

PUBLIC UTILITIES COMMISSION

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May 25, 1999

VIA UNITED PARCEL SERVICE AND ECFS

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 96-98 and 95-185

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MAY 26 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dear Ms. Salas:

Please find enclosed for filing an original and twelve copies of the Comments of the People of the State of California and the California Public Utilities Commission in the above-referenced dockets. Also enclosed is one additional copy of this document. Kindly file-stamp this copy and return it to me in the enclosed self-addressed envelope

California is also providing an electronic copy of these comments via your ECFS system.

Thank you for your attention to this matter. If you have any questions, I can be reached at (415) 703-2047.

Sincerely,

Ellen S. LeVine
Attorney for California

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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MAY 26 1999

Federal Communications Commission
Office of Secretary

In the Matter of

Implementation of the Local
Competition Provisions in the
Telecommunications Act of 1996

CC Docket No. 96-98

Interconnection Between Local
Exchange Carriers and Commercial
Mobile Radio Service Providers

CC Docket No. 95-185

**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE
CALIFORNIA PUBLIC UTILITIES COMMISSION**

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May 26, 1999

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**COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE
CALIFORNIA PUBLIC UTILITIES COMMISSION**

The People of the State of California and the California Public Utilities Commission ("California") hereby file these comments in response to the Second Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission ("FCC") in the above-captioned proceeding.

I. BACKGROUND

In response to the United States Supreme Court's decision in AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 142 L.Ed.2d 834 (1999), the FCC has issued this second FNPRM to address two principal issues: (1) to define the standard for determining the network elements which incumbent local exchange carriers ("LECs") should unbundle

and provide to competitive carriers under section 251(d)(2) of the Telecommunications Act of 1996 (“1996 Act”); and (2) to identify a list of specific network elements that, at a minimum, incumbent LECs must unbundle and provide to competitive carriers under that standard. In addressing these two issues, the FCC correctly recognizes that Congress’ objective in promoting full and fair competition in the local telecommunications market is dependent upon making available network elements that are necessary for the rapid and efficient deployment of all telecommunications services. FNPRM, ¶ 3. As a threshold issue, the FCC tentatively concludes that the Commission should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. To further that goal, the FCC posits that the local loop must be subject to section 251(d)(2) unbundling requirements. FNPRM, ¶ 32. The FCC also seeks comment on whether the other six network elements that it had previously identified as subject to unbundling obligations should continue to be so subject. FNPRM, ¶¶ 32, 33.

In its FNPRM, the FCC recognizes that variations in geographic markets may affect the availability of network elements from sources other than the incumbent LEC that competitors may need. Thus, consistent with Congress’ intent to permit states to adopt interconnection obligations tailored to particular local markets, and in keeping with the FCC’s goal of fostering a partnership with the states in promoting the pro-competitive goals of the 1996 Act, the FCC has proposed to reinstate Rule 317, 47 C.F.R. § 51.317, which allows the states to impose additional unbundling requirements in accordance with the FCC’s standards and criteria. This rule enables a state to adapt the degree of

unbundling of network elements to the particular competitive circumstances within a state. FNPRM, ¶ 14.

In addition, the FCC asks whether it may delegate to the states the authority to determine “in the first instance” that competitive conditions within a state do not require an incumbent LEC to provide a particular network element. FNPRM, ¶ 14. The FCC also asks whether it may delegate to the states the authority to withdraw from the list of network elements particular elements that an incumbent LEC need no longer provide in order to foster competitive entry in particular telecommunications markets. FNPRM, ¶ 38. In the latter two instances (i.e., withdrawal of element in the first instance or at a later date), the FCC asks for comment on what degree, if any, of federal review of state decisions is warranted. FNPRM, ¶¶ 14, 38.

In these comments, California addresses the issues discussed below.

II. THE FCC SHOULD IDENTIFY A LIST OF NETWORK ELEMENTS THAT WOULD BE AVAILABLE ON A NATIONAL BASIS.

California supports the creation of a list of unbundled network elements (“UNEs”) that, at a minimum, would be mandated on a national basis. Such a list would allow multi-state competitors to create a national business plan, with the certainty of knowing that a discrete set of network elements will be available in all states. A national list of minimum unbundling requirements also facilitates the arbitration process in individual states. The condensed time frame allowed for arbitrations under the 1996 Act would

make it difficult for state commissions to define which unbundled elements are to be included in each and every case.¹

A. The FCC Should Specify Switching As An Unbundled Network Element

In its FNPRM, the FCC asks for comment on a number of issues, including the identification of particular UNEs that incumbent LECS should generally provide to competitors. FNPRM, ¶ 11. California agrees with the FCC's analysis that the local loop should be included in a national list of UNEs that incumbent LECs must unbundle and offer. FNPRM, ¶ 32. In addition, California believes that the national list of UNEs should include switching. The FCC raises the issue of whether the quantity of facilities that competitors would need to obtain in order to compete effectively should be considered as part of the "necessary" and "impair" analysis. FNPRM, ¶ 27. The CPUC believes that it should. Otherwise, competitors will be required either to replicate the LEC's network, which is inefficient and uneconomic, or to curtail their business plans to encompass only those areas where they have deployed their own switches. Competitors have found it advantageous to have their switches serve a much larger geographic area than LEC switches, and most competitors in California have configured their networks to take advantage of those economies, knowing that they can purchase unbundled switching from the LEC in those areas where they presently lack the customer base to install their own switch facilities.

¹ On May 10, 1999, the California Public Utilities Commission issued a proposed decision that establishes prices for UNEs based on the TELRIC methodology for the list of elements identified in the FCC's First Report and Order. The proposed decision also established price floors for several ILEC access line services. The proposed decision identified unbundled switching, directory listings and unbundled loops as building blocks whose contribution should be imputed into the ILEC's price floors for access line services.

In addition, collocation space has been a hotly contested issue in California and competitors are not always able to obtain collocation space in every central office where they want to establish a presence. It is thus essential that competitors be able to lease switching on an unbundled basis from the incumbent LEC in order to serve their customer base, however large or small that number may be. If the LEC's unbundled switching is not made available, there is a substantial and significant risk that competition will be limited only to those areas where competitors are able to obtain adequate collocation space, and only if competitors have a sufficiently large customer base to warrant investment in switches in the first place. Without unbundled switching as a required UNE, little more than dispersed "pockets of competition" would ever develop.

B. The FCC Should Specify Operations Support Systems As An Unbundled Network Element

In the three years since passage of the 1996 Act, one of the most pervasive and persistent problems has been competitor access to the manual and electronic systems used by the LECs for pre-ordering, ordering, provisioning, maintenance and billing. The availability of Operations Support Systems ("OSS") is where the rubber meets the road in the development of a competitive telecommunications market. Nothing can "impair" a competitor's successful entry into a market more effectively than slow, inefficient and inaccurate methods for processing customer orders and service requests. OSS certainly meets the Supreme Court's criteria for inclusion as a necessary unbundled element, and California supports maintaining OSS as a mandatory network element. Even in those cases where competitors develop their own EDI interfaces, the competitor's systems must still interface with those of the LEC. If the competitor's customer loses dialtone or

custom calling features during the transition to a new carrier, the competitor is blamed. If it takes longer to provision service to customers of a competitive carrier, the competitor will lose business to the LEC. Without OSS which operate at parity and afford the CLECs a reasonable opportunity to compete with the LEC's retail operations, the competitive market will falter and stagnate. In the past three years in California, more state commission, LEC and competitor resources have been devoted to OSS than to any other competitive issue. OSS is a necessary part of the day-to-day business relationship between carriers, and should be a mandated UNE available nationally.

C. The FCC Should Require LECs To Provide Extended Link Capability

In its FNPRM, the FCC asks whether LECs should be required to combine unbundled network elements that they do not already combine. The example given was an unbundled loop combined with unbundled transport, which is also known as "extended link" capability. FNPRM, ¶ 33. The FCC asks whether there are competitive alternatives to such network elements. California supports making the extended link available and sees no viable competitive alternatives. Extended link provides a way for a competitor whose business strategy focuses on serving customers using unbundled loops with a way to serve customers out of a central office where the competitor is not collocated. With extended link capability, the loop serving the customer can be transported back to another central office where the competitor does have a collocation facility. As discussed above, competitors are not always able to obtain collocation space. Use of extended link makes it possible for those competitors to serve customers they could not otherwise reach. Also, in those cases where the competitor does not expect to

serve a large number of customers, extended link capability presents a potential alternative to physical collocation in each central office.

D. The FCC Should Specify Directory Listing As An Unbundled Network Element

The information contained in so-called white page or directory listings are essential for all competitors. Without it, competitors would be forced to replicate their own directory listings, which would be both inefficient and uneconomic. Moreover, access to directory databases can be achieved in a manner that allows carriers to share information contained within the databases, thus preventing needless replication of white page listings and by multiple carriers. From the customer's perspective, the simple process of finding a neighbor's telephone number should not become mired in multiple databases and directory listings. Accordingly, directory listing should be included on a national list of mandated UNEs.

III. THE FCC SHOULD ALLOW THE STATES TO ADD UNES OR TO SUBTRACT UNES PREVIOUSLY ADDED

A. Additional State Unbundling Requirements

Both in this FNPRM and its First Report and Order, the FCC has expressly recognized that the degree of competition in individual geographic markets may depend upon a competitor's ability to secure network elements from sources other than the incumbent LEC. For this reason, the FCC gave the states discretion in Rule 317, 47 C.F.R. § 51.317, to require an incumbent LEC in a given market to provide additional UNEs to further the pro-competitive goals of the 1996 Act. FNPRM, ¶ 14. The FCC

does not propose to retreat from its original rule, and California urges the FCC not to do so. *Id.* To be sure, Rule 317 effectuates congressional intent in the 1996 Act to permit states to supplement or complement federal rules.

Specifically, section 251(d)(3) of the 1996 Act expressly 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 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.”

Congress thus recognized in section 251(d)(3) the unique and desired role that states necessarily play in tailoring interconnection obligations to the specific conditions within particular local markets. Congress’ recognition of the important role of the states in promoting local competition is further evidenced in sections 261(b) and (c).

Subsection (b) provides that “[n]othing in this part shall be construed to prohibit any State commission from ... prescribing regulations [after the date of enactment of the 1996 Act] in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.” Subsection (c) provides that “[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State’s requirements are not inconsistent with this part or the commission’s regulations to implement this part.”

The reinstatement of Rule 317 is also consistent with the FCC’s intent to adopt a *minimum* list of unbundled network elements. Specifically, geographic variations in particular local markets may compel a state to require an incumbent LEC to assume

additional unbundling obligations to promote competitive entry into these markets. For example, some states have determined that dark fiber is a UNE, a determination that state commissions are best positioned to make on a case-by-case basis. The FCC's Rule 317 permits such state action in recognition that it advances the central purpose of the 1996 Act.

In sum, Rule 317 comports with the intent of Congress and the FCC to give states discretion to adopt different requirements when consistent with federal requirements and the purposes of the 1996 Act. Accordingly, Rule 317 should be reinstated.

B. Modification Of Unbundling Requirements

Insofar as the FCC enables the states to add to the minimum "national list" of UNEs, California also urges the FCC to delegate to the states the authority to remove UNEs previously added by the states because the element requested is otherwise available in the particular local market which a competitor seeks to enter. A state would determine the availability of the UNE based on standards and criteria established by the FCC. State determinations of availability could be made when the particular element subsequently becomes available from other sources.²

In California's view, Section 251(d)(2) permits the FCC to delegate such authority to the states. Although the FCC intends to adopt a minimum set of UNEs that incumbent LECs must provide, nothing in section 251(d)(2) limits the FCC from allowing the states to add elements, or to remove elements previously added, based on local market conditions. Section 251(d)(2) simply requires the FCC to determine "what network

² However, the FCC's pick and choose rule would continue to permit competitors to select terms and conditions from unexpired interconnection agreements.

elements should be made available for purposes of subsection (c)(3)...” Section 251(c)(3) in turn states that incumbent LECs are under a duty to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.”

Pursuant to these sections, the FCC could have chosen simply to establish national standards and criteria embodied in regulations, and left it to parties in negotiations, or to states in arbitration proceedings, to define the specific network elements that incumbent LECs must offer in particular interconnection agreements. This is precisely the approach that the FCC adopted for the pricing of UNEs. The FCC established a forward-looking cost methodology, and left it to parties and the states to determine in specific interconnection proceedings the actual prices for UNEs.

The Supreme Court upheld the latter approach in AT&T Corp. v. Iowa Utils. Bd. In affirming the FCC’s interpretation of state and federal roles under sections 251 and 252 of the 1996 Act, the Supreme Court made clear that “[i]t is the States that will apply those standards and implement [the FCC’s] methodology, determining the concrete result in particular circumstances.” AT&T Corp. v. Iowa Utils. Bd., 142 L.Ed.2d at 852.³ Similarly here, the 1996 Act authorizes the FCC to permit the states to apply federal standards in determining in particular circumstances the concrete result of whether a specific UNE must be offered by an incumbent LEC. The fact that the FCC proposes to

³ The Supreme Court also made clear that the FCC could issue “rules to guide the state-commission judgments” in approving interconnection agreements. Id. at 853 and 849 n.6 (“state commissions’ participation in the administration of the new *federal* regime is to be guided by federal-agency regulations.”)(emphasis in original).

adopt a national list of UNEs does not alter the FCC's authority to delegate to the states the ability to make case-by-case factual determinations whether a particular network element not on the national list is available in a given local market from sources other than the incumbent LEC.

C. Review Of State Determinations

To the extent that a state decides in an interconnection proceeding that a specific UNE is no longer required because of particular competitive circumstances in a given local market, such determination should be subject to the same review process as any other state decision governing interconnection rates, terms and conditions. That process is defined in section 252(e)(6), which provides that an aggrieved party may bring an action in federal district court.

As matter of policy, it makes no sense to enable an aggrieved party to appeal to the FCC a state arbitration decision that withdraws a specific network element from unbundling requirements in accordance with federal standards and based on facts and circumstances unique to a discrete geographic market in that state. Such appeals will result in a needless duplication of effort, resulting in additional costs, expenditure of scarce resources and further delay in fostering competition in local telecommunications markets. To be sure, if review is permitted before the FCC, then the FCC can expect to see each and every state-arbitrated decision appealed to the FCC by aggrieved parties. With the likelihood of facing scores of appeals from around the country, the FCC will be forced to expend significant resources reviewing fact-intensive state determinations, made after a hearing on a record, of the competitiveness of individual, geographic

markets within that state. Aside from the administrative burdens and costs that would result,⁴ federal agency review of state decisions thwarts the carefully crafted review process that Congress set forth in the 1996 Act.

Specifically, in section 252 (e)(6), Congress created a new and separate forum for reviewing state arbitration decisions in an appropriate federal district court. Under this model, Congress intended the federal district court to be guided by the specific federal standards adopted by the FCC in determining the lawfulness of the state decisions. AT&T Corp. v. Iowa Utils. Bd., 142 L.Ed.2d at 849 n.6. At the same time, Congress necessarily understood that state arbitration decisions applying federal standards would be tailored to the particular facts and circumstances governing the degree of competitiveness within each local market of a state. See sections 252(d)(3) and 261. Congress thus expected the states, not the FCC, to reach “the concrete result in particular circumstances.” AT&T Corp. v. Iowa Utils. Bd., 142 L.Ed.2d at 852.

Congress’ legislated approach for review of state arbitration decisions in federal district court makes practical sense. Not only does this approach conserve the scarce resources of the federal agency, but more importantly the approach recognizes the necessity for a cooperative state-federal agency partnership if the 1996 Act’s goal of competition in local markets is to be realized. The adopted approach properly balances the FCC’s role in defining specific standards to guide the states, the states’ role in implementing these standards in accordance with the FCC’s guidance, and the federal district court’s role in reviewing the states’ implementation of federal standards. In

⁴ The state would likely participate before the FCC to defend its decision, thus causing the state also to divert its scarce resources to this task.

contrast, subjecting state arbitration decisions to federal agency review short-circuits this orderly process, and undermines the carefully constructed state-federal partnership that Congress, and indeed the FCC itself, have sought to foster to realize the Act's purpose. The federal district courts have provided an adequate forum for parties to redress their grievances with state arbitration decisions, and should continue to be the forum in which aggrieved parties appear to contest these decisions.

IV. CONCLUSION

For the reasons discussed, California urges the FCC to (1) require incumbent LECs to offer to competitors a minimum set of UNEs defined by the FCC; (2) include switching, OSS, directory listings databases and extended link capability in the national list of UNEs; and (3) delegate to the states the authority to determine in arbitration proceedings whether to add or subtract UNEs not on the minimum national list, subject to federal district court review.

Respectfully submitted,

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By: /s/ ELLEN S. LEVINE

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May 26, 1999

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon all known parties of record by mailing, by first-class mail, postage prepaid, a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 26th day of May, 1999.

/s/ ELLEN S. LEVINE

ELLEN S. LEVINE