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February 12, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation in CC Docket Nos. 96-98

Dear Ms. Salas:

Transmitted herewith on behalf of Hyperion Telecommunications, Inc., KMC Telecom, Inc., RCN Telecom Services, Inc., and CoreComm Ltd., pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1997), I hereby provide three copies of an *ex parte* letter sent to Chairman Kennard regarding the above-referenced proceeding.

Should any further information be required with respect to this *ex parte* notice, please do not hesitate to contact me. I would also appreciate it if you would date-stamp the enclosed extra copy of this filing and return it with the messenger to acknowledge receipt by the Commission.

Sincerely,

Richard M. Rindler

Richard M. Rindler

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Honorable William E. Kennard
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C., 20554

Re: ***Ex Parte Presentation in CC Docket No. 96-98***
Request for Immediate Interim Guidance in Light of the U.S. Supreme Court's Iowa Utilities Board Decision

Dear Chairman Kennard:

On behalf of Hyperion Telecommunications, Inc., KMC Telecom, Inc., RCN Telecom Services, Inc. and CoreComm Ltd., we hereby respectfully request that the Commission promptly issue an order to provide guidance to the industry concerning the impact of the United States Supreme Court's recent decision in *AT&T v. Iowa Utilities Board.*

We congratulate the Commission on the outcome of the *Iowa Utilities Board* decision. The Court's opinion represents a victory for the Commission's efforts to promote local competition consistent with the Telecommunications Act of 1996 ("1996 Act"). Many competitive local exchange carriers ("CLECs") have found in the intervening days, however, that the Regional Bell Operating Companies ("RBOCs") and GTE intend to use the decision to inhibit competitive entry. Because the Supreme Court's decision reaffirmed the Commission's authority to interpret and implement many of the pro-competitive provisions of the 1996 Act, we urge the Commission to promptly issue an order consistent with the views expressed in this letter to ensure that the goals of the 1996 Act are achieved.

When the Supreme Court handed down its decision in the *Iowa Utilities Board* case on January 25, 1999, it appeared at first to represent a "shot in the arm" for the cause of local competition. After more than two years of litigation and regulatory uncertainty, CLECs anticipated finally taking the fight to compete for customers out of the courtroom and into the marketplace. Yet in the intervening days since the Supreme Court's decision, the RBOCs and GTE have taken steps to circumvent the spirit of the Commission's reinstated rules and the *Iowa Utilities Board* ruling, adopting unreasonable and anticompetitive positions on matters such as "pick and choose," intraLATA toll dialing parity, and the determination of whether certain network elements will be available to CLECs.

Promptly issuing an order to provide guidance following *AT&T v. Iowa Utilities Board* would not be without precedent. Following the decision of the U.S. Court of Appeals for the Ninth Circuit in *California III*, this Commission released an interim order granting the RBOCs limited waivers to continue providing enhanced services on an integrated basis even as the rules governing the provision of such services were being considered more thoroughly upon remand.[1] Accordingly, we request that the Commission promptly issue an interim order to provide guidance to the industry in light of the Supreme Court decision. Specifically, we urge the Commission to clarify incumbent local exchange carrier ("ILEC") obligations and CLEC rights with respect to the following issues.

1. ***Access to Unbundled Network Elements:*** Although the Supreme Court remanded the Commission's rule on UNEs so that the Commission could further develop the standard it used in defining UNEs, there is nothing in the decision that eliminates any existing UNE. Based on recent ILEC actions, there is the danger that because the Supreme Court vacated the Commission's rule defining UNEs, an ILEC will assert that it is under no obligation to provide a specified UNE to a competitor. Even if there were an argument for questioning the existence of a UNE, however, CLECs should at a minimum be able to obtain access to the several UNEs that are spelled out in section 271. It is essential that in this interim period, CLECs' businesses using UNEs or having the contractual right to obtain UNEs, not be disrupted. Unfortunately, the ILECs do not necessarily agree with this conclusion. Indeed, even as the RBOCs and GTE have apparently pledged to the Commission that they will continue to provide existing UNEs while this matter is revisited upon remand, Ameritech has filed a pleading in federal court in Michigan asking that the court vacate a state commission decision requiring the provision of unbundled common transport. GTE and other RBOCs have similarly made representations that they may attempt to limit access to UNEs. Denying CLECs adequate access to UNEs could bring much of the competitive local exchange market to a standstill, and it would also represent a severe abrogation of the ILECs' contractual

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[1] *Bell Operating Companies' Joint Petition of Waiver of Computer II Rules*, 10 FCC Rcd 1724 (1995).

obligations. The public interest dictates that ILECs not be allowed to "pull the plug" on UNE access by competitors.

To ensure that competitors continue to have adequate access to UNEs, and to affirm the commitments apparently made by the RBOCs and GTE, the Commission should direct that ILECs must continue to make available to *all CLECs* – whether under existing interconnection agreements or in the context of new negotiations – the UNEs identified in the *Local Competition Order* pending future definition of what satisfies the "necessary" and "impair" standards in the 1996 Act.

2. ***Allowing CLECs to Exercise 252(i) Rights:*** Since the Eighth Circuit first stayed many of the Commission's local competition rules in October 1996, CLECs seeking to obtain interconnection and UNEs from an incumbent have been forced to either enter into new interconnection agreements or opt into other carriers' agreements in their entirety. Under the Supreme Court's recent ruling, however, CLECs should now be able to take individual provisions of other agreements in the manner envisioned by Congress and by the Commission in its *Local Competition Order*. This ruling is a significant benefit for those CLECs now negotiating new contract. To ensure that the procompetitive goals of the 1996 Act are being served, those CLECs who entered the market while the rule was temporarily vacated should not be deprived of the full extent of their rights under the statute. We respectfully request that the Commission direct that *all CLECs* – even those currently operating under effective interconnection agreements with ILECs – have the right under section 51.809 of its rules to avail themselves of individual provisions of other carriers' contracts in accordance with that rule.

We call to the Commission's attention the fact that at least one of the RBOCs has already attempted to manipulate this rule in the wake of the Supreme Court's decision to delay competitive entry and thwart CLEC efforts to exercise their section 252(i) rights. Bell Atlantic has claimed that only certain approved agreements will be made available to other CLECs, rejecting prior CLEC requests to "opt into" other agreements and thereby preventing these CLECs from getting into business in several jurisdictions. It has gone so far as to deny opt-ins when the CLEC is seeking to opt into the entire agreement, not to "pick and choose." The Commission should therefore clarify that an ILEC may not deny a CLEC request to take provisions from an ILEC's effective agreement with another CLEC where the ILEC is currently providing UNEs or services under those provisions to the other CLEC.

Moreover, even if the ILEC is not currently providing UNEs or services to a CLEC under an effective agreement, the Commission should require the ILEC to make the provisions of that agreement available to other CLECs unless the incumbent can demonstrate that use of that agreement would be technically infeasible or unreasonable in some other manner. Because CLECs seeking to "opt into" other agreements are often attempting to enter a market on a highly expedited

basis, the Commission should also clarify – consistent with paragraph 1321 of its *Local Competition Order* – that it will promptly address any disputes over whether a particular agreement should be made available to a CLEC pursuant to section 252(i) within two weeks of a request.

3. ***UNE Combinations and Elimination of "Glue" Charges:*** Following the Eighth Circuit's finding that ILECs were not required to provide combined UNEs for CLECs, a number of incumbents began proposing artificial "glue charges" that CLECs could be required to pay in order to obtain combined UNEs. Although these charges had little, if any, basis in cost given that the UNEs were usually already combined in the ILECs' networks, some CLECs agreed to pay these charges so that they could begin providing service. In light of the Supreme Court's holding that ILECs are required to provide UNEs in combination, the Commission should affirm the requirement for ILECs to provide combined UNEs and prohibit ILECs from imposing any "glue charges" under interconnection agreements that are entered into following the issuance of this order. These charges – which already represented a windfall for the ILECs – are all the more baseless now that the ILECs are obligated by statute to provide UNEs on a stand-alone or combined basis. In addition, in the interest of implementing the provisions of the 1996 Act on an industry-wide basis, the Commission should clarify that even those CLECs operating under existing interconnection agreements that do not provide for combined UNEs or require the payment of "glue charges" have the opportunity to demand renegotiation of the contracts to eliminate these charges and to require the ILECs to provide UNE combinations consistent with the 1996 Act.

4. ***IntraLATA Toll Dialing Parity:*** Although the Commission's rules directing the implementation of intraLATA toll dialing parity were initially vacated by the Eighth Circuit in *California v. F.C.C.*, a number of state commissions attempted to compel the RBOCs to implement dialing parity even in the absence of national rules. Yet carriers such as Bell Atlantic and Ameritech have at every turn fought their obligation to implement dialing parity under the 1996 Act, relying upon distorted interpretations of the statute and resorting to litigation to maintain their firm, monopoly-era grasp on the intraLATA toll market.

The Supreme Court's reaffirmation of the Commission's authority to implement the 1996 Act makes it perfectly clear that the RBOCs are required to provide toll dialing parity by February 8, 1999, as section 51.211 of the Commission's rules originally provided. The RBOCs, however, continue their efforts to evade this obligation by all possible means. Indeed, Ameritech has now challenged the Michigan Public Service Commission's order directing the implementation of dialing parity by February 8, 1999, apparently claiming that the state commission lacks jurisdiction to order Ameritech to provide dialing parity. Ameritech's action is particularly disingenuous when one considers that the date established by the Michigan commission is no different than the date by which this Commission's reinstated rules require that dialing parity be implemented.

It is therefore clear that Ameritech and other RBOCs will use every procedural hurdle in their arsenal to delay the implementation of dialing parity that both federal and state regulators (as well as consumers and competitors) want in place. To counter the ability of the RBOCs to engage in these anticompetitive and evasive tactics, while recognizing that carriers need time to implement parity, the Commission should issue an order requiring each RBOC to implement intraLATA toll dialing parity by March 31, 1999 for those states in which parity is not already in place. If an RBOC believes that this schedule does not provide adequate time to prepare for implementation in a specific jurisdiction, it should be required to petition for a waiver of the Commission's rules and propose a date certain by which dialing parity will be in place.

Acting in accordance with the recommendations set forth in this correspondence will help to provide certainty and continuity as the industry and regulators sort through the implications of the *Iowa Utilities Board* decision. Although this decision represents a validation of the Commission's efforts to open the local exchange market to competition, the incumbents have already shown that they will attempt to utilize temporary ambiguities resulting from the decision to their competitive advantage. This decision was recognized by the Commission as a major step forward for competition. The ILECs should not be permitted to turn the decision into a step backward from the goal of local competition. We therefore respectfully request that the Commission make the determinations requested above within the next 30 days to ensure that the ILECs are unable to stall competitive progress in the wake of the Supreme Court's decision.

Respectfully submitted,

Andrew D. Lipman
Richard M. Rindler
Eric J. Branfman

Counsel for
KMC Telecom, Inc.
Hyperion Telecommunications, Inc.
RCN Telecom Services, Inc.
CoreComm Ltd.

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Christopher Wright
Lawrence Strickling