

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 18 2001
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)

CC Docket No. 96-98

**OPPOSITION OF SBC COMMUNICATIONS INC.
TO ITC DELTACOM PETITION FOR WAIVER**

I. INTRODUCTION AND SUMMARY

ITC's waiver request is nothing more than a petition for reconsideration offered under the guise of a waiver. In fact, every single argument offered in this waiver request already has been considered and rejected by the Commission. ITC thus has not come close to showing the "extraordinary circumstance" that is a prerequisite for a waiver of the carefully tailored special access conversion rules adopted in the *Supplemental Order Clarification*.¹ Moreover, a waiver of the comingling prohibition would be unlawful insofar as it would effectively require unbundling of a new network element – an individual channel of a DS-3 facility – that has yet to be identified by the Commission. It also would raise a number of administrative and operational concerns that ITC wholly ignores. For these reasons, ITC's petition must be rejected.

But there is another reason, as well, why ITC's petition should be rejected. The 1996 Act requires incumbent LECs to provide access to UNEs only when CLECs would be impaired without such access. Here, ITC claims already to be providing local dialtone service over 3,000

¹ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 at para. 23 (rel. June 2, 2000) (*Supplemental Order Clarification*).

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DS-1 circuits that it seeks to convert to UNEs. If, indeed, that is the case, ITC could not possibly be impaired in its ability to provide such services without converting these DS-1 circuits to UNEs.

The Commission recognized in the *Supplemental Order Clarification* that, in certain respects, the impair analysis in the *UNE Remand Order* did not adequately address special access conversions. It issued Public Notice in early 2001 to obtain additional information and comment on how the impair analysis should apply to special access circuits. In its response, SBC presented compelling evidence that special access conversions are never consistent with the impair standard or the goals of the 1996 Act. Moreover, SBC, BellSouth and Verizon have filed a petition demonstrating that the underlying components of a special access circuit – high capacity loops and inter-office transport – also do not need the impair test. Pending consideration of this evidence, the Commission should not whittle away at the compromise effected in the *Supplemental Order Clarification*. To the extent the Commission revisits that compromise – and that is exactly what ITC asks the Commission to do, notwithstanding its packaging of its request as a waiver – it should do so only in the context of the ongoing complete review of these rules – including a review of how the impairment test should apply to special access circuits and to the components thereof.

II. ARGUMENT

The *Supplemental Order Clarification* reflects a careful balance of conflicting considerations. On the one hand, the Commission sought to give CLECs access to unbundled network elements (UNEs), including preexisting combinations of network elements, to the extent that they would be impaired in their ability to provide particular services without such access.

On the Commission's concern that "permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations and would threaten an important source of funding for universal service."² It also reflects the Commission's recognition that there are substantial questions with respect to the operation of the impairment test to special access conversions.

Three critical components of that compromise are: (1) the restrictions on co-mingling; (2) the collocation requirements for options 1 and 2; and (3) the local service usage requirements. Although arguments against each of those components were raised in a series of *ex partes* filed prior to the issuance of the *Supplemental Order Clarification*,³ the Commission rejected these arguments. Now, having failed to seek reconsideration of the *Supplemental Order Clarification*, ITC asks the Commission to waive these same requirements. Its waiver request, however, simply repeats the arguments that the Commission previously considered and rejected. It does not show the extraordinary circumstances necessary for a waiver and, therefore, must be denied.⁴

² *Supplemental Order Clarification* at para. 7.

³ March 10, 2000, Letter of Chuck Goldfarb, Director Law and Public Policy, MCI Worldcom, to Larry Strickling, Chief, Common Carrier Bureau; March 22, 2000, Letter of Lori Wright, Senior Manager, Regulatory Affairs, MCI Worldcom, to Magalie Roman Salas, Secretary, Federal Communications Commission; April 4, 2000, Letter of Chuck Goldfarb, Director, Law and Public Policy, MCI Worldcom, to Larry Strickling, Chief, Common Carrier Bureau at 7 (*April 4 Ex Parte*); May 11, 2000, Letter of Chuck Goldfarb, Director, Law and Public Policy, MCI Worldcom, to Magalie Roman Salas, Secretary, Federal Communications Commission; May 18, 2000, Letter of Bradley Stillman, Senior Policy Counsel, Strategic Advocacy, MCI Worldcom, to Magalie Roman Salas, Secretary, Federal Communications Commission; June 21, 2000, Letter of Chuck Goldfarb, Director, Law and Public Policy, MCI Worldcom, to Magalie Roman Salas, Secretary, Federal Communications Commission.

⁴ See *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("a waiver is appropriate only if special circumstances warrant a deviation from the general rule"); *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (special circumstances beyond those considered during regular rulemaking required to justify a waiver). In *Industrial Broadcasting*, the court concluded that the Commission properly rejected a waiver application that, like ITC's petition, simply raised the same arguments previously considered by the Commission in a rulemaking. *Industrial Broadcasting*, 437 F.2d at 682 (holding "a heavy burden traditionally has been placed upon one seeking a waiver to

A. Comingling Requirement.

In its petition, ITC asks the Commission to waive the Order's restriction on comingling loops or loop-transport combinations with tariffed special access services.⁵ ITC seeks to justify this waiver on the ground that its network is "unique" in that it focuses on secondary markets within its service area. It claims in this regard that it has DS-3 entrance facilities (many of which have been leased out of ILEC special access tariffs) from a single POP to serve multiple communities and uses DS-1s to carry either local or dedicated access traffic to and from customer premises and more distant end offices to the DS-3s, where traffic is multiplexed up or down. ITC asserts that approximately 3,000 of its leased DS-1s carry exclusively local and/or switched access traffic and almost all of these are comingled onto ILEC special access multiplexing and/or access DS-3 services.⁶ It claims that, in order to convert these circuits to UNEs, it would have to groom them off of the DS-3 trunks used for special access traffic, thereby unnecessarily raising its costs.

Each of these arguments has already been considered and rejected by the Commission. For example, in an *ex parte* filed on April 4, 2000, MCI Worldcom urged the Commission to eliminate any restriction on comingling on the grounds that such a prohibition would "force[] needless inefficiencies on competitive carriers" by requiring them "to operate two overlapping networks,"⁷ and would "needlessly take down customers' services during any circuit

demonstrate that his arguments are substantially different from those which have been carefully considered at the rulemaking proceeding").

⁵ ITC Petition at 1.

⁶ ITC Comments at 5.

⁷ April 4, 2000, Letter of Chuck Goldfarb, Director, Law and Public Policy, MCI WorldCom, to Larry Strickling, Chief, Common Carrier Bureau at 7 (*April 4 Ex Parte*).

migration.”⁸ The Commission rejected these arguments,⁹ concluding that it could not find on the record before it that removing the prohibition would not lead to the use of UNEs solely or primarily to bypass special access services.¹⁰

Even if a waiver were a permissible vehicle for the establishment of unbundling obligations, ITC has presented no evidence that it is impaired in its ability to provide local services if it is denied unbundled access to individual channels of dedicated transport facilities (such as DS-3s). Indeed, its petition confirms that ITC is in no way impaired without such access. According to ITC, it is providing its customers local switched service over 3,000 DS-1 circuits leased out of ILEC special access tariffs. ITC’s own petition thus definitively establishes that ITC is not impaired in its ability to provide local DS-1 services if it is denied unbundled access to individual channels of DS-3 (and higher) interoffice transmission facilities. For this reason, as well, its request for a waiver of the commingling restriction must be denied.

Additionally, ITC disingenuously argues that this waiver would promote facilities based competition by encouraging ITC to serve smaller and under-served markets. To the contrary, this waiver would produce the opposite effect. By lowering the cost of leased circuits to TELRIC, the Commission would encourage CLECSs to rely on ILEC facilities instead of deploying their own.

⁸ *Id.*

⁹ *Supplemental Clarification Order*, FCC 00-183 at para. 28 (“We further reject the suggestion that we eliminate the prohibition on ‘co-mingling’ . . . in the local usage options discussed above.”) (citing *MCI WorldCom Apr. 4, 2000 Letter* at 6-8).

¹⁰ *Id.*

B. Operational Issues.

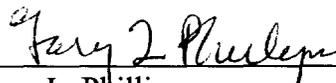
Finally, ITC's request raises a host of operational and administrative issues that ITC fails utterly to address, and which would have to be resolved before the Commission could grant ITC's petition. For example, in order to ensure compliance with the legal and regulatory requirements for unbundled network elements, and also to insulate SBC retail personnel from access to proprietary information about CLEC purchases of UNEs, SBC (like other local exchange carriers) has created separate organizations for the provision of access services and UNEs. Each organization is specially trained to handle the unique provisioning, repair, maintenance, billing, tracking and reporting requirements for their respective facilities, and maintain separate facility inventories. ITC has failed even to consider how this separation – which, as noted, helps not only to ensure compliance with all applicable regulations but to create a “Chinese wall” between SBC's retail and wholesale units – could be squared with co-mingled facilities. Nor has it considered all the work that would be required to breach this wall.

Moreover, permitting CLECs to commingle UNEs and special access circuits would require SBC to modify its billing systems. These systems currently are not capable of pro-rating DS-3 circuit costs based on the percentage of channels that are purchased as UNEs versus access. Given the short comment cycle in this proceeding, SBC cannot quantify precisely the cost and time necessary to modify its billing systems, but estimates that it would take months to make the required changes. Accordingly, ITC's request for a waiver of the commingling restriction in the *Supplemental Clarification Order* should be denied.

III. CONCLUSION

For the foregoing reasons, the Commission should reject ITC's petition.

Respectfully submitted,



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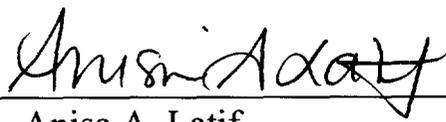
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September 18, 2001

CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the **Opposition of SBC Communications Inc. to ITC DeltaCom Petition for Waiver** has been served on the party below via first class mail – postage prepaid on this 18th day of September 2001.

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