

ORIGINAL

EX PARTE OR LATE FILED

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JUL 30 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Robert T. Blau, Ph.D., CFA
Vice President-Executive and
Federal Regulatory Affairs

202 463-4108
Fax 202 463-4631

July 30, 2001

EX PARTE

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th St. SW
Washington, D.C. 20554

Re: CC Docket No. 96-98

Dear Ms. Salas:

This is to notify you that I submitted the attached written ex parte to Dorothy Attwood, Chief of the Common Bureau. The attached letter describes BellSouth's position regarding the Bureau's current commingling proposal, and suggests why the Bureau should not go through with the proposal.

I am filing notice of the ex parte meeting described above in the docket identified above, as required by Commission rule, and request that you associate this notice with the record of that proceeding. If you have any questions concerning this, please call me at 202-463-4108.

Sincerely,



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Attachment

cc: Dorothy Attwood
Samuel Feder
Jeffrey Carlisle
Julie Veach

Kyle Dixon
Matthew Brill
Michelle Carey

Jordan Goldstein
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Jeremy Miller

BellSouth

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Robert T. Blau, Ph.D., CFA
Vice President-Executive and
Federal Regulatory Affairs

202 463-4108
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July 27, 2001

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Room 5-C450
Washington, DC 20554

Dear Dorothy:

I am writing to express concerns regarding a proposal that the Commission relax certain constraints on the conversion of special access services to combinations of unbundled loop and transport elements. That proposal responds in part to a request filed last fall by WorldCom.¹

The relief sought by WorldCom – including modifying or eliminating the restriction on “commingling” – is both unlawful and inimical to sound public policy. In particular, as discussed below, granting such relief would: (1) violate the limitations on unbundling contained in Section 251(d)(2) by making UNEs available when there is no impairment; (2) arbitrarily prejudice pending proceedings concerning related issues; (3) potentially trigger a large and unwarranted revenue shortfall for incumbent LECs, with inevitable harm to network upgrades and deployment of advanced services; and (4) undermine past and discourage future investments by facilities-based CLECs. Taking the proposed actions, in short, would be antithetical to the letter and spirit of the Telecommunications Act of 1996.

Removing restrictions on special access conversions is unlawful. Permitting CLECs to convert special access circuits to UNE combinations would be unlawful for three reasons.

¹ See WorldCom Petition for Waiver, filed Sept. 12, 2000, asking the Commission to eliminate various restrictions in the “safe harbors” adopted in the *Supplemental Order Clarification*, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000). Although styled as a waiver request, WorldCom effectively filed an untimely petition for reconsideration of the *Supplemental Order Clarification*.

First, CLECs are not “impaired” if they remain unable to convert existing special access services into loop/transport combinations – and without impairment, the Commission cannot mandate the unbundling of particular UNEs or UNE combinations. *See* 47 U.S.C. § 251(d)(2). Of necessity, a CLEC that is currently using special access to serve an existing customer already has won that customer’s business: it is providing the “service it seeks to offer,” in the statute’s terms. That the CLEC could earn a higher profit margin by converting to UNE pricing is irrelevant to the impairment analysis, as the Supreme Court has made clear. *See Iowa Util. Bd. v. FCC*, 525 U.S. 366, 389-90 (1999).

Second, even if the impact on CLECs’ profit margins were relevant, it would be difficult, if not impossible, to reconcile Commission-prescribed re-pricing of special access at TELRIC levels just months after Commission action substantially relaxing or eliminating regulation of those rates in MSAs generating the vast majority of BOC special access revenues. The FCC predicated that earlier action on its finding that special access rates in those MSAs already are competitively disciplined. Re-imposing an even harsher form of rate regulation now would be both arbitrary and irreconcilable with the Act’s deregulatory imperative.

Third, pursuing such a course would improperly prejudge the outcomes of related, pending proceedings. As you know, BellSouth, Verizon, and SBC have filed a Joint Petition demonstrating that CLECs are not impaired without access to unbundled high-capacity loops and dedicated transport – the constituent parts of the UNE combinations to which CLECs wish to convert special access services. That petition showed, for example, that CLECs already have more than 200,000 local fiber miles and 635 local fiber networks in the top 150 MSAs and enjoy a 36 percent market share in the provision of special access services. (In BellSouth’s region alone, there are 15 CLEC local networks in Atlanta, 11 in Tampa/St. Petersburg, 9 in Orlando, 8 in Jacksonville, and 7 each in Raleigh-Durham, Nashville, and Ft. Lauderdale.) It would be irrational to order expanded access to loop/transport combinations without first determining whether the component parts of the combinations continue to meet the impairment standard.

Even if the Commission denied the Joint Petition, the pending special access conversion docket considers the same issues at stake here and is ripe for action.² There is no compelling need to grant any part of MCI’s petition before taking action in that docket. Once again, to the extent CLECs already are using special access circuits to serve customers, no cognizable harm would result from deciding all commingling and conversion issues in a rational and orderly manner. In contrast, preemptively making *ad hoc* decisions now would complicate the Commission’s actions in the broader proceeding.

Expanding the scope of special access conversions is inimical to sound public policy. Eliminating the commingling ban or otherwise relaxing limitations on the conversion of special access circuits would have a harsh impact on ILECs and facilities-

² *See* Public Notice, “Comments Sought on the Use of Unbundled Network Elements To Provide Exchange Access Service,” DA 01-169 (rel. January 24, 2001).

based CLECs alike. For BellSouth alone, taking such action would impose a substantial and unwarranted revenue loss in the first year, even after taking into account term commitments and termination liability.

The resulting effect on investment and service quality could be devastating. Although interstate special access services do not contribute toward universal service, intrastate special access services often do. In addition, revenues legitimately earned from special access services are used by BellSouth and other ILECs to invest in and to upgrade their networks and to deploy additional advanced services and technologies. Importantly, preserving those revenues is not tantamount to protectionism. The revenue loss here would not be a byproduct of true competition, but rather would stem from pure regulatory arbitrage – an arbitrary price break (from special access rates that already are competitively disciplined) bestowed principally on the Big 3 IXCs, who would enjoy about 60 percent of the savings from new conversions.

The detrimental impact on CLECs could well be even more severe. As the Commission recognized in the *Supplemental Order Clarification* (at ¶ 18), allowing expanded conversions of special access services to UNEs “could undercut the market position of many facilities-based competitive access providers.” The reason is clear: in the robustly competitive special access market, any decrease in costs to a facilities-based CLEC would very likely be passed on to customers. This is particularly true in today’s market environment since many cash strapped CLECs may view price cuts made possible by reductions in ILEC special access rates as the only practical means of gaining market share and, thus, additional revenue.

It is equally apparent, however, that in markets served by facilities-based carriers, once one or more carriers cut rates others will follow suit or risk losing market share. While seemingly good for users of high cap services, at least in the near term, general reductions in revenue from these services will further reduce operating margins of facilities-based CLECs at a time when they can ill afford such reductions.³ Again, this is

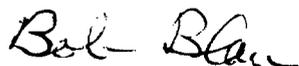
³ As a case in point, the Eastern Management Group (EMG) estimates that XO Communications provisions 58 percent of its high cap services over XO’s own network facilities, 27 percent over facilities the company acquires from non-ILEC networks, and the remaining 15 percent through ILEC special access facilities. EMG further estimates that the gross operating margin on CLEC high cap services provided over their owned facilities, non-ILEC networks, and ILEC special access arrangements are 80 percent, 50 percent and 30 percent respectively. Given this situation, revenue losses that facilities-based CLECs experience from an across-the-board rate reduction triggered by adoption of the commingling proposal would be well in excess of any savings that those CLECs might experience from acquiring special access services from the ILECs at UNE rates. Furthermore, because an estimated 60 percent of the savings that result from the commingling proposal would accrue to the Big 3 long distance carriers – versus only 16 percent going to the CLECs – the commingling proposal arguably would give the Big 3 IXCs a cost advantage *vis a vis* those facilities-based CLECs that also compete in the long distance market. The same obviously would be true of network wholesalers like Level 3 and Williams who compete with the ILECs in provisioning high capacity circuits to retail carriers. Those carriers also would have no choice but to lower rates proportionate to whatever reductions in ILEC special access revenues result from the commingling proposal, in order to avoid losing market share and traffic volume to the ILECs. At the end of the day, if the commingling proposal is adopted and reductions in special access revenues prompt an across the board rate cut, which is highly likely, nearly all, if not all, facilities-based carriers will make do with less revenue from the same number of customers and no significant reductions in underlying cost. That, in turn, portends further

particularly true in today's tight capital market. Thus adoption of the commingling proposal would have the perverse effect of punishing, in the marketplace and in the eyes of Wall Street, those CLECs that are seeking to compete using their own facilities.⁴

No one will invest in new special access loop and transport facilities if such facilities are available from the ILEC at artificially low, TELRIC-based rates (which, after all, are supposed to reflect a hypothetical maximally efficient network). Rather than promoting competition, the planned action would intensify and perpetuate competitors' reliance on the ILECs' networks. In the end, consumers might still have several potential suppliers of special access service, but each would be peddling the same wares at the same prices – there would be no room for innovation and no true price competition.⁵ As Chairman Powell has noted, “[i]f the infrastructure is never invented, is never deployed, or lacks economic viability we will not see even a glimmer of the bright future we envision.”⁶ Such an outcome would undermine Congress' and the Commission's fundamental goal of stimulating widespread, facilities-based local competition and the deployment of advanced services and technologies.

I urge you not to act precipitously in this matter. The Commission should address all pending UNE-related issues in a coordinated and coherent fashion instead of bumping this subset of the special access conversion issues to the head of the line. Nothing would be gained, and a great deal could be lost, from hasty action on the commingling proposal.

Sincerely,



cc: Kyle Dixon
Jordan Goldstein
Samuel Feder
Matthew Brill
Deena Shetler
Jeffrey Carlisle
Michelle Carey
Jeremy Miller
Julie Veech

erosion in operating margins (and stock prices), thereby making it all the more difficult for cash strapped CLECs to access capital markets.

⁴ Moreover, expanded access to UNEs and UNE combinations would further entrench CLEC reliance on ILEC networks, causing greater withdrawal pains if the Commission later removes these elements from the UNE “list.”

⁵ As Justice Breyer cautioned, “[i]ncreased sharing by itself does not automatically mean increased competition. It is in the *unshared*, not the *shared*, portions of the enterprise that meaningful competition would likely emerge.” Concurring Opinion of Justice Breyer, *Iowa Util. Bd.*, 525 U.S. at 429.

⁶ Opening Statement of Michael K. Powell, Chairman, FCC, before the Subcommittee on Telecommunications and the Internet of the House Committee on Energy and Commerce, March 29, 2001, at 4.