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EX PARTE OR LATE FILED

August 11, 1999

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
Portals II Building
445 Twelfth Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Salas:

Please include the attached written ex parte communication to Lawrence E. Strickling, Chief, Common Carrier Bureau in the public file of the above-referenced proceeding.

Should you have any further questions concerning this issue, please do not hesitate to contact me.

Sincerely,

cc: Larry E. Strickling
Carol E. Matthey
Michael H. Pryor
Jake E. Jennings

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Lawrence E. Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
Portals II Building
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Strickling:

As you will recall, I met with you to discuss the concept of the "extended loop" – i.e., the combination of an unbundled loop and unbundled local transport – in connection with the Texas PUC's pending review of SBC's compliance with Section 271(c). Specifically, I sought confirmation that the Commission had not yet addressed the question of whether ILECs must provide the "extended loop" where it was going to be used solely to bypass access services, and explained that in SBC's view such a requirement would not be in the public interest.

In that connection, you requested (1) a legal memorandum addressing whether the Commission had the legal authority to place limits on the use of "extended loops" to bypass access charges, (2) SBC's position on whether "extended loops" could be used to provide xDSL, and (3) information on what the costs to SBC would be if CLECs could obtain "extended loops" without restriction.

Attached is a legal memorandum entitled "The Commission's Authority To Place Limits On Use Of Unbundled Loops And Transport To Bypass Access Charges." Essentially, it explains that first, Section 251(c)(3), on its face, allows an ILEC to impose "just" and "reasonable" terms and conditions on access to network elements; second, Section 251(g) preserves the existing access charge regime, including "receipt of compensation," until such obligations are explicitly

superseded – which they have not been – by new regulations; and third, the use of UNEs to avoid access charges threatens universal service and deployment of facilities-based special access competition.

Moreover, if the Commission were to deem it appropriate to establish a rule specifically allowing ILECs to require that the “extended loop” be used to provide local service to end users, in addition to access services, the Commission would certainly have such authority under Sections 201(b) and 4(i) of the Communications Act. See AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721, 730 (1999). Thus, the Commission possesses all of the authority necessary to permit just and reasonable restrictions to prevent the use of “extended loops” to bypass access charges.

It should be noted that in responding to your question, SBC has assumed an obligation to provide unbundled loops and unbundled transport under Section 251 (c)(3). However, as you know, SBC has argued in the pending UNE remand proceeding that this threshold requirement – i.e., access to the “extended loop” – cannot be imposed consistent with the U.S. Supreme Court’s decision in Iowa Utilities Board.

On the question of whether the “extended loop” could be used to provide xDSL service, it has been SBC’s experience that CLECs providing these services have not expressed much, if any, interest in “extended loops.” In view of the inherent transmission limitations of most DSL signals over copper facilities, CLECs providing DSL-based services collocate their Digital Subscriber Line Access Multiplexers (DSLAM) in the central offices subtending the loops connected to their end user customers’ premises. This allows the CLECs to cover the maximum geographic area surrounding a central office, to aggregate the loops serving their customers and to route the data onto the CLEC’s packet switched network. Since xDSL technology is designed for use on copper facilities, it is not, as a technical matter, possible to extend xDSL loops over interoffice transport facilities since the transport facilities between SBC’s central offices generally are fiber technology.

Finally, with respect to the costs to SBC if CLECs were permitted to utilize “extended loops” to bypass access, SBC would experience both an increase in capital expenditures, and a loss in access revenues. SBC estimates the capital costs associated with the need to deploy additional transport facilities to be approximately \$510 million in the case of residence customers and \$1.3 billion in

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Page 3

the case of business customers. These figures do not address the special access revenues that would be lost to this form of bypass, nor the loss of switched access revenues caused by switched access customers moving to special access-like UNEs in order to obtain the benefit of the lower network element rates.

Should you have any further questions concerning this issue, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Greenwood". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

cc: Carol E. Matthey
Michael H. Pryor
Jake E. Jennings

THE COMMISSION'S AUTHORITY TO PLACE LIMITS ON USE OF UNBUNDLED LOOPS AND TRANSPORT TO BYPASS ACCESS CHARGES

The Fifth Circuit has now held that the Commission must remove implicit universal service support from interstate access charges. See Texas Office of Pub. Util. Counsel v. FCC, No. 97-60421, 1999 U.S. App. LEXIS 17941, at *64-*66 (5th Cir. July 30, 1999). But today, access charges at both the state and federal levels continue to contain such implicit subsidies. The Communications Act and Commission decisions therefore permit incumbent LECs to protect the interstate access charge regime and universal service through conditions on use of unbundled network elements ("UNEs").

As incumbent LECs have demonstrated in the Commission's proceedings on remand from AT&T Iowa Utilities Board v. FCC, mandatory unbundling of local transport or other network elements cannot be justified under 47 U.S.C. § 252(d)(2) where the elements would be used simply as a lower-priced substitute for the incumbent's readily available, regulated access services (or other available facilities or services).¹ This paper does not revisit that pending issue. Rather, the point here is that even if the new FCC Rule 51.319 required unbundling of loop and transport elements without limitation, the 1996 Act and existing Commission decisions would allow incumbent LECs to prohibit use of unbundled local loops and unbundled local transport

¹ See, e.g., Comments of SBC Communications Inc., CC Docket No. 96-98, at 45-51 (filed May 26, 1999) (discussing transport); Reply Comments of SBC Communications Inc. on the Application of Section 251(d)(2) to Individual Network Elements, CC Docket No. 96-98, at iv-v, 18-22 (filed June 10, 1999) (same).

solely to bypass the incumbent LEC's access services, where the carrier does not also provide local service to the end user.²

1. Two provisions of the Telecommunications Act of 1996 are especially relevant to this question. The first, section 251(c)(3), establishes a general obligation to make UNEs available. It requires incumbent LECs to:

provide, to any requesting telecommunications carrier for the provision of a telecommunications service, 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. . . .

47 U.S.C. § 251(c)(3). On its face, this language requires purchasers to use UNEs to provide telecommunications services, while allowing incumbent LECs to place reasonable conditions on sale of the UNEs. The Commission, however, has held that “for the long term” this provision allows carriers to use UNEs to provide any telecommunications service.³

The second key statutory provision, section 251(g), states:

On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance

² Prior to the current UNE remand proceeding, the Commission reserved the question whether carriers could use the unbundled transport UNE to provide access services without also providing local service. Third Order on Reconsideration and Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 12 FCC Rcd 12460, 12462, ¶ 3, 12484 n.102, 12495-96 ¶ 61 (1997), aff'd sub nom. SBC v. FCC, 153 F.3d 597 (8th Cir. 1998).

³ First Report and Order, Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 FCC Rcd 15499, 15679-80, ¶¶ 356, 359 (“Local Competition Order”), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part on other grounds, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. . . .

47 U.S.C. § 251(g). In its Local Competition Order, the Commission indicated that “the primary purpose of section 251(g) is to preserve the right of interexchange carriers to order and receive exchange access services” 11 FCC Rcd at 15682-83, ¶ 362 (emphasis added). But that is not the only purpose.⁴ Rather, incumbent LECs remain entitled to “receipt of compensation” for their services, indicating a congressional concern that incumbent LECs be able to recover, after passage of the 1996 Act, the costs historically recovered through interstate access charges. As the Commission has explained, section 251(g) illustrates Congress’s awareness of the practical need to protect access charge recoveries so long as they fund universal service, notwithstanding incumbent LECs’ interconnection and unbundling duties under section 251. Id. at 15867, ¶ 726.

In its Local Competition Order, the Commission stressed that the UNE provisions of section 251, access charges, and universal service issues are “intensely interrelated.” Id. at 15507, ¶ 8. Universal service reform pursuant to 47 U.S.C. § 254 is necessary to eliminate regulatory pricing distortions – such as recovery of fixed network costs through traffic-sensitive access charges – that impede full competition. See id. at 15506, 15507-08, ¶¶ 5, 9, 718. The Commission pledged to do this “by completing our pending universal service proceeding to implement section 254 . . . and by addressing access charge issues.” Id. at 15862, ¶ 716. The

⁴ In recent briefing before the D.C. Circuit, the Commission acknowledged that section 251(g) preserves the entire “existing regulatory regime regarding access provided” by incumbent LECs, as opposed to simply the interexchange carriers’ benefits under that regime. Brief for Federal Communications Commission, Bell Atl. Tel. Cos. v. FCC, No. 99-1094, at 34 (D.C. Cir. to be argued Nov. 22, 1999).

Commission recognized, however, that universal service reform and access charge reform would take time. Thus, to avoid “significant, immediate, adverse effects that were neither intended nor foreseen by Congress,” id., the Commission temporarily required carriers to pay access charges to the incumbent LEC when they used UNEs to provide access services to their local customers. Id. at 15864-66, ¶¶ 721-725. The Commission noted that absent such a rule, “carrier decisions about how to interconnect with incumbent LECs would be driven by regulatory distortions in our access charge rules and our universal service scheme, rather than unfettered operation of a competitive market.” Id. at 15863, ¶ 719. The Commission resolved not to “allo[w] such a result before we have reformed our universal service and access charge regimes.” Id. The Eighth Circuit affirmed, holding that it was reasonable for the Commission temporarily to balance the statutory command of cost-based UNE pricing with “another major purpose of the Act” – supporting universal service. Competitive Telecomms. Ass’n (“CompTel”) v. FCC, 117 F.3d 1068, 1072-74 (8th Cir. 1997).

More recently, the Fifth Circuit has ordered the Commission to remove implicit universal service subsidies from interstate access charges. Texas Office of Pub. Util. Counsel, 1999 U.S. App. LEXIS 17941, at *64-*66. In doing so, however, the Fifth Circuit agreed with the Eighth Circuit that the Commission has substantial discretion to ensure an orderly transition to purely explicit subsidies, and to ensure that elimination of implicit subsidies does not come at the expense of universal service collections. See id. at *99-*103 (“defer[ing] to the agency’s reasonable judgment about what will constitute ‘sufficient’ support during the transition period from one universal service system to another”).

This principle applies directly to conditions that incumbent LECs may place on use of loop/transport combinations to bypass access charges. If carriers could obtain loop and transport

elements at cost-based rates, solely to provide exchange access to interexchange carriers (or for their own interexchange services), they would simply substitute these UNEs for leases of the same facilities under access tariffs. Interexchange carriers would be using the same facilities of the incumbent as before, on similar terms, but without making any contribution to universal service. The carriers' decisions to use UNEs rather than access services "would be driven by regulatory distortions in [the] access charge rules and [the] universal service scheme, rather than unfettered operation of a competitive market" – the very result this Commission rejected in the Local Interconnection Order. 11 FCC Rcd at 15863, ¶ 719. Thus, restrictions on use of UNEs to bypass access services fall squarely within the general rule that carriers should not be permitted to circumvent the Commission's regulatory policies.⁵

2. There is no inconsistency between restrictions on access bypass and section 251(c)(3). The Commission reads section 251(c)(3) as allowing carriers to provide any telecommunications service they choose in "the long term," but as the Commission and Eighth Circuit have held, access to UNEs is qualified by to the Act's universal service and access charge requirements.⁶ Local Competition Order, 11 FCC Rcd at 15679, ¶ 356; see generally John

⁵ See, e.g., Report and Order, Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873, 3918, ¶ 120 (1995) ("Allowing foreign carriers to indirectly serve markets which they are barred from serving directly would defeat the purposes behind the effective competitive opportunities analysis and not contribute to the goals of this proceeding."); Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 FCC Rcd 14171, 14227, ¶ 162 (1996) (interpreting section 251(c)(2) to ensure that interexchange carriers cannot evade restrictions on interconnection by setting up affiliates to interconnect with the incumbent LEC on their behalf); First Report and Order, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Servs., 11 FCC Rcd 18455, 18471-72, ¶ 31 (1996) ("excluding from the resale rule all bundled packages that include non-Title II components would potentially offer carriers an easy means to circumvent the rule").

⁶ At a bare minimum, interpreting section 251(c)(3) in a manner that harmonizes that provision with sections 251(g) and 254 would be a reasonable response to textual ambiguity.

Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993) (statutory provisions should be read by reference to whole act); United States Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (statutory interpretation should produce a “a substantive effect that is compatible with the rest of the law”). Furthermore, section 251(c)(3) expressly permits the incumbent LEC to impose “just, reasonable, and nondiscriminatory” conditions on use of its UNEs. 47 U.S.C. § 251(c)(3). Conditions that require access providers to serve local end users meet this test because they advance the purposes of sections 251 and 254. Allowing carriers to purchase access over the incumbent’s network at cost-based UNE rates would excuse those carriers from paying the Commission-approved access charges – in violation of the “receipt of compensation” language of section 251(g). Such bypass also would shift the burden of universal service disproportionately to the incumbent LEC – in violation of section 254.

3. Interpreting section 251(c)(3) as a license to evade regulated access charges would also undermine the goals of section 251(c). See Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (statutory interpretation should be guided by object and policy of law). Increasing competition in access services is, at most, a secondary goal under the 1996 Act. Such competition already is robust; recently, the Commission adopted pricing flexibility and other streamlined regulation of incumbent LECs’ access services in recognition of this competition.⁷ Congress, moreover, drafted section 251(c) specifically to encourage competition in providing

See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

⁷ See Fifth Report and Order and Further Notice of Proposed Rulemaking, Access Charge Reform, CC Docket No. 96-262 (adopted August 5, 1999); see also id., Separate Statement of Commissioner Susan Ness (“During the past decade, exchange access competition has increased significantly.”).

local services to end users.⁸ As Senator Pressler, the manager of the Senate bill, explained, the new legislation required incumbent LECs “to open and unbundle their local networks, to increase the likelihood that competition will develop for local telephone service.” 141 Cong. Rec. S7887 (daily ed. June 7, 1995). Representative Hastert similarly noted that the 1996 Act’s unbundling requirements – like the Act’s interconnection, resale, number portability, and dialing parity requirements – were based on what the long distance carriers said they needed to provide “real competition in the local loop.” 141 Cong. Rec. H8289 (daily ed. Aug. 2, 1995). See also Reno v. ACLU, 521 U.S. 844, 888 (1997) (Act “designed to promote competition in the local telephone service market”); MCI Telcoms. Corp. v. Illinois Commerce Comm’n, 168 F.3d 315, 317 (7th Cir. 1999) (local competition provisions of 1996 Act designed “to introduce competition into local telephone service markets by ending the historic monopoly held by incumbent local exchange carriers”); S. Conf. Rep. No. 104-230, at 148 (1996) (drafters of Act contemplated that it would promote facilities-based, “local residential competition”). Using UNEs solely to complete interexchange calls, in lieu of ordinary access services and without providing local services to end users, would be inconsistent with the congressional goal of promoting competitive local services.⁹

In fact, UNE-based bypass would actually hamper full competition in exchange access services and slow deployment of competitive local networks. Carriers would use UNEs as a

⁸ Thus, for example, the obligation to provide services for resale applies only to the incumbent’s retail services, not to access services. See 47 U.S.C. § 251(c)(4).

⁹ Interexchange carriers could not credibly argue that their ability to succeed as local carriers depends upon denying existing long distance customers local service. In fact, AT&T and the Department of Justice have argued exactly the opposite before this Commission, saying that local entry depends upon the ability to provide both access services and local services over UNEs. Local Competition Order, 11 FCC at 15672-73, ¶ 346.

substitute for not only the incumbent's access services, but also the services of the well-established, facilities-based competitive access providers ("CAPs"). There would be a net migration of access traffic off of CAP networks and back to the incumbent LECs' (unbundled) networks. Regulatory distortions thus would increase the percentage of access traffic sent over the incumbents' networks and discourage construction of alternative facilities, which is not what Congress had in mind when it drafted the 1996 Act.¹⁰

Nor would consumers realize any compensating benefit in their capacity as long distance callers. Arbitrageurs would buy access at cost-based UNE rates and sell it to interexchange carriers at prices close to the incumbent's access charges, effectively diverting universal service funds to themselves. To the extent interexchange carriers realized any significant cost reductions, they likewise would pocket those savings, just as they have failed to pass along substantial cuts in incumbents' access charges.

4. Although not necessary to support the policy, a formal Commission rule (issued under 47 U.S.C. §§ 201(b) and/or 154(i)) that protected access charge recoveries and universal service would enjoy "the deference that interim rules command." CompTel, 117 F.3d at 1075. A rule allowing restrictions on use of loop and transport UNEs to bypass access charges would be effective only until the Commission completes the process of eliminating implicit universal service subsidies from access charges. Cf. Local Competition Order, 11 FCC Rcd at 15862,

¹⁰ See, e.g., S. Conf. Rep. No. 104-230, at 1 (Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies"); Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, Amendment of the Comm'n's Rules to Establish Competitive Serv. Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Servs., 11 FCC Rcd 16639, 16678-79, ¶ 80 (1996) ("[t]he interconnection provisions of the Act, Section 251 and 252, are designed to promote facilities-based local exchange competition").

¶ 716; see also Texas Office of Pub. Util. Counsel, 1999 U.S. App. LEXIS 17941 at *64-*66. CompTel definitively establishes that it is permissible to protect access charge recoveries while the new methods of funding universal service are developed and implemented. See 117 F.3d at 1074-75; see also Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1107-08 (D.C. Cir. 1981) (upholding interim collection system under section 4(i), as “both a helpful and a necessary step for the Commission to take” to ensure a carrier “a continuing source of funds”). And there is no specific limit on the duration of permissible interim measures. Courts have approved transitional regulatory regimes that are of indeterminate length, and those that last for a number of years. See, e.g., National Ass’n of Reg. Util. Comm’rs v. FCC, 737 F.2d 1095, 1135-36 (D.C. Cir. 1984) (“[t]he shift from one type of nondiscriminatory rate structure to another may certainly be accomplished gradually . . .”), cert. denied, 469 U.S. 1227 (1985); id. at 1124-25 (upholding transitional access charge approach “pending a more thorough assessment of the problem” by state commission and Joint Board); North Am. Telecomms. Ass’n, 772 F.2d at 1286-87 (upholding four-year transitional rule for BOC billing of CPE).

CONCLUSION

Allowing carriers to use UNEs only for access services, without providing local services to end users as well, would squander an opportunity to promote local competition for end user customers. Such UNE-based bypass would undermine universal service, which Congress specifically intended to protect, and simultaneously threaten access competition over competitive networks. All of these results are antithetical to the 1996 Act and Commission precedent.