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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

February 25, 1999

Ms. Magalie Roman Salas
Secretary Federal Communication Commission
445 12th Street, SW
Washington, DC 20554

EX PARTE PRESENTATION

Re: *In the Matter of Petition of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell for Expedited Declaratory Ruling on Interstate IntraLATA Toll Dialing Parity, or in the Alternative, Various Other Relief, NSD File L-98-121; CC Docket No. 96-98*

Dear Ms. Salas:

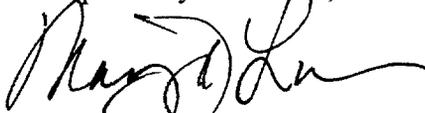
Attached are two recent documents issued in state proceedings addressing intraLATA dialing parity implementation.

- *Order Requiring Implementation of Dialing Parity by BellSouth, South Carolina Public Service Commission, February 10, 1999*
- *Pacific Bell's (U 1001 C) Brief on Dialing Parity Issues in Response to the Assigned Commissioner's Ruling, California Public Utilities Commission, February 19, 1999*

Please include this in the record of these proceedings in accordance with Section 1.1206 (a)(2) of the Commission Rules.

Please contact me should you have any questions at 202.887.3045.

Respectfully submitted,



Mary De Luca
Federal Regulatory

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of Alternative)	
Regulatory Frameworks for Local)	I.87-11-033
Exchange Carriers)	
)	A.85-01-034
)	A.87-01-002
)	I.85-03-078
And Related Matters)	I.87-02-025
(IntraLATA Presubscription Phase))	Case 87-07-024
)	
)	

PACIFIC BELL'S (U 1001 C) BRIEF ON DIALING PARITY
ISSUES IN RESPONSE TO THE ASSIGNED
COMMISSIONER'S RULING

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I. PRELIMINARY STATEMENT.

Pacific Bell files this brief in response to the Assigned Commissioner's Ruling ("Ruling"), dated February 3, 1999. The Ruling requests the parties to brief the "subject of dialing parity requirements in light of the Supreme Court decision" in AT&T Corp. v. Iowa Utilities Bd.¹ and identifies specific subjects to be addressed. Ruling, pp. 2-3. The Ruling further instructs that the briefs should be "thorough and complete." Ruling, p. 2.

In Decision No. 97-04-083,² the Commission determined that "Pacific Bell is required to implement intraLATA presubscription coincident with its parent company's entry into the long distance market." April Decision, p. 45 (Conclusion of Law No. 3). As we demonstrate below, there is no reason for the Commission to modify that decision:

- The April Decision correctly determined that the Telecommunications Act requires Pacific Bell to implement dialing parity "coincident with" its exercise of the "authority to provide interLATA services" 47 U.S.C. §271(e)(2)(A). There is nothing in the Act that mandates dialing parity by February 8, 1999 or a date earlier than long distance entry. 47 U.S.C. §271(e)(2)(B); see, AT&T Communications of Virginia Inc. v. Bell Atlantic Virginia, Inc., Civil Action No. 98-2821-A (E.D. Va., February 5, 1999) (rejecting AT&T argument and concluding that there is "no way" to read §271 "as imposing a deadline by which intraLATA toll dialing parity is required" (Slip. Op., p. 18)).³

¹ U.S. __, 1999 WL 24568 (U.S., Jan. 25, 1999) (hereinafter, "Iowa Utilities Bd.").

² In the Matter of Alternative Regulatory Frameworks for LECs (IntraLATA Presubscription Phase), D.97-04-083, 1997 WL 377077 (Cal.P.U.C., Apr. 23, 1997) (hereinafter, "April Decision").

³ The ALJ Draft Decision, which has been withdrawn by the Ruling, is in accord: "We interpret the plain language of Section 271(e)(2)(B) to be permissive rather than mandatory." Draft Decision, p. 5.

- The Supreme Court's decision in Iowa Utilities Bd. and any FCC rules that may be issued as a result, do not and should not cause this Commission to change the April Decision. The Commission's decision is preserved under sections 251(d)(3) and 261(b) of the Act and also on a separate, independent basis in state law, grounded in the law of contracts and the enforcement of settlement agreements.
- The April Decision followed evidentiary hearings, and AT&T, et al. cannot reject the parts of the Decision and settlement agreement that they do not like (dialing parity coincident with long distance entry) and require us to implement the rest. If the Commission were disposed to modify or rescind the April Decision, evidentiary hearings would be required (Pub. Util. Code §1708) to litigate issues (regarding notice, business office procedures, etc.) that would necessarily have to accompany this process.

II. THE BACKGROUND OF THE COMMISSION'S APRIL 1997 DIALING PARITY DECISION AND THIS PROCEEDING.

A. The Commission Decision and the Belated Application to Modify that Decision.

As the Commission's April Decision states in detail, proceedings in the IntraLATA Presubscription Phase of this docket commenced in April 1996, involving Pacific Bell, GTEC, ORA and the major interexchange carriers. The proceeding involved workshops, settlement negotiations and agreements, and eight days of evidentiary hearings. See April Decision, pp. 5-8. The April Decision resolved numerous issues concerning dialing parity, including the timing of intraLATA presubscription, PIC methodology and changes, performance measures, liquidated performance remedies, business office practices and customer notice provisions.

In resolving these issues, in particular the performance remedies, the April Decision adopted a settlement agreement between AT&T, MCI, Sprint, ORA and Pacific Bell. The settlement agreement was incorporated into the Decision and

approved as "reasonable in light of the whole record, consistent with Law, and in the public interest." April Decision, pp. 15-16, 43 (Finding of Fact No. 12); Appx. A.

Both the Decision and the settlement agreement are premised on the date being the same for Pacific Bell's implementation of dialing parity and entry into long distance. Thus, for example, the Commission's summary states that the "date of implementation will be the date that a Pacific Bell affiliate begins competition in the long distance market * * *." Id. at 2. The April Decision concludes that "Pacific Bell is required to implement intraLATA presubscription coincident with its parent company's entry into the long distance market." Id. at 45 (Conclusion of Law No. 3); see also, e.g., id. at 6, 9-10, 14; Appx. A, pp. 2-4.

It is, moreover, clear from the April Decision that the Commission did not address a number of issues that Pacific Bell had raised expressly because intraLATA presubscription would coincide with long distance entry. In one section discussing "timing," the Decision states:

"Pacific Bell initially asked whether 1-plus dialing should be considered in conjunction with cost and pricing proceedings in the event it faced intraLATA competition and loss of business before it could compete in the interLATA market, or before regulatory safeguards were in place to protect Pacific Bell's revenue. Since Pacific Bell will not be required to implement 1-plus dialing until it is authorized (through an affiliate) to compete in long distance service, this issue is no longer before us." April Decision, p. 10 (emphasis added and citation omitted).

No party sought rehearing or review of the April Decision and it became final in May 1997.

In September 1998, AT&T, CalTel, MCI and Sprint filed a petition to modify the April Decision. The petition, which made no attempt to comply with the Commission's rules,⁴ presented a single legal issue for the Commission. Petitioners' contended that section 271 (e)(2)(B) of the Telecommunications Act required or mandated Pacific Bell to offer intraLATA dialing parity by February 8, 1999, even if it was not yet authorized to provide long distance service. As petitioners' counsel stated at the prehearing conference, this motion presented a "purely legal" issue. PHC-14, November 23, 1998, Tr. 911. Following briefing on this issue, the Draft ALJ Decision denied AT&T's motion and upheld simultaneous dialing parity and interLATA relief. On January 25, 1999, shortly before comments were due on the ALJ Draft Decision, the Supreme Court issued its decision in Iowa Utilities Board.

B. The Supreme Court's Decision in Iowa Utilities Board.

In August 1996, the FCC issued two decisions that made findings and rules designed to implement the local competition provisions of the Act.⁵ A number of parties, including this Commission, challenged various aspects of the FCC rules in appeals that were consolidated in the Eighth Circuit Court of Appeals. That court, in two opinions, invalidated substantial portions of the FCC rules, primarily

⁴ AT&T's petition was filed over a year and one-half after the April Decision and failed to offer any justification for delay as required by the Commission's rules. Rule 47, sections (b) and (d). The ALJ's Draft Decision correctly concluded that the "petition for modification is untimely" (e.g., p. 11) but did not propose to dismiss on that basis.

⁵ First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, 61 Fed. Reg. 45476 (Aug. 8, 1996); Second Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98 and 95-185, 61 Fed. Reg. 47284 (Aug. 8, 1996).

on the grounds that, in certain areas, the FCC exceeded its jurisdiction in promulgating rules the Act had left to state commissions. Iowa Utilities Bd., v. F.C.C., 120 F.3d 753 (8th Cir. 1997); People of the State of Cal. v. F.C.C., 124 F.3d 934 (8th Cir. 1997).

The FCC and numerous parties filed petitions and cross-petitions for certiorari requesting the Supreme Court to review these decisions. The FCC's petition for certiorari raised the issues whether the FCC had the authority to issue rules implementing the Act, including rules concerning pricing and dialing parity, whether the FCC could issue rules requiring the CLECs to combine unbundled networks elements, and whether the FCC could require CLECs to make available specific provisions of an existing interconnection agreement without also accepting the terms of the entire agreement (the "pick and choose" rule). See FCC's Petition for a Writ of Certiorari, appended hereto as Exhibit A (identifying the questions presented for review). The Supreme Court granted all the petitions. Slip. Op., p. 9.

In a majority opinion by Justice Scalia, the Supreme Court addressed three broad aspects of the Eighth Circuit's decisions. First, the Supreme Court reviewed the Eighth Circuit's holding that the states, not the FCC, generally have jurisdiction over the prices and terms of intrastate facilities and services made available pursuant to the 1996 Act. Iowa Utilities Bd., 120 F.3d, supra, at 793-805. Second, the Court considered FCC rules that established terms and conditions under which incumbent LECs must make pieces of their networks available to new entrants. See id. at 807-818. Finally, the Court considered the legality of the FCC's "pick and choose" rule, which the Eighth Circuit had struck

down as inconsistent with the Act's preference for voluntary negotiations between carriers. Id. at 800-801.

Like the Eighth Circuit, the Supreme Court considered jurisdictional issues principally in the context of pricing. Unlike the court of appeals, however, the Supreme Court found that the FCC does have jurisdiction under 47 U.S.C. §201(b) to promulgate rules to guide state decisions on the pricing of unbundled network elements ("UNEs"), resold services, and intrastate dialing parity. Slip Op. pp. 9-17; see generally 47 C.F.R. §§51.501-51.515, 51.601-51.611, 51.701-51.717 and 51.205-215. The Supreme Court did not address the merits of many of the FCC rules because the Eighth Circuit had not yet ruled on their substantive validity. See 120 F.3d at 800; as Justice Breyer pointed out with regard to the FCC's pricing approach, it was not before the Court. Slip. Op., p. 17 (Breyer, J., concurring in part and dissenting in part). Although not relevant here, the Supreme Court addressed a series of related issues regarding the terms under which incumbent LECs must unbundle their local networks for new entrants (id. at 20-28) and also reversed the Eighth Circuit and upheld the FCC's "pick and choose rule," which implemented 47 U.S.C. §252(i). Id. at 28-29.

Three Justices wrote separate opinions. Justice Souter disagreed with the majority's rejection of the FCC's guidelines for determining what UNEs must be provided to CLECs. Justice Thomas (joined by Chief Justice Rehnquist and Justice Breyer), dissented from the Court's jurisdictional findings, on the basis that "the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission." Slip. Op., p. 2 (Thomas,

J., concurring in part and dissenting in part). Justice Breyer wrote a separate opinion faulting the majority's jurisdictional analysis, but also rejecting the proposition that the 1996 Act compels use of a TELRIC-like, forward-looking pricing methodology. Slip. Op., pp. 13-17 (Breyer, J., concurring in part and dissenting in part).

III. THE SUPREME COURT'S DECISION DOES NOT REQUIRE THE COMMISSION TO DEPART FROM THE APRIL DECISION, WHICH WAS THE CORRECT DECISION CONSISTENT WITH THE ACT.

A. The Supreme Court's Decision Does Not Automatically Reinstate the FCC Rules and the FCC Rules Will Necessarily Have to Be Reissued.

Under the Supreme Court's rules, parties have 25 days to petition for rehearing and the effective date of the Supreme Court's decision likely will be today, February 19. The Supreme Court's order provides:

"For the reasons stated, the July 18, 1997 judgment of the Court of Appeals, 120 F. 3d 753, is reversed in part and affirmed in part; the August 22, 1997 judgment of the Court of Appeals, 124 F. 3d 934, is reversed in part; and the cases are remanded for proceedings consistent with this opinion." Slip. Op., p. 30.

The Supreme Court will thus send both judgments back to the Eighth Circuit for proceedings consistent with its opinion. The Supreme Court has made it clear that the FCC has "general rulemaking authority" to issue rules implementing the local competition provisions of the Act. Id. at 9, 17. On remand, the Court of Appeals will now have to decide, in light of the Supreme Court's decision, which FCC rules it will address on the merits or which rules, if any, may be sent back to the FCC. Where the Eighth Circuit concluded that the FCC lacked the authority to issue the rules, it did not reach the issue of whether the rules as promulgated were

consistent with the Act (see, e.g., the Court's discussion noting that the FCC lacked jurisdiction to issue the pricing rules, but that "we vacate the FCC's pricing rules on that ground alone and choose not to review these rules on their merits." 120 F.3d, supra, at 800.

In the area of dialing parity, the Eighth Circuit did not address the relationship between the timing provisions in section 271(e)(2) and the FCC's general rulemaking authority under section 201(b).⁶ Because it determined that the FCC's authority did not extend to any aspect of intrastate telecommunications, the Court of Appeals had no occasion to consider the narrower question whether the FCC rules were otherwise consistent with the provisions of the Act. *

If the FCC's dialing parity rules were to be remanded to the FCC, the effectiveness and status of those rules is far from clear as it relates solely to the FCC's own procedures. The February 8, 1999 date for implementation set forth in 47 C.F.R. §51.211(a) will no longer be valid because the date will have past. The FCC rules also require a state-approved implementation plan and notice to customers. 47 C.F.R. §51.213. The FCC necessarily will have to issue new rules that take into account the circumstances that exist today as opposed to when the rules initially were issued.

⁶ As MCI's counsel stated at the prehearing conference, the "Eighth Circuit vacated the rules on purely jurisdictional grounds, never reached the merits of any of those rules, including the merits of the rule in question here. In other words, the Court did not say that the FCC's interpretation of this issue was wrong, right or before it all because of the jurisdictional issue * * * ." PHC-14, November 23, 1998, Tr. 905.

B. The Commission Would Not Have to Change its April 1997 Decision Even if Valid FCC Rules Were to be Reissued Establishing a New Date for IntraLATA Dialing Parity.

1. The Act Specifies that the States Regulate the Timing of IntraLATA Toll Dialing Parity.

Congress recognized that requiring all carriers immediately to implement dialing parity for intraLATA toll calls would lead to an unfair competitive imbalance. Congress imposed special restrictions on Pacific Bell (and other BOCs), that prohibit them from providing interLATA services until they obtain FCC authority under section 271. Congress concluded that forcing us to provide intraLATA toll dialing parity immediately would allow long-distance carriers to exploit a temporary regulatory inequity by offering packages of interLATA and intraLATA services that we would be unable to match.

To prevent long-distance carriers from unfairly capitalizing on this disparity, Congress established two rules in section 271(e)(2). First, Congress made clear in section 271(e)(2)(A) that, when a Bell company obtains authority to provide interLATA service in a state (that is, when it is free to compete with long-distance carriers for all toll traffic), the Bell company "shall provide intraLATA toll dialing parity throughout the State coincident with its exercise of that authority." 47 U.S.C. §271(e)(2)(A) (emphasis added). Second, Congress provided in section 271(e)(2)(B) that "a State may not require a Bell operating company to implement intraLATA toll dialing parity in that state before a Bell operating company has been granted authority under this section to provide interLATA services originating in

that State or before 3 years after February 8, 1996, whichever is earlier." Id. at §271(e)(2)(B).

Section 271(e)(2)(A) and section 271(e)(2)(B), therefore, specifically address the timing of intraLATA toll dialing parity for Pacific Bell. Subsection (A) establishes the latest date by which dialing parity must be implemented, and subsection (B) provides the earliest date by which a state may require such implementation.

Section 251(b)(3) does not change this analysis. It establishes a general duty to provide all forms of dialing parity - interLATA toll, intraLATA toll, and local. But it does not address the question of timing. The general duty, moreover, is clearly qualified by the more specific provisions of section 271(e)(2), which apply only to Bell operating companies and only to the subcategory of dialing parity for intraLATA toll calls. And, under established rules of statutory construction, the specific language controls. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.") (internal quotation marks omitted).

Each provision of the Act addressing dialing parity thus serves a distinct role. Section 251(b)(3) imposes on all local exchange carriers a duty to provide local and interLATA toll dialing parity; it imposes on all but Bell operating companies a duty to provide intraLATA toll dialing parity; and it imposes on Bell

operating companies a duty to provide intraLATA toll dialing parity when the implementation of that duty is triggered either by the terms of section 271(e)(2)(A) or by a state order requiring implementation in accordance with section 271(e)(2)(B). It is only under this reading of the Act that section 271(e)(2)(A) has a meaning independent of section 251(b)(3); there would have been no reason for Congress to enact section 271(e)(2)(A) if section 251(b)(3) already performed the very same function. See Colautti v. Franklin, 439 U.S. 379, 392 (1979) (relying on the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

Thus, under the plain terms of the Act, this Commission retains authority over the timing of Pacific Bell's implementation of intraLATA presubscription, subject to the limits in section 271(e)(2)(A) and (B). Although there is no need to consult legislative history when the meaning of a statute is plain, the legislative history of section 271(e)(2)(B) further establishes that the Act gives the states authority to regulate the timing of intraLATA toll dialing parity.

As originally proposed, section 271(e)(2)(B) stated that "[a] State may not order the implementation of toll dialing parity in an intraLATA area before a Bell operating company has been granted authority under this subsection to provide interLATA services in that area." Telecommunications Act of 1996, S. 652, 104th Cong. §255(b)(ii) (March 31, 1995 - Version 1). In its earliest form, section 271(e)(2)(B) presumed the state's complete authority to order intraLATA toll dialing parity and imposed a limit on that power to protect the Bell operating companies.

Senators Breaux and Leahy offered an amendment, which eventually became section 271(e)(2)(B), that was designed to give the states some flexibility in timing and still provide protection to the Bell companies. 141 Cong. Rec. S8349 (daily ed. June 14, 1995) (statement of Sen. Leahy). Senator Leahy there describes state efforts to order intraLATA dialing parity and commented that states "should not be second-guessed and preempted on the Federal level." *Id.* "[T]he Breaux-Leahy amendment provides a time certain for . . . States to be able to implement such dialing parity on the earlier of 3 years after enactment or when the [Bell operating company] is granted authority to provide interexchange service." *Id.* (emphasis added); see also 141 Cong. Rec. S8348 (daily ed. June 14, 1995) (statement of Sen. Breaux). Both sponsors of the amendment understood that the states have authority to regulate intraLATA dialing parity. Congress was merely deciding to what extent states should be precluded from ordering dialing parity too soon.

2. Any New FCC Rules Would Only Be a Guide for the Relevant States to Implement Dialing Parity.

As discussed above, the Act, in section 251, establishes the general obligation of all local exchange companies concerning interconnection, including the requirement to provide dialing parity. 47 U.S.C. §251(a)-(b).⁷ The timing of intraLATA presubscription is addressed only in section 271(e)(2) of the Act. This section of the Act specifically identifies the "States" - - and not the FCC - - as the

⁷ Section 251(d) requires the FCC within 6 months after enactment of the Act to establish regulations to implement section 251, and at the Supreme Court the FCC relied on this section as an "alternative source" for its jurisdiction. The Supreme Court relied on section 201(b) of the Communications Act of 1934 as the basis for FCC jurisdiction (Slip Op., pp. 9-14), and therefore concluded that the parties' arguments concerning section 251(d) were rendered "academic." *Id.* at 15.

implementators of the timing of intraLATA presubscription. The word "State" is used seven times, while there is no reference at all to the FCC.

The fact that section 271 delegates responsibility for the timing of intraLATA presubscription is significant under the Supreme Court's interpretation of the Act. The LECs and state commissions argued in the Supreme Court that the Act plainly delegated specific authority to the states to implement various provisions of the Act, and that this should, as the Supreme Court put it, "negate particular aspects of the Commission's [FCC's] implementing authority." Slip. Op., p. 16. In reconciling the FCC's general authority to issue rules with the specific delegation to state commissions, the Supreme Court concluded that when the Act "entrusts state commissions with the job," the FCC rules are to guide state commissions:

"None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, 47 U.S.C. §252(e) (1994 ed. Supp. II), and granting exemptions to rural LECs, § 251(f), these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." Slip. Op., p. 17 (emphasis added).⁸

Thus, as the Supreme Court explained in its discussion of pricing, this

⁸ The Supreme Court also stated with reference to §251(b)(3), regarding dialing parity, that the FCC's §201(b) authority is "not superseded" because the states were not mentioned. *Id.* at 17. There is, however, no mention or discussion of section 271 in the opinion.

Commission has the authority to determine the "concrete result in particular circumstances." Id. at 16.

In this regard, moreover, AT&T has interpreted the Supreme Court's decision in Iowa Utilities Bd. in the same manner as we have. AT&T filed an ex parte memorandum with the FCC on February 11, 1999, presenting AT&T's views as to how the FCC should rework its UNE rules in consideration of the Supreme Court's determination that the FCC had not properly interpreted the "necessary" and "impair" standards of the Act. Slip. Op., pp. 20-25; AT&T, Remand Proceeding on Rule 319, February 11, 1999 (Exhibit B hereto). AT&T, in its FCC filing, argues that the FCC should interpret section 251 (d)(2) and (c)(3) as requiring a "national" approach, rather than an approach based on individual markets or carriers. AT&T Remand, pp. 3-4. As support, AT&T argues that section 251 (e)(2) makes the FCC the "agency that is responsible" and contrasts this with how the Act works when the state Commissions are responsible:

"If Congress had intended the core list of minimum networks elements to vary by region and be based on local conditions, it would instead have provided for State Commission's to make such decisions in the first instance, subject to more general FCC rules. Indeed, Congress took this exact path in dealing with several other matters, * * *" AT&T Remand, p. 4.

Here, as noted above, Congress did take this path with regard to the timing of intraLATA presubscription, and this Commission is the specifically identified agency. 47 U.S.C. §271(e)(2).

3. The Commission's April 1997 Decision is a Permissible State Order Under §251(d)(3) Even if New FCC Rules Provide for A Different Implementation Date.

The Commission's April 1997 Decision was consistent with the Act when decided, and it is consistent with the Act now. It will be consistent with the Act even if the Eighth Circuit remands its decision to the FCC and even if the FCC issues new, valid rules that establish a specific date for intraLATA dialing parity that turns out to be a date earlier than the date that Pacific Bell's affiliate is authorized to provide long distance service. This is so because section 251(d)(3) of the Act authorizes state rules and decisions to differ from FCC guidelines, as long as the state decision meets the requirements of this section. The Commission's April Decision is consistent with those requirements, and there is therefore no need for the Commission to change its Decision or for the parties to relitigate various dialing parity issues.

The Act, in section 251(d)(3), is explicit that the FCC "shall not preclude" state access orders. This section provides:

"In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that:

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

The Eighth Circuit had occasion to address this section in connection with its review of the First Report and Order where the FCC determined that its rules override any state commission rules. 120 F.3d, supra, at 806-807. The Court of Appeals concluded that, "[e]ven when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection 251(d)(3) prevents the FCC from preempting a state commission order that established access and interconnection obligations so long as" the order meets the 251(d)(3) requirements. Id. at 806 (emphasis in original). The Court of Appeals rejected the FCC's argument that a state rule "inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251" and concluded that a state interconnection order could "vary from a specific FCC regulation" and comply with section 251(d)(3) "even though it differed from an FCC regulation." Id.⁹

The Commission's April Decision easily satisfies the requirements of section 251(d)(3). First, the April Decision was designed to and does implement "access and interconnection obligations" of Pacific Bell (and GTEC) under the Act. See, e.g., Decision No. 97-04-083, pp. 8-9, 45 (Conclusion of Law No. 1). AT&T, et al. have represented to the Court of Appeals that dialing parity is an equal access obligation under the Act. People of the State of Cal. v. F.C.C., 124 F.3d 934, 942, n.5 (8th Cir. 1997), reversed in part and affirmed in part sub. nom. AT&T Corp. v. Iowa Utilities Bd., 1999 WL 24568 (U.S.) (Jan. 25, 1999). Second, the Commission's April Decision is not inconsistent with the requirements of section

⁹ The Eighth Circuit's interpretation of section 251(d)(3) was not an issue presented for review by the FCC (see Exhibit A appended hereto, pp. 13-14), or any other party.

251 or otherwise inconsistent with the Act, but rather implements those requirements in a manner consistent with and authorized by the Act. See, e.g., 47 U.S.C. §271(e)(2)(B).¹⁰ Finally, the April Decision does not "prevent," much less "substantially prevent" (47 U.S.C. §251(d)(3)(C), the implementation of any provision of section 251. At most, the April Decision will defer the implementation of intraLATA presubscription. In any event, the Commission, in the ALJ Draft Decision, reserved the right to revisit the timing issue to protect against any excessive delays.

4. The Settlement Agreement Bars the Parties From Arguing that Any Date for Implementation Should Apply Other Than a Date Coincident With Our Entry Into Long Distance.

AT&T, et al., as noted above, entered into the settlement agreement that the Commission approved and that became a part of the April Decision. In presenting the settlement agreement to the Commission, the parties to the agreement made the unequivocal representation that the "Settlement Agreement is consistent with the law" and that the "Act requires Pacific to implement 'intraLATA toll dialing parity throughout [the] State coincident with its exercise of [interLATA] authority."¹¹ The Commission cannot allow AT&T, et al. to claim now that the timing for intraLATA presubscription should be different from that agreed to in connection with the settlement agreement.

¹⁰ The opposition has never contended that the April Decision is somehow inconsistent with section 251 or the Act. Their argument has been that section 271 of the Act imposes a mandatory requirement on the Commission to order dialing parity by February 8, 1999, when they claim the dialing parity "grace period" ends. Motion of AT&T et. al. for an Order Requiring Pacific Bell to Implement IntraLATA Presubscription by February 8, 1999, dated Sept. 8, 1998, p. 4.

¹¹ Joint Motion to Adopt Settlement Agreement Pursuant to Article 13.5 of the Commission's Rules of Practice and Procedures, dated Jan. 23, 1997, p. 6 (emphasis added).

The Commission should, moreover, have in mind that there was considerable uncertainty at the time of the settlement agreement over the FCC's jurisdiction and rules, including the timing for dialing parity. The Commission had issued both the First and Second Report and Order and the issues were in the process of being briefed and argued before the Eighth Circuit. The point here is straight forward: If AT&T, et al. wanted to preserve their rights to contend that intraLATA presubscription should occur at a time different or earlier than when Pacific Bell's affiliate entered the long distance market, they should have reserved that right in the agreement. But they did not. To the contrary, they waived that opportunity by assuming the risk that the law might change. The "knowing" and "voluntary" provision of the agreement provides that the "Parties each expressly assume the risk or any mistake of law or fact made by them or their counsel." Decision No. 97-04-083, Appx. A, p. 12 (¶ P).

As a legal matter, both the Commission's Decision and the settlement agreement are based on the fact that intraLATA presubscription would coincide with our entry into long distance. Thus, for example, from the AT&T, et al. perspective, performance remedies were supposedly required to prevent Pacific Bell from favoring PB Com "in the implementation of PIC changes." April Decision, Appx. A, p. 2.

The law in California generally, and this Commission in particular, favors the enforcement of settlements. See, e.g., Re So. Cal. Edison Co., Decision No. 98-02-091, 1998 WL 209288 (Cal. P.U.C., Feb. 19, 1998) at *4 ("strong public policy favoring settlement"); Re San Diego Gas & Elec. Co., Decision No. 90-

08-068, 37 Cal. P.U.C. 2d 346, 363 (Aug. 24, 1990) (settlements result "from a good deal of give and take among the parties and reflect interrelated trade-offs"). In addition, whether characterized as a waiver, estoppel or enforcement of the settlement agreement, AT&T, et al. are barred from contending that intraLATA dialing parity should occur at any time other than coincident with our entry into long distance. They bargained for and obtained the performance measures and remedies in the settlement agreement on the understanding that presubscription would coincide with long distance entry and cannot now backtrack on the agreement. See, e.g., Flanagan v. Capital Nat. Bank, 213 Cal. 664, 666 (1931) (the "'waiver' was in fact a contract"); Walters v. Calderon, 25 Cal. App. 3d 863 (1972); Healy v. Brewster, 251 Cal. App. 2d 541 (1967).

IV. ANSWERS TO SPECIFIC QUESTIONS RAISED BY THE ASSIGNED COMMISSIONER'S RULING.

- Is the Supreme Court decision self-executing with respect to the start of dialing parity, or are further orders or proceedings necessary?

No. As explained above, the Supreme Court's decision is not self-executing and further proceedings will necessarily result both at the Court of Appeals and at the FCC.

- As a practical matter, given technical and other constraints on the parties, as well as time constraints on the Commission in issuing its decisions, what date other than February 8, 1999, should the Commission consider if it considers a time certain for implementing dialing parity by Pacific Bell?

If the Commission were to establish a date certain for implementation of intraLATA presubscription, the date certain should be no less than 120 days

from any Commission order establishing the date certain. That lead time is required to implement the system changes necessary to provision intraLATA presubscription. There are four basic system groups that will support the intraLATA presubscription function -- billing, ordering, provisioning and service assurance. In order to implement intraLATA presubscription, there are forty-one systems and applications that we must program for code modifications, table updates and/or database conversions. The minimum time necessary for Pacific Bell to make these changes is 30 days for systems-specific requirements, 60 days for systems design, coding and building, and 30 days for systems integration testing. Systems integration and testing is critical since many of the systems are interdependent, requiring hand-offs from one system to another. In addition, during this same period, we will have to provide customer notification, file and obtain tariff approvals, train our employees on new procedures, and modify 150 switches to full PIC 2 capability.

- What adjustments, if any, should be made in the notice requirements of D.97-04-083 in the implementation of dialing parity?

In Pacific Bell's view, no adjustments to the customer notice requirements would be necessary or appropriate. The Commission cannot, however, require Pacific Bell to implement intraLATA presubscription before being authorized to provide long distance and, at the same time, require us to comply with the settlement agreement. Any such requirement would be in excess of the Commission's authority, arbitrary and contrary to law. If the April Decision were to

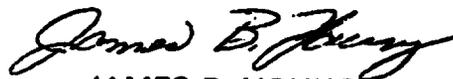
be modified, the settlement agreement would have to be vacated and the issues resolved therein relitigated.

V. CONCLUSION.

For the reasons stated above, the Commission should deny the petition of AT&T, et al. to modify Decision No. 97-04-083.

Dated at San Francisco, California, this 19th day of February, 1999.

PACIFIC BELL



JAMES B. YOUNG
ED KOLTO-WININGER

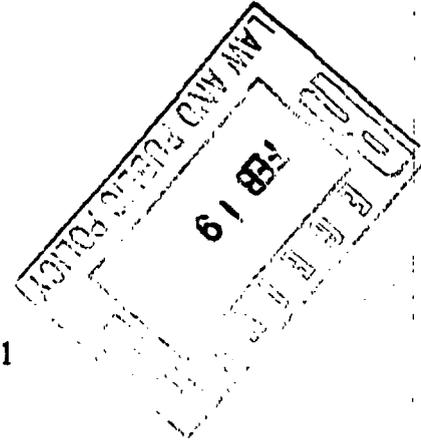
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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 95-835-C - ORDER NO. 1999-111

FEBRUARY 10, 1999



IN RE: Request of AT&T Communications of the) ORDER REQUIRING
Southern States, Inc. to Implement 1+ and 0+) IMPLEMENTATION OF
IntraLATA Presubscription for IntraLATA) DIALING PARITY BY
Toll Service.) BELLSOUTH

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Motion of AT&T Communications of the Southern States, Inc. (AT&T) that we order implementation of 1+ and 0+ presubscription by BellSouth Telecommunications, Inc. (BellSouth) for intraLATA toll services in South Carolina by February 8, 1999. We then set a hearing on this Motion.

The hearing was held on January 21, 1999 in the offices of the Commission, with the Honorable Philip T. Bradley, Chairman, presiding. AT&T was represented by Francis P. Mood, Esquire, Roxanne Douglas, Esq. and Steve A. Matthews, Esq. AT&T presented the testimony of Richard Guepe. The Southeastern Competitive Carriers Association (SCCA) was represented by Frank R. Ellerbe, III, Esq. SCCA presented the testimony of Hamilton E. Russell, III. Sprint Communications Company (Sprint) was represented by Ben Fincher, Esq. and Darra Cothran, Esq. Sprint presented the testimony of Tony Key, who adopted the prefiled testimony of David E. Stahly. MCI WorldCom was represented by Frank R. Ellerbe, III, Esq. and Ken Woods, Esq. This Company presented no witnesses. BellSouth was represented by Caroline N. Watson, Esq., William F. Austin,

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Esq., and William Ellenburg, Esq. BellSouth presented the testimony of Chris Boltz and Al Varner. Both the South Carolina Telephone Association (SCTA) and the South Carolina Telephone Coalition (SCTC) were represented by M. John Bowen, Jr., Esq. and Margaret M. Fox, Esq. SCTA presented no witnesses. SCTC presented the testimony of Steven Meltzer, who adopted the prefiled testimony of Emmanuel Staurulakis. The Consumer Advocate for the State of South Carolina (the Consumer Advocate) was represented by Elliott F. Elam, Jr., Esq. The Consumer Advocate presented no witnesses. The Commission Staff (the Staff) was represented by F. David Butler, General Counsel. The Staff presented the testimony of Gary E. Walsh. The Intervenor GTE South, Inc., United Telephone Company of the Carolinas, and the South Carolina Public Communications Association were not present at the hearing, nor were they represented by counsel.

Our Order No. 96-197 required all local exchange carriers, except for BellSouth, to implement intraLATA 1+ and 0+ presubscription, finding such presubscription to be in the public interest. That Order recognized the limitations of Section 271 (e)(2)(B) of the Telecommunications Act of 1996 (the Act), and held in abeyance any ruling as to the timing of implementation for BellSouth. We found that that section of the Act prohibited State Commissions from requiring Bell Operating Companies (BOCs) to implement intraLATA toll dialing parity until BellSouth entered the interLATA market or until 3 years had lapsed from the date of passage of the Act. AT&T through its Motion, and the testimony of its witness Richard Guepe, states that the three-year exception for BellSouth expires on February 8, 1999, and that there is no longer any limitation depriving

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BellSouth's customers of the benefits being enjoyed by others. Guepe and others urge that South Carolina not wait to order 1+ and 0+ presubscription until BellSouth receives interLATA authority.

Guepe states that, without intraLATA toll dialing parity, South Carolina customers in BellSouth territory are forced to use BellSouth as their intraLATA toll carrier whenever they dial 1+, the area code, and the number called, in order to place their intraLATA toll calls. At present, the only way that BellSouth customers in South Carolina can use their intraLATA toll carrier of choice is to "dial around" BellSouth by dialing additional digits for every intraLATA toll call. Guepe believes that this "dial around" requirement constitutes a real and significant burden, which is a barrier to effective competition. AT&T also pointed out various states where intraLATA dialing parity has been ordered to be implemented by February 8, 1999. Guepe's positions are generally supported by witnesses for SECA and Sprint. SECA witness Hamilton E. Russell, III states that intraLATA dialing parity instituted by BellSouth will bring competitive pressures to bear on the market, resulting in lower prices for South Carolina's consumers. Tony Key of Sprint testified to the public interest aspect of intraLATA toll dialing parity. As Key states, this Commission has already found intraLATA dialing parity to be in the public interest in Order No. 96-167. Key agrees that the concept will promote increased competition in the intraLATA market.

Chris Boltz and Alphonso Varner testified for BellSouth. Boltz outlined what BellSouth has already done and what it needs to do to implement dialing parity. Varner opined that 1+ 0+ presubscription should not be implemented until BellSouth receives

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interLATA authority. SCTC witness Stephen Meltzer outlined the issues that he believed should be addressed before implementation of intraLATA toll dialing parity by BellSouth. Among other subjects of the testimony were the possible termination of the Depooling Plan. Meltzer stated that SCTC member LEC's should not be required to become intraLATA toll providers in their service territories, and that if the Depooling Plan is terminated, BellSouth may very well determine that it is not in its financial interest to remain the toll provider of last resort in rural areas where it is not profitable to do so. Gary E. Walsh testified for the Commission Staff. Walsh opined that presubscription should not occur until this Commission has finalized the intrastate Universal Service Fund. Walsh also furnished a review of past Commission Orders related to this Docket.

It should be noted, however, that the United States Supreme Court decision issued on January 25, 1999, a date after the hearing, has settled the dialing parity issue as a matter of law. We take judicial notice of this opinion. This decision reversed the Eighth Circuit Court of Appeals decision on a number of issues, including the dialing parity issue. It appears to us that, in light of this Supreme Court opinion, BellSouth must implement dialing parity by February 8, 1999. A bit of historical perspective is helpful in explicating our reasoning in this matter.

The Telecommunications Act of 1996 (the Act), signed into law on February 8, 1996, fundamentally attempts to restructure the telecommunications industry, and to facilitate competition in the local telephone market. One of the requirements is that the local telephone companies provide dialing parity. Specifically, the Act directed the

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Federal Communications Commission (FCC) within six months of the passage of the Act to “complete all actions necessary to establish regulations” to implement the requirements established in Section 251. Furthermore, with respect to dialing parity, Section 271(e)(2) of the Act provides that a state cannot order toll dialing parity before the Bell Operating Company (BOC) has been granted interLATA authority for services originating in that state or three years after passage of the Act, which is February 8, 1999. Sections 251 and 271 read in conjunction appear to require a BOC to implement toll dialing parity by February 8, 1999.

On August 8, 1996, as required by Congress, the FCC promulgated rules (FCC 96-333, Second Report and Order and Memorandum Opinion and Order) to implement certain parts of the Act, including the duty of the local telephone companies to provide dialing parity. Specifically, FCC Rule 47 CFR Section 51.211(a) required a local telephone company, such as BellSouth, that had not been given authority to begin providing interLATA service in a State before February 8, 1999, to implement dialing parity throughout that State by February 8, 1999 or an earlier date as the State may determine.

After the FCC issued these rules, various local telephone companies and state commissions filed court challenges across the country, all of which were consolidated subsequently in one Federal Appeals Court, the Eighth Circuit Court of Appeals. Thereafter, in a decision issued on August 22, 1997, that Court held that the FCC lacked jurisdiction to promulgate certain of these implementation rules, including the dialing parity rules. Subsequent to this decision, various parties appealed this decision to the

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United States Supreme Court, including the rules pertaining to dialing parity. On January 25, 1999, the Supreme Court issued a decision reversing the Eighth Circuit Court of Appeals opinion on dialing parity, and held that the FCC did in fact have the authority to promulgate dialing parity regulations. Accordingly, the FCC's dialing parity rules have been reinstated. Therefore, BellSouth is required to implement intraLATA toll dialing parity effective on February 8, 1999.

With regard to implementation of cost recovery, we hereby approve the settlement reached between BellSouth and AT&T as the Commission ordered implementation plan. This settlement reflects implementation cost recovery over intrastate access minutes of use. In addition customers will be given a period of ninety days within which to make one change of their intraLATA carrier at no cost to the customer. Costs associated with this waiver will be recovered through the general cost recovery plan.

In addition, the Commission continues in its belief that customers of rural telephone companies should not be harmed. The Commission believes that it addressed and resolved the concerns expressed by the South Carolina Telephone Coalition in our Order No. 96-234. We hereby reaffirm the principles enunciated in that Order with regard to rural LEC's.

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This Order shall remain in full force and effect until further Order of the
Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:



Executive Director

(SEAL)