routing or technical feasibility. In reaching that judgment, the Commission should of course give whatever weight is appropriate to relevant state commission findings, considering, inter alia, the state of the administrative record, the extent to which the state explained its decision and addressed the contentions of the parties, and

[3]In this regard, in addressing the issue of the technical feasibility of customized routing in a section 271 context, it would be relevant for the Commission to consider that aside from North Carolina, every state commission of which we are aware has found customized routing to be technically feasible. In particular, though the Kentucky Commission initially ruled that customized routing was not technically feasible, in its first order on reconsideration it reversed itself and required BellSouth to prove that customized routing is not technically feasible, and in its subsequent second arbitration order the Commission ordered BellSouth to provide customized routing to MCI.

subsequent developments. As to the technical feasibility of customized routing, where BOCs are offering or have agreed to offer customized routing in many states, the Commission should feel no compulsion to defer to North Carolina's singular judgment that it is nevertheless not technically feasible.

FCC's Authority to Require BOCs to Provide ITC Listings.

[This issue, as well as other questions on directory assistance, will be fully addressed in a separate submission that will follow shortly.]

FCC's Authority to Require BOCs to Pay Reciprocal Compensation for ISP Traffic.

The Commission has the authority to require BOCs to pay reciprocal compensation for ISP traffic. Section 251(b)(5) of the Act requires all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252(d)(2) in turn states that

> For the purposes of compliance by an incumbent local exchange carrier with Section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> > (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier . . . .

Although the Eighth Circuit struck down the Commission's pricing rules on reciprocal compensation, it did not strike down any aspect of the Act. The Act explicitly requires that reciprocal compensation be paid for "transport and termination of telecommunications," and the Commission is the agency charged with interpreting that statutory command. Thus, even if, arguendo, the Commission may not set actual prices or pricing methodologies for reciprocal compensation, it indisputably has the authority to interpret what type of traffic is subject to the

Act's reciprocal compensation requirements. Nothing in the Eighth Circuit's decision prevents the Commission from interpreting whether ISP traffic is "telecommunications" within the meaning of sections 251(b)(5) and 252(d)(2) and the structure of the Act.

Additionally, the regime proposed by the BOCs, whereby they treat ISP calls over their network as local, but would treat the same calls originating on CLECs' networks as interstate, is discriminatory, and the Commission has jurisdiction to determine whether a BOC is discriminating in its obligation to provide interconnection under section 251(c)(2). The Commission has already determined that ISP calls should be exempt from the access charge regime and treated as local end user calls. So long as the Commission maintains the existing pricing structure for ISPs as end users, there is no legal basis for treating ISP traffic differently than the traffic of any other similarly-situated end users for the purposes of reciprocal compensation.

Appropriate Uses of the Bona Fide Request Process.

Bona fide request (BFR) processes are not on their face illegal. BFR processes should be limited, however, only to legitimate cases where they are necessary to fulfill extraordinary requests from competing carriers. In such instances, the use of a BFR process can advance the pro-competitive goals of the Act by enabling greater flexibility between ILECs and CLECs regarding interconnection and access to unbundled network elements. In order for the BFR process to be appropriate, it must be reasonable and nondiscriminatory, so that non-routine CLEC requests are treated as efficiently as requests from the BOCs' own business units. It is critically important that BFRs should not be required for what should be ordinary business-to-business interactions. In such cases, requiring CLECs to comply with costly and time-

consuming BFR processes is discriminatory and is an unreasonable term and condition of interconnection in violation of the Act.

The Commission's Authority to Require BOCs to Provide Redundant and Diverse 911 Trunks.

Pursuant to sections 251(c)(2) and 271(c)(2)(B)(vii), a BOC has the duty to provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory and in particular to provide nondiscriminatory access to 911 and E911 services. Thus, a BOC must provide 911 trunks in a manner that allows CLECs to offer 911 services that are equal in quality to the 911 services that the BOC offers to its own customers. Diverse and redundant 911 trunks are needed to ensure that CLECs can provide equal-in-quality services. Because 911 outages are more competitively damaging to CLECs than to the BOC, see Mich. Order ¶ 274, it is appropriate to require diversity and redundancy even if the BOC has chosen not to build similar diversity and redundancy into its own network.

Further authority for requiring a BOC to provide diverse and redundant 911 trunks can be found in the Commission's statutory mandate to promote the safety of life and property. See 47 U.S.C. § 151. Ensuring effective 911 service is an important part of the Commission's implementation of that mandate. See Mich. Order ¶ 257.

Conclusion

The Commission has ample authority to implement most of the critical provisions of the 1996 Act. For the Act to achieve its purpose and bring competition to monopoly local telephone markets, the Commission must make full use of that authority.

April 28, 1998