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August 19, 1998

**VIA HAND DELIVERY**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Washington, DC 20554

RECEIVED  
AUG 19 1998  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation  
CC Docket No. 96-98  
CPD 97-30

Dear Ms. Salas:

Pursuant to Sections 1.1206(b)(1) and (2) of the Commission's rules, 47 C.F.R. Sections 1.1.206(b)(1) and (2), I am providing this notice of an *ex parte* presentation in the above-captioned matters.

On August 18, 1998, I and Richard M. Rindler, on behalf of WorldCom, Inc. and US LEC, Inc. met with Kathryn Brown, Chief Common Carrier Bureau, and Kathryn Schroder and Tamara Preiss of the Common Carrier Bureau concerning a motion by BellSouth Corporation for referral to the Commission on primary jurisdiction grounds filed in Civil Action No. 3:98CV170-MU pending in the United States District Court for the Western District of North Carolina, Charlotte Division.

A summary of our presentation is attached.

An original and four copies are enclosed.

Sincerely,



Patrick J. Donovan

cc: Kathryn Brown  
Katherine Schroder  
Tamara Preiss  
Edward Krachmer

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The North Carolina Utilities Commission earlier this year ruled against BellSouth in its proceeding concerning whether ILECs are required to pay reciprocal compensation to CLECs for Internet traffic. BellSouth appealed that decision to federal district court in North Carolina and filed a motion that the matter be referred to the FCC on primary jurisdiction grounds.

WorldCom, US LEC, and other CLECs are concerned that the Commission may take the affirmative step of intervening in the North Carolina appeal by requesting referral to the FCC.

We are concerned by this because:

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- The FCC for nearly two years has allowed 20 state proceedings concerning reciprocal compensation to proceed without requesting a referral of any of them to the FCC on primary jurisdiction grounds. In every one of these cases, state commissions have agreed with the CLEC position that ILECs owe reciprocal compensation to CLECs for Internet traffic.
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- It is not appropriate at this late date for the Commission to request a primary jurisdiction referral.
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- It is unusual for the Commission to intervene in an appeal of a state proceeding.
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- A primary jurisdiction referral would effectively preempt all twenty state commissions that have addressed this matter.
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- It would be gratuitous and unnecessary for the Commission to request a primary jurisdiction referral because the Commission can in any event rule on the underlying reciprocal compensation issues if it desires to do so.
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- Stepping in to support BellSouth could be interpreted as a prejudgment by the Commission of the underlying issues before the Commissioners have actually voted on the matter.
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- We are concerned that Commission staff may take this step soon before interested parties have had an opportunity to meet with Commissioners. (Pleadings are due to the court by August 27.)
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- Courts have said that the states, not the FCC, have primary authority to interpret what the parties have agreed to in interconnection agreements. States have "primary authority to enforce the substantive terms of the agreements made pursuant to section 251 and 252." *Iowa Utilities Board* 120 F.3d 753, 804

## **INFORMATION SHEET ON PRIMARY JURISDICTION**

The majority of U.S. appellate courts have held that the issue of primary jurisdiction, if not raised in the proceeding below, was waived. In those few cases where an appellate court invoked the doctrine, they did so *sua sponte*. The Supreme Court has expressly declined to invoke the doctrine *sua sponte*, arguably endorsing the view that the issue cannot be heard for the first time on appeal.

### **1. Primary Jurisdiction Waived if First Raised on Appeal**

*Kendra Oil & Gas, Inc. v. Homco, Ltd.*, 879 F.2d 240 (7th Cir. 1989).

Having lost on the merits, Homco suddenly perceived the virtue of a second opinion. . . . To try the case fully, discard a verdict, refer the case to an agency, and then retry the dispute is to waste everyone's time, and courts don't have time to waste. . . . Primary jurisdiction therefore may be waived or forfeited. 879 F.2d at 242.

*Gross Common Carrier, Inc. v. Baxter Healthcare Corp.*, 51 F.3d 703 (7th Cir. 1995).

*United States v. Campbell*, 42 F.3d 1199 (9th Cir. 1994).

The entry of a judgment in the case resolved all issues bearing on matters within agency competence. Referral to the [agency] at this stage would only produce pointless delay. 42 F.3d at 1203

*United States v. Bessemer and Lake Erie R. Co.*, 717 F.2d 593 (D.C. Cir. 1983).

Put simply, the time for urging the doctrine of primary jurisdiction has passed in this case. . . . We may not now second guess whether the trial judge used his discretion wisely. 717 F.2d at 599.

### **2. Primary Jurisdiction Recognized *Sua Sponte* by Court of Appeals**

*Louisiana & Arkansas Railway Co. v. Export Drum Co., Inc.*, 359 F.2d 311 (5th Cir. 1966)

*Atlantic Express, Inc. v. Standard Transportation Services, Inc.*, 955 F.2d 529 (8th Cir. 1992)

*Distrigas of Massachusetts Corp. v. Boston Gas Company*, 693 F.2d 1113 (1st Cir. 1983)

### **3. Supreme Court Declines to Invoke Primary Jurisdiction *Sua Sponte***

In *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 114 S.Ct. 855 (1994), the United States Supreme Court noted that none of the parties had raised the primary jurisdiction argument below and, on that basis, declined to invoke it on its own. 510 U.S. at 367, n. 10, 114 S.Ct. at 863, n. 10.