



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

January 10, 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 9, 2003, Tom Koutsky of Z-Tel and Tim Simeone and I met with Jordan Goldstein in Commissioner Copps' office and then with John Rogovin, Mary McManus, Linda Kinney, John Ingle, Nick Bourne, Debra Weiner, and Paula Silberthau in the Office of General Counsel. We distributed and discussed the attached document at the meetings, along with Z-Tel's December 20, 2002, *ex parte* letter that was previously filed in these dockets. We focused on 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: The Role of the State Commissions and the Importance of Section 271

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

January 9, 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.



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.



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



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.



The FCC Cannot Mandate “Market-Based” Rates for Elements Provided by BOCs

- 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 to network elements.
 - Checklist item 2 says network elements must be provided at cost-based rates.

- Congress did not intend that the Commission instead to use a 1934 provision governing interstate rates.
 - Under *Louisiana Public Service Commission*, the Commission lacks authority under those provisions to set intrastate rates.