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January 8, 2003

EX PARTE – Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On January 7, 2003, Rob Curtis and Tom Koutsky of Z-Tel and Tim Simeone and I met with Commissioner Martin and Dan Gonzalez. We distributed and discussed the attached documents at the meetings, along with some others that had previously been filed in these dockets. We focused on the statutory provisions giving state commissions a central role in resolving interconnection disputes and the importance of section 271 in establishing that BOCs must unbundle loops, transport, switching, and signaling at cost-based rates.

In accordance with FCC rules, a copy of this letter is being filed in the above-captioned dockets.

Sincerely,

/s/
Christopher J. Wright
Counsel to Z-Tel Communications, Inc.

Triennial Review: State Role, Section 271, and the Development of Wholesale Markets

Robert Curtis
Thomas M. Koutsky
Christopher J. Wright
Timothy J. Simeone
Z-Tel Communications, Inc

January 7, 2003

Agenda

- The States have an important role to play in making unbundling and pricing decisions.
- Section 271 requires the BOCs to unbundle the network elements comprising the platform.
- The Commission's goal should be to foster the development of wholesale markets.
  - Z-Tel has presented a five-step plan.

As A Practical Matter, State Commissions Must Play a Role

Section 251(d)(2)

- The ***USTA*** and ***CompTel*** decisions: Section 251(d)(2) requires granular analyses beyond the capabilities of the FCC.
  - ***USTA*****:** FCC erred by adopting rules of "unvarying scope" that were "detached from any specific markets or market categories."
  - ***CompTel***: Section 251(d)(2) "invite[s] an inquiry that is specific to particular carriers and services."
  - Under those decisions, the question will be whether, with respect to network element X (from NIDs to OSS), carrier A (from AT&T to Z-Tel), seeking to provide service B (from POTS to broadband) is impaired in geographic market C (from Alaska to Manhattan) to serve different types of end-users (from mass-market consumers to large, data-intensive businesses).
- States can **help** FCC write rules that pass legal muster by doing fact-finding to determine whether impairments continue to exist – with particular focus upon whether reduction in output would occur in their states

As A Legal Matter, State Commissions Must Play A Role

Section 252

- The State Commissions arbitrate interconnection agreements, which set forth a list of network elements and the price for leasing those elements.
- No "delegation" issue: Congress told the state commissions to play a role.

Section 251(d)(3)

- Regardless of the section 251(d)(2) analysis, Congress preserved the states' right to establish additional unbundling obligations.
- *Iowa Utilities Board*: In a portion of its opinion that was not overturned, the Eighth Circuit held that the FCC could not preempt state unbundling rules merely because they differ from FCC rules

Section 252(e)(3)

- Provides that state commissions may "establish[] or enforc[e] other requirements of state law" when arbitrating interconnection agreements.

Section 271 Requires the Bells to Provide UNE-P

- Regardless of the results of the impairment analysis, the BOCs must provide access to the network elements comprising the platform.
  - The section 271 checklist specifically requires BOCs to unbundle loops, switching, transport, and signaling.
  - The legislative history says the checklist sets forth what a BOC must provide "at a minimum … in any interconnection agreement approved under section 251."
  - The FCC previously concluded that BOCs must provide access to unbundled switching even in circumstances where it need not be offered under section 251.
- Verizon recognized that section 271 means what it says by filing a forbearance petition.
  - But the record in that separate proceeding shows that sections 251(c)(3) and 271 have not been "fully implemented" and won't be until wholesale markets exist.
- FCC erroneously concluded that BOCs need not provide network elements at cost-based rates. Congress…
  - Intended the cost-based pricing rule it established in 1996 for network elements to be applied.
  - Did not intend that the Commission instead use a 1934 provision governing interstate rates, and the Commission lacks authority under those provisions to set intrastate rates.

A Five Step Plan to Wholesale Alternatives

Step 1. **Resolve loop access impairment**

Step 2. **Competitive transport markets**

Step 3. **Migration by Switch-Based CLECs**

Step 4. **Wholesale competitive analysis**

Step 5. **Transition by all carriers**

- Steps must be taken "in order"
- Focus on mass-market DS0 switching/shared transport
- State commission fact-finds and adjudicates each step
- Avoid pitfalls of 271 process (notice filings, social promotion)
- Establish path to ultimate deregulation

Step 1: Resolve Loop Impairment

- State commission must determine that ILEC can provide DS0 loops in a --
  - Cost-effective
  - Reliable
  - Timely, and
  - Scalable manner
- Wholesale market for mass-market local switching/transport cannot develop unless efficient and effective access to DS0 loops
- Manual process amounts to classic barrier to entry
  - AT&T conservatively estimated $7/mth per line difference
  - Result: 31% diminution of CLEC market share
- Scale matters
  - Volume of hot-cuts not tested in 271 proceedings
  - SBC's "offer" of 1 million hot-cuts per year in Ameritech region would limit CLECs to <8% market share

Step 2: Competitive Transport Markets

- Wholesale providers must not be dependent upon ILEC-provided interoffice transport
- CompTel/ALTS test for competitive alternatives to interoffice transport should be completed by State commission *before* ILEC permitted to proceed to Step 3
- Analysis must be undertaken separately for dedicated and shared transport

Step 3: Switch-Based CLEC Migration

- ILEC makes *prima facie* showing to state commission of satisfaction with Steps 1 and 2 with regard to particular central office
- State commission examines and, after opportunity for discovery and hearings, makes preliminary determination of ILEC compliance – then…
- Entrant that has **already** collocated and deployed in that central office the necessary equipment, software and facilities to switch DS0 circuits should be required, where cost-effective and non-customer effecting, to begin to migrate DS0 UNE-P lines to that switch
- State commission supervises migration – if ILEC fails in provisioning, reversion back to Step 1
- Benefits
  - Ramp up and test ILEC loop provisioning systems in real-world setting
  - Encourage development of non-ILEC sources of supply

Step 4: Wholesale Market Analysis

- Once all Step 3 migrations completed, ILEC may for that central office petition State commission for determination that a vibrant, effective and efficient wholesale alternatives for DS0 switching and transport exists in that office

- State commission competitive analysis:
  - At least ***five*** non-ILEC providers that provide substitutable wholesale service for DS0 switching and transport interconnected with ILEC loops are present
  - The five wholesale providers have sufficient personnel and resources to provide wholesale service and each have done so for at least 100 DS0s in that office
  - Wholesale providers have sufficient capacity to serve retail CLEC demand
  - Transfer to wholesale providers can be accomplished seamlessly and cost-effectively

- Five provider requirements based on game theory, Cournot models of competition, and presence of lack of complete information *ex ante*

Step 5: UNE-P Transition Process

- CLECs file transition plans with State commission within six months of completion of Step 4 in a CO
- State commissions accept plans or grant exceptions
- ILEC obligated to provide UNE-P while transitions in progress
- If during transition ILEC fail to provide seamless, cost-effective cutovers, State commission shall suspend all transition for at least six months
- Three Strikes: third time an ILEC fails in its obligations in any CO for a third time, ILEC immediately reverts back to Step 1 and must provide UNE-P