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

JUN 1 - 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Performance Measurements and)	
Reporting Requirements)	CC Docket No. 98-56
for Operations Support Systems,)	RM 9101
Interconnection, and Operator Services)	
and Directory Assistance)	

**COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION**

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SUMMARY

The Notice of Proposed Rulemaking (“NPRM”) seeks comments on the Commission’s national “performance measurements” and “reporting requirements” for measuring incumbent local exchange carrier (“ILECs”) obligations to provide competitive local exchange carriers (“CLECs”) access to ILECs’ operations support systems, interconnection, operator services, and directory assistance services. According to the Commission, its model rules would not be legally binding. Yet, the Commission surmises that mandatory model rules may be necessary if state commissions and the ILECs fail to implement its legally non-binding regulations.

The Commission’s NPRM is unnecessary and misguided. Prior Commission policy rejected national standards in favor of private negotiation, state commission oversight, and federal district court review. This policy comports with the requirements of the Telecommunications Act of 1996. Similarly, there is no evidence in the NPRM supporting a change in the Commission’s prior policy. By contrast, the NPRM is inconsistent with the Commission’s previous Orders. Moreover, the explosive growth in competition in the local exchange market, and the development of CLECs with billions of dollars in market capitalization, is clear evidence that the existing process is working quite effectively without national model rules.

The use of an NPRM to establish legally non-binding regulations purportedly to provide guidance to state regulators on access by CLECs to the network features and functions of ILECs is an inappropriate means for the Commission to express public policy, or a non-binding policy statement. Compliance by the Commission with requirements of the Administrative Procedure

Act and the Commission's own regulations seem to have been sacrificed in favor of administrative expediency. The Commission's NPRM creates regulatory uncertainty by using the NPRM to suggest rulemaking, while announcing that the very rules proposed are legally non-binding -- for now.

The Commission's NPRM also raises serious questions regarding the jurisdictional authority of the Commission to establish model rules which impact intrastate telecommunications services. USTA is concerned that the action undertaken by the Commission challenges the Eighth Circuit Court decision that the Commission did not have the authority to impose, review, or enforce the terms of agreements between ILECs and CLECs.

Beyond the authority of the Commission to act pursuant to this NPRM, its model rules are unenforceable by the Commission's own admission. Thus, the Commission may not enforce its model rules in any complaint proceedings, Section 271 proceedings and in any matter involving ILECs subject to Section 251(f).

The Commission's NPRM acknowledges that its legally non-binding model rules may impose additional costs upon ILECs, with particular administrative and financial hardship imposed on small, rural and mid-size ILECs. Unfortunately, the Commission's NPRM correctly raises questions about the regulatory burdens of complying with the Commission's model rules, but fails to recognize that the Commission has no authority to adopt cost recovery because the model rules which the Commission expects ILECs to comply with are not legally binding.

USTA urges the Commission to forbear from imposing its model rules. The Commission should rely upon its prior public policy that encouraged private negotiations, while rejecting

national standards. As the unprecedented growth in local competition makes clear, market forces, regulatory forbearance, and the elimination of burdensome regulations, are the most effective means to ensure that competition continues to grow in the local exchange market.

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INTRODUCTION

The United States Telephone Association ("USTA") hereby files these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM").¹ USTA is the principal trade association of the incumbent local exchange carrier ("ILEC") industry.

USTA opposes the Commission's effort in this proceeding to establish national "performance measurements" and "reporting requirements" for operations support systems ("OSS"), interconnection, operator services and directory assistance. The Commission's NPRM proposes non-legally binding performance and reporting requirements² which suggests a one-size-fits-all approach to these issues.

¹ Notice of Proposed Rulemaking ("NPRM"), FCC 98-72, released April 17, 1998.

² 63 Fed. Reg. 27021-27035 (1998).

The Commission's proposed "performance measurements" and "reporting requirements" impose *de facto* binding regulations, are burdensome, contrary to the pro-competitive deregulatory requirements of the Telecommunications Act of 1996 ("Act"), establishes pre-conditions for the private negotiations intended by the Act, are inconsistent with the Administrative Procedure Act ("APA"), and raise important jurisdictional questions regarding the scope of the Commission's authority as a result of the rulings of the Court of Appeals for the 8th Circuit. The Commission cannot use its broad administrative authority over interstate telecommunications services to require ILECs to comply with Commission mandates that are legally and procedurally defective. ILECs are faced with an untenable choice of complying with legally non-binding regulations, or face uncertain sanctions by the Commission for complying with the requirements of the Act regarding their obligations to provide non-discriminatory access to their network features and functions.

If the intended audience for the Commission's model "performance measurements" and "reporting requirements" are state commissions, and the Commission's intent is to provide what it believes is guidance to the states, then such guidance may prove useful. The Commission, however, could have simply informally released its proposal.

This NPRM is an inappropriate vehicle for the Commission to express its views on implementation of access to ILEC's operational support systems, interconnection, operator services, and directory assistance. The Commission's NPRM creates regulatory uncertainty, confusion and potential harm to local competition. USTA urges the Commission to forebear from imposing national regulations or, in the alternative, authorize full cost recovery for expenses incurred by ILECs in complying with the Commission's mandate. Commissioner

Furchtgott-Roth's dissent identifies important defects in the Commission's NPRM and why it should not have been issued in the first instance. USTA supports the arguments raised by Commissioner Furchtgott-Roth against adoption of model "performance measurements" and "reporting requirements." USTA's arguments opposing national standards are consistent with its prior comments and reply comments filed in this proceeding.

I. COMMISSION ACTION IS MISPLACED

The Commission states that the primary goal of the NPRM "is to provide the requested guidance to the states in the most efficient and expeditious manner possible."³ Next, the Commission makes clear that "These model performance measurements and reporting requirements would not be legally binding."⁴ In defining what it is proposing, the Commission seeks to distinguish what it is not proposing in the NPRM:

We emphasize, however, that we do not propose performance or technical standards in this area, preferring instead to rely in the first instance on the industry standard-setting process and contractual arrangements between private parties.⁵

The Commission attempts to give meaning to its terms while attempting to distance the NPRM from the relief sought by LCI/CompTel in their Petition⁶ filed May 30, 1997:

We underscore that "performance measurements" and "reporting

³ NPRM at 12, ¶23.

⁴ *Id.*

⁵ NPRM at 9, ¶17.

⁶ LCI/CompTel Petition for Expedited Rulemaking, Public Notice DA No. 97-1211, released June 10, 1997.

requirements” are quite different from “performance standards” and “technical standards.” In this Notice, we use the term “performance measurements” to refer to the measures used to collect data regarding an incumbent carrier’s performance, such as the period of time it takes to order and provision a resold service. Likewise, we use the term “reporting requirements” to refer to the incumbent LEC’s obligation to collect performance measurements and provide the results of those measurements to other parties. On the other hand, we use the term “performance standards” to refer to specific performance goals or benchmarks, such as a requirement that an incumbent LEC complete a resale order for residential service within a specific period of time. Finally, we use the term “technical standards” to refer to the establishment of industry-wide OSS interface specifications.⁷

This NPRM is not the most effective, efficient and least burdensome means for the Commission to provide guidance to the states on operational support systems, interconnection, operator services and directory assistance issues. Commissioner Furchtgott-Roth correctly reasons that Sections 251 and 252 are sufficient to ensure access to ILEC network features and functions, and that the consequences from this NPRM are “large, bad, and unintended.”⁸ According to the Commissioner, this NPRM: (1) relies on regulations, and not market forces; (2) fails to recognize that there is no evidence in the record that private negotiations between parties and state commission arbitration and mediation proceedings are not working; (3) raises real questions regarding FCC jurisdiction over implementation issues involving access to the network features and functions of ILECs because of the 8th Circuit Court decision; and (4) is an example

⁷ NPRM at 9-10, ¶18.

⁸ Dissenting Statement of Commissioner Harold Furchtgott-Roth at 1 (April 16, 1998).

of excessive regulation⁹ even assuming that the Commission has jurisdiction to act.

USTA agrees with the sentiments articulated by Commissioner Furchtgott-Roth. The Commission's actions are inconsistent with its prior position against imposing national standards. Moreover, there is no evidence in the NPRM to support a change in the Commission's prior public policy which has favored private negotiations between ILECs and CLECs regarding operations support systems, interconnection, operator services and directory assistance issues, while recognizing the efforts of state commissions in implementing policies on access to the ILEC's network features and functions.

While the NPRM is well-intentioned, USTA urges the Commission to revisit its own findings and policy statements that led the Commission to reject national standards for access to OSS of ILECs. USTA believes that the Commission's own arguments supporting regulatory forbearance are just as compelling today as they were when the Commission issued its local competition *Order*¹⁰ and its *Second Order on Reconsideration*.¹¹

II. THE COMMISSION HAS CORRECTLY REFUSED TO IMPOSE NATIONAL STANDARDS

The Commission has also consistently declined in the past to adopt national standards of any kind involving OSS, or find a basis of engaging in any enforcement action against an ILEC

⁹ *Id.* at 2-4.

¹⁰ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (August 8, 1996).

¹¹ *Id.* *Second Order on Reconsideration* (December 13, 1996).

for non-compliance with Section 251(c)(3) and 251(c)(4).¹² As USTA stated:

[I]n the *Second Report on Reconsideration*, the Commission rejected delaying implementation of nondiscriminatory access to OSS functions until national standards were fully developed by stating that ***it is apparent from arbitration agreements and ex parte submissions that access to OSS functions can be provided without national standards.*** The Commission further concluded that ***We continue to encourage parties to develop national standards for access to OSS functions, but decline to condition the requirement to provide access to OSS functions upon the creation of such standards.*** According to the Commission, there was no basis on which the Commission should ***initiate enforcement action against incumbent LECs that are making good faith efforts to provide such access within a reasonable period of time, pursuant to an implementation schedule approved by the relevant state commission.*** Negotiated agreements contain measurements for comparing the performance of incumbent LECs in providing OSS functions equivalent to the level of performance the incumbent LECs and its customers, or other carriers receive. These agreements are approved by state commissions. Within these state commission approved agreements are implementation schedules which vary from agreement to agreement depending upon the needs of the parties. The Commission should not mandate national performance standards because parties are capable of negotiating agreements pursuant to individual needs.¹³

The Commission also acknowledged the role that state commissions were playing regarding implementation of OSS. As USTA stated in its Comments:

Also, in the *First Report and Order*, the Commission discussed at length the role state commissions, including the New York, Georgia, Illinois, and Indiana commissions, have played in establishing requirements for implementation and access to OSS functions. Many states have passed laws or adopted regulations regarding electronic interfaces and specific timetables for parity of access to OSS functions. The Commission stated ***We recognize***

¹² USTA Comments at 15-16, RM-9101 (July 10, 1997), citing *Second Report on Reconsideration* at 7, ¶13, CC Docket No. 96-98 (December 13, 1996).

¹³ *Id.* (emphasis in USTA's comments).

*the lead taken by these states and others, and we generally rely upon their conclusions in this Order.*¹⁴

USTA is unaware of any changed circumstances, enforcement actions, or other justifiable reasons, that support the Commission's unprecedented regulatory action as proposed in the NPRM. Similarly, incoming Common Carrier Bureau Chief Kathryn Brown supported negotiation over regulation of OSS agreements:

What is obvious from the Commission's *First Report and Order* is the presence of clearly defined requirements that incumbent LECs must meet to provide OSS functions on a case-by-case basis to CLECs for unbundled network elements under Section 251(c)(3) and for resale of LEC services under Section 251(c)(4) on a nondiscriminatory basis pursuant to terms and conditions enjoyed by the incumbent LEC. This process involves contracting between incumbent LECs and CLECs. *As Kathryn Brown of the Department of Commerce, National Telecommunications Information Administration stated "optimally the relationship between the carriers should be a contractual one. We have to move ... away from a regulatory prescriptive approach to a contractual approach."*¹⁵

There is a total absence of supporting arguments in favor of adopting the Commission's model rules. To the contrary, during the Commission's *en banc* hearing on local competition, USTA confirmed, as the Commission had in its *Second Order on Reconsideration*, that local competition agreements continue to proliferate at an accelerated pace, with over 2,400 negotiated interconnection agreements between ILECs and CLECs existing in all 50 states in accordance

¹⁴ *Id.* at 12 (emphasis in USTA's comments).

¹⁵ USTA Comments at 12-13, *citing* Common Carrier Bureau Operations Support Systems Forum, Comments of Kathryn C. Brown. Transcript at 65 (May 28, 1997)(emphasis added).

with the Act.¹⁶ Statistical data supports the view that private negotiations, and not additional regulations, has led to local competition. As USTA noted there were 1,600 collocation agreements, 22 billion minutes of traffic exchanged between just five ILECs and new competitors while ILECs processed over 8,000 competitive orders daily for more than 1,200 certificated CLECs operating in all 50 states.¹⁷ These figures have obviously increased since January 1998. Based upon analyst reports, CLECs are gaining market share at an incremental rate of \$3 billion annually, that CLEC access lines are expected to double to 3 million lines in 1998 and 5 million lines by 1999 with a corresponding doubling of CLEC market share in the local exchange market.¹⁸ Negotiation between parties, not regulations has led to the successful introduction of competition into the local exchange market since the passage of the Act.¹⁹

The growth in CLEC business lines during the first quarter of 1998 is further evidence that market forces, and not regulations, are driving local competition. As Solomon Smith Barney Analyst Jack Grubman recently reported, the impact on market share gains by CLECs is unprecedented:

Specifically, the CLECs ... added 498,000 new business lines while the Bells as a group added 461,000 net business lines, thus the CLECs as a group accounted for 52% of the total business line additions between the Bells and CLECs and the CLECs as a group

¹⁶ Statement of USTA's Roy M. Neel, President and CEO (January 29, 1998).

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 5.

¹⁹ It is important to note that its has been less than two years since the Commission issued its Orders on local competition. The fact that thousands of interconnection agreements have been successfully negotiated, and CLECs are a growth industry, supports continuation of the Commission's public policy in not adopting national standards.

accounted for 108% of Bell business line additions.

To put this in perspective, the non-AT&T long distance competitors did not have more incremental minutes than AT&T until 1986, a full 10 years after MCI carried its first switched long distance minute. What this shows is that the combination of access to low cost capital coupled with a clear regulatory and public policy initiative toward opening up local markets has allowed the CLECs as a group to achieve in less than 2 years after the Telecom Act, what it took MCI and other alternative long distance carriers over 10 years to achieve during the 1970s and 1980s. If one takes the obvious logical extension of this, this means that the 50% loss of market share that AT&T saw from 1986 through 1996 could be replicated in the local market in a much quicker time period.²⁰

Until now, the Commission has consistently relied upon the requirements of the Act favoring private negotiations between parties, recognized the efforts of ILECs and state commissions to implement the requirements of the Act, while encouraging the industry to develop private sector solutions to meet the divergent needs of all parties. There is no reason for the Commission to divert from its prior public policy positions which have rejected a one-size-fits-all approach to local competition issues. Conversely, there are compelling reasons why the Commission's NPRM should be withdrawn.

²⁰ Grubman/McMahon, *CLECs Surpass Bells in Net Business Line Additions for First Time*, (May 6, 1998); See USA Today (May 7, 1998). As USTA stated during the Commission's *en banc* hearing on local competition, ILECs had lost more than 1.5 million telephone lines to competitors, "practically all lucrative business customers." See Presentation of Roy M. Neel at 3 (January, 29, 1998).

III. THE COMMISSION'S USE OF AN NPRM TO PROPOSE LEGALLY NON-BINDING MODEL RULES RAISES SERIOUS CONCERNS REGARDING COMPLIANCE WITH THE APA AND COMMISSION REGULATIONS

Under the Administrative Procedure Act ("APA"), there are two distinct types of rules, *i.e.*, "legislative rules," which create new law, rights, or duties, in what amounts to legislative action, and "interpretive rules," which do not create rights, but instead clarify existing statutes or regulations. The proposed model rules neither constitute rulemaking nor interpretive action under the APA.²¹ The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or public policy"²² According to the APA, a rulemaking "means agency process for formulating, amending, or repealing a rule."²³ Moreover, agency action "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent denial thereof, or failure to act."²⁴

Clearly, by the Commission's own admission, its model "performance measurements" and "reporting requirements" are not legally binding. The Commission states that "these model performance measurements and reporting requirements would not be legally binding." To enforce its position, the Commission further states:

The adoption of national, legally binding rules may prove

²¹ 5 U.S.C. §553 (1997).

²² 5 U.S.C. §551(4).

²³ 5 U.S.C. §551(5).

²⁴ 5 U.S.C. §551(13).

unnecessary, however, in light of the states' and carriers' application of the model performance measurements and reporting requirements we propose to adopt in the first instance. We underscore, however, that we have no intention to issue binding rules in the first instance.²⁵

Given that the Commission's proposed rules are not legally binding by the Commission's own admission, then the NPRM is procedurally defective. Conversely, the Commission admits that it would not impose national standards if state commissions and carriers voluntarily adopt the Commission's legally non-binding regulations. The Commission's NPRM has the *de facto* impact of legally binding regulations. In short, the Commission is using the NPRM process to "jawbone"²⁶ ILECs and state commissions to adopt its model rules through a regulatory process that does not comport with APA requirements. Yet, the threat of agency action leading to legally-binding national regulations involving the implementation of access to the network features and functions of ILECs is explicit should the Commission's jawboning prove unsuccessful.

Notwithstanding the fact that the Commission's stated intent is not to propose legally binding national standards for access to ILEC operations support systems, interconnection, operator services and directory assistance services, the force and effect of the Commission's NPRM unequivocally establishes that the Commission has done just that. The Commission's actions are inconsistent with the APA and constitute agency action which is arbitrary, capricious,

²⁵ NPRM at 12, ¶24.

²⁶ "Jawboning" is defined as an effort to influence or pressure through strong persuasion, with the intent to urge voluntary compliance with government guidelines. *See American Heritage Dictionary of the English Language.*

an abuse of agency discretion, and subject to judicial review. The status of agency guidelines as "rules" is determined by their binding character, and the fact that any agency, including the Commission, uses the term guidelines is not controlling because it is the impact, and not the phrasing, that matters.²⁷

As interpreted by prior court decisions, the Commission's NPRM proposes legally binding rules. In *McLouth Steel Products Corp. v. Thomas*,²⁸ the EPA argued that its model rules were a "non-binding statement of agency policy."²⁹ The court rejected the EPA's assertion by finding that the language in the Federal Register notice based upon "the agency's own words strongly suggest that the model is not just a musing about what the agency might do in the future," but in fact "[t]he agency treated the model as conclusively disposing of certain issues"³⁰ The court opined that the "model thus created a norm with "present-day binding effect" on the rights of ... petitioners."³¹ In short, the court held that the EPA's model was an "affirmative definition of a legislative rule: it substantially curtails EPA's discretion ... and accordingly has present binding effect."³² The Commission's NPRM proposes legally non-binding model rules

²⁷ See *Western Coal Traffic League v. U.S.*, 694 F.2d 378, 392 (5th Cir. 1982), *rehearing*, 719 F.2d 772, *cert. denied*, 466 U.S. 953 (1983).

²⁸ 838 F.2d 1317 (D.C. Cir. 1988).

²⁹ *Id.* at 1320.

³⁰ *Id.* at 1321.

³¹ *Id.*

³² *Id.* at 1322; *see, also American Min. Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)(judicial decision must determine whether the disputed rule has "the force of law").

which the Commission states it intends to make binding unless the states and ILECs voluntarily adopt these regulations.³³ As in *McLouth*, the Commission, like the EPA, has proposed rules with “present binding effect.”

Conversely, the Supreme Court reiterated in *Lincoln v. Virgil*,³⁴ that general statements of policy are “issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” and that such statements are exempt from the APA’s notice and comment procedures required of rulemakings.³⁵ In *Telecommunications Research and Action v. F.C.C.*,³⁶ the court describes the differences in legal impact between a rulemaking and release by an agency of a general policy statement:

Before an agency may adopt a substantive rule, it must publish a notice of the proposed rule and provide interested persons an opportunity to comment The APA, however, does not require notice and public comment procedures for “general statements of policy”

A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

³³ NPRM at 12, ¶24.

³⁴ 508 U.S. 182, 197 (1993); *Bechtel v. F.C.C.*, 10 F.3d 875, 878 (D.C. Cir. 1993)(policy statements are exempt from APA notice and comment requirements, but are subject to attack before applied in future cases).

³⁵ *Id.* at 197.

³⁶ 800 F.2d. 1181 (D.C. Cir. 1986).

A general statement of policy ... does not establish a "binding norm " The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy.³⁷

Whether an effort at rulemaking, or a general statement of policy, the Commission's proposed model rules are not enforceable. USTA believes that the regulatory confusion created by the Commission's NPRM could have been avoided if the Commission had released a policy statement.³⁸

The Commission's own regulations are also being violated by the issuance of the NPRM. As required by the Commission's regulations "Rulemaking proceedings are commenced by the Commission, either on its own motion or on the basis of a petition for rulemaking."³⁹ When making a determination to grant or deny a petition for rulemaking, the Commission must act as follows:

If the Commission determines that the petition discloses sufficient reasons in support of the action requested to justify the institution of a rulemaking proceeding, and notice and public procedure ... are required or deemed desirable by the Commission, an appropriate notice of proposed rulemaking will be issued In all other cases the petition for rulemaking will be denied and the petitioner will be notified of the Commission's action with the grounds therefor.⁴⁰

³⁷ *Id.* at 1186 (emphasis added).

³⁸ If by operation of law, the Commission is proposing legally binding model rules, then the NPRM is at best confusing. If the model rules are nothing more than an statement of Commission policy, then an NPRM was unnecessary, and the policy statement is unenforceable.

³⁹ 47 C.F.R. §1.411 *citing* 47 C.F.R. §§ 1.401-1.407.

⁴⁰ 47 C.F.R. §1.407.

In addition, a Commission NPRM must disclose "Either the terms or substance of the proposed rule or a description of the subjects and issues involved."⁴¹

The NPRM makes clear that the Commission is not proposing legally binding regulations. Secondly, the Commission announces that it is denying the substance of the requests made in the LCI/CompTel Petition for Expedited Rulemaking. Specifically, the Commission concluded in the NPRM:

In developing model rules, we tentatively conclude that it is not appropriate at this time to undertake certain additional actions requested by petitioners. These additional actions include establishing performance standards, technical standards for OSS interfaces, and remedial measures for non-compliant incumbent LECs. For the reasons discussed below, we decline to pursue these measures at present and seek comment on this tentative conclusion.⁴²

The NPRM raises legitimate concerns about whether the Commission's actions are consistent with the APA, Commission regulations, constitutional due process rights of ILECs and other interested parties, the Act's intent that parties would privately negotiate terms and conditions regarding access to the network features and functions of ILECs, and the 8th Circuit Court's decision rejecting Commission assertions of jurisdiction over implementation of Section 251(c) requirements. The Commission should formally deny the LCI/CompTel Petition for Expedited Rulemaking in accordance with Section 1.407 of its regulations, and on its own motion terminate further action with respect to this NPRM.

⁴¹ 47 C.F.R §1.413(c).

⁴² NPRM at 53, ¶124.

IV. THE COMMISSION'S JURISDICTIONAL AUTHORITY TO ESTABLISH NATIONAL STANDARDS IS QUESTIONABLE

USTA stated in comments and reply comments in this proceeding that the plain language of the Act prohibits the Commission from imposing national standards regarding access by competitors to unbundled network elements, interconnection and resale of ILEC network features and functions. Any effort by the Commission to do so through this NPRM would be a clear challenge to the 8th Circuit Court decision.

In reply comments filed in this proceeding, USTA argued that the 8th Circuit Court decision "preserves implementation and review of interconnection, unbundling of network elements, and resale agreements to state commissions and federal district courts, [and that] the Commission unequivocally lacks the authority to grant the relief requested in the LCI/CompTel Petition."⁴³ The court rejected the Commission's arguments that based on Sections 251 and 252, Section 208 complaint proceedings, and Section 2(b) that the Commission had the authority to impose, review or enforce the terms of agreements pursuant to the Act. USTA agrees with Commissioner Furchtgott-Roth that the Commission could have released its model rules in an informal paper, thereby avoiding the potential for litigation over the Commission's jurisdiction regarding implementation issues.⁴⁴ Under any circumstances, the Commission's model rules are not enforceable.

⁴³ USTA Reply Comments at 2, RM-9101 (July 30, 1997).

⁴⁴ Dissenting Statement of Commissioner Harold Furchtgott-Roth at 2-3 and 6-7.

V. THE COMMISSION'S MODEL RULES ARE NOT OTHERWISE ENFORCEABLE

According to the NPRM, the Commission's model rules are not legally binding.⁴⁵

Therefore, the Commission has no authority to consider Section 208 complaints based upon these model rules, or use these model rules in evaluating Section 271 applications by RBOCs for in-region long distance authority. Similarly, state commissions are not bound by the model rules, and are subject to individual state requirements for imposing regulations on ILECs in general, in evaluating RBOC in-region long distance applications, and in Section 251(f) proceedings. Any effort to enforce the Commission's legally non-binding model rules would be inconsistent with the due process rights of ILECs.

VI. SMALL AND MID-SIZE ILECS SHOULD NOT BEAR THE COSTS OF COMPLYING WITH THE COMMISSION'S MODEL RULES

The Commission seeks comments on whether compliance by small, rural and mid-size ILECs "will impose particular costs or burdens" on these carriers.⁴⁶ According to the Commission, "the proposed reporting requirements may require [ILECs] to modify existing computer systems to collect the necessary data."⁴⁷ In addition, the Commission "recognize[s] there may be a certain level of expense involved in generating performance measurements and

⁴⁵ NPRM at 12-13, ¶24.

⁴⁶ *Id.* at 56, ¶131.

⁴⁷ *Id.*

statistical analysis"⁴⁸

The Commission has correctly identified several administrative and financial hardships imposed upon ILECs in general, and small, rural, and mid-size companies in particular, in complying with legally non-binding Commission rules. Not only are the Commission's proposed model rules unnecessary given the explosive growth in local competition, the Commission is unable to provide cost recovery for ILECs in complying with these proposed model rules. The Commission admits that its proposed model rules are legally non-binding. If the model rules are intended as guidelines, or a statement of policy, then the Commission could not solve these problems in this proceeding. Based on this indisputable fact, the Commission could only grant cost recovery through a formal commission proceeding. USTA has demonstrated that the NPRM does not comport with the APA or the Commission's regulations.

Unfunded Commission mandates constitute bad public policy and are inconsistent with the pro-competitive, deregulatory intent of the Act when promulgated pursuant to APA and Commission regulations. The fact that the Commission's NPRM proposes unenforceable regulations, which *de facto* will prove administratively burdensome and costly to comply with, is legally and procedurally untenable. The Commission can correct this anomaly by simply withdrawing its NPRM. In the alternative, USTA urges the Commission to adopt a legally permissible means for all ILECs to recover their costs in meeting the "performance measurements" and "reporting requirements."

⁴⁸ *Id.*

CONCLUSION

The Commission's NPRM proposes legally non-binding model rules. Also, the NPRM denies the LCI/CompTel Petition in every way short of issuing an order. Meanwhile, competition is growing at unprecedented levels. There is no need for the Commission to reverse its prior public policy by imposing needless regulations.

Although perhaps well-intentioned, the NPRM is unintelligible, unnecessary, unworkable, and unenforceable. Certainly, ILECs prefer to spend their limited resources responding to the Commission's many pending dockets in which legally binding rules are being considered. USTA submits that the Commission should withdraw this defective NPRM and continue to rely upon private negotiations, state commission action, review by federal courts and at all times market forces to govern the implementation of access to operations support systems, interconnection, operator services and directory assistance of ILECs. Conversely, ILECs must be permitted full cost recovery for expenses associated with complying with any legal requirement by the Commission to impose national model rules.

The public interest benefits of market-driven forces and regulatory forbearance will continue to be the most efficient, effective and least burdensome and costly means to ensure that local competition continues to grow. USTA urges the Commission to remove this unintended regulatory uncertainty by relying on its prior public policy that encouraged private negotiations as the cornerstone of local competition, while recognizing that national standards are unnecessary to