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January 21, 2003

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147*

Dear Ms. Dortch:

SBC Communications Inc., BellSouth Corporation, and Qwest Communications International Inc. respectfully submit this ex parte letter in the above-captioned proceeding in order to address the effect that a Commission decision holding that a previously provided network element does not meet the "necessary" or "impair" standards of 47 U.S.C. § 251(d)(2) would have on existing change-of-law provisions in interconnection agreements between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs"). It is crucially important that the Commission address and clarify this change-of-law issue in the *Triennial Review* decision because, absent such clarity, CLECs may seek to extend the prior unbundling regime indefinitely, in direct conflict with both the D.C. Circuit's determination that the old regime is unlawful and this Commission's judgment that the prior regime is not in the public interest. The Commission has ample power to prevent such unlawful and inappropriate actions.

Ex Parte Presentation

This letter makes three points. First, the Commission should make clear that change-of-law provisions in existing interconnection agreements cannot be used to block implementation of the Commission's new unbundling requirements. Second, the Commission should make clear that any negotiation of new interconnection agreement terms for implementation of new unbundling requirements must be done in good faith and in a manner that complies with the time frames established by the Commission for the implementation of those rules. Finally, the Commission should clarify that, if a network element is removed from the list of those required to be unbundled, then it may not be obtained or prolonged through use of the Commission's pick-and-choose rule.

1. There are a variety of change-of-law provisions in existing interconnection agreements. The Commission should not and need not allow such provisions to impede a smooth transition to the Commission's new list of network elements to be established in this *Triennial Review* proceeding. The Commission should accordingly establish a single national transition plan declaring that all interconnection agreements be conformed to any Commission holding that delists a network element, and on the same timetable.

Many interconnection agreements provide generally for amendment pursuant to "legally binding" intervening law[1] or a "final and nonappealable" order.[2] Such provisions would be triggered, at the very latest, when the decision of the D.C. Circuit vacating all of the Commission's prior unbundled network element rules becomes final and nonappealable. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"), *petition for cert. pending*, No. 02-858 (U.S. filed Dec. 3, 2002). If and when the Supreme Court denies the pending petition for certiorari, there will obviously be a final, binding, nonappealable order. That vacatur of the prior rules will trigger the change-of-law provisions (to the extent that they have not already been triggered). Nevertheless, in an attempt to preserve the old unbundling rules that the D.C. Circuit has vacated, some parties may argue that such change-of-law provisions would not be triggered until all appeals of the new, *Triennial Review* order are final. That position lacks merit. Once the vacatur of the prior rules is final, the legal obligation upon which the existing interconnection agreements are based will no longer exist. The D.C. Circuit vacatur thus creates the change of law. The FCC's *Triennial Review* order will simply create new unbundling obligations that are binding on the ILECs on a going-forward basis. It is those new obligations that will have to be incorporated into amended interconnection agreements in order for ILECs to have any obligation to provide unbundled network elements ("UNEs") to CLECs pursuant to the terms of those agreements. But, whether or not the Commission issued new unbundling rules, the elimination of the old requirements – and thus the change of law – would take place pursuant to the final, nonappealable D.C. Circuit order vacating the Commission's prior rules. The Commission should, at a minimum, confirm that fact in its decision.

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[1] *See, e.g.*, Interconnection Agreement Between Pacific Bell Tel. Co. and AT&T Communications of California, Inc., General Terms and Conditions § 8.3, Aug. 14, 2000 (California).

[2] *See, e.g.*, Interconnection Agreement Between Ameritech Information Indus. Servs. and MCImetro Access Transmission Servs., Inc. § 29.3, July 31, 1997 (Michigan).

Even more important, to avoid uncertainty and to ensure a smooth transition to the new regime that the Commission intends to put in place, the Commission should establish a uniform, national transition plan for implementation of the new rules. The Commission has ample authority to override any change-of-law provisions (or lack thereof) that would impede implementation of its new UNE regime adopted in this *Triennial Review* proceeding. The interconnection agreements under which ILECs currently operate were implemented pursuant to a prior, soon-to-be vacated regulatory regime, and the Commission has the power to ensure the success of the transition to the new regime it intends to put in place.

Indeed, under the so-called *Mobile-Sierra* doctrine, the Commission arguably may negate any contract terms of regulated carriers so long as it makes adequate public interest findings. "For all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) (citing, in turn, *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956))). In *Cable & Wireless*, the court upheld the Commission's finding that contracts containing international settlement rates exceeding FCC benchmarks were not in the public interest. *Id.*

The Commission has similarly applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed prior to the 1996 Act, in light of the reciprocal compensation provision of § 251(b)(5) of the 1996 Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1095 (1996) ("*Local Competition Order*") ("Courts have held that 'the Commission has the power . . . to modify . . . provisions of private contracts when necessary to serve the public interest.'") (quoting *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987)) (subsequent history omitted); *see also id.* ¶ 1322 (explaining that § 252(a)(1) "clearly states that 'agreement' for purposes of section 252, 'includes any interconnection agreement negotiated before the date of enactment'"). The Commission also noted that the "opportunity that we are affording to CMRS providers in this context is consistent with similar 'fresh look' requirements that we have adopted in the past." *Id.* ¶ 1095 & n.2636 (citing three pre-1996 Act fresh-look requirements imposed by the Commission).

In this context, the Commission need not even address the question of whether it may generally override interconnection agreements when it determines that they are not in the public interest, but rather only needs to rely upon its clearly established power to create a transition period away from agreements that were entered into under a regime that the federal courts have authoritatively determined to be unlawful. Courts have made clear that agencies have broad authority to correct the consequences of their vacated rules. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals").

Thus, to give full and fair effect to removal of a network element from the mandatory unbundling list, the Commission should make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede or negate changes to the national UNE regime established by the Commission in this proceeding. The D.C. Circuit has held that, "where intervening circumstances – in this instance, FERC-mandated open access transmission – affect an entire class of contracts in an identical manner, we find nothing in the *Mobile-Sierra* doctrine to prohibit FERC from responding with a public interest finding applicable to all contracts of that class." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 710 (D.C. Cir. 2000). Likewise, this Commission's removal of any network element from the mandatory unbundling list, pursuant to this generic rulemaking proceeding, would affect "an entire class of contracts in an identical manner," and the public interest therefore demands that the Commission provide for uniform implementation regardless of any inconsistent provisions in interconnection agreements. The Commission is entitled to "'substantial deference' to its judgments regarding the public interest." *Cable & Wireless*, 166 F.3d at 1232 (quoting *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996)).

The objections that might be raised to the Commission's invocation of *Mobile-Sierra* in this context are not substantial. Because *Cable & Wireless* applied its reasoning to "all contracts filed with the FCC," 166 F.3d at 1231, some might claim it inapplicable because the Commission in 1996 decided not to require that interconnection agreements be filed at the FCC, finding instead that the requirement in § 252(h) for state-commission filing was sufficient. *See Local Competition Order* ¶ 1320. But the reference to "filing" in *Cable & Wireless* does not mean that the court's decision applies only to contracts actually filed with the Commission; rather, the decision applies to all contracts and other agreements that are subject to the Commission's rulemaking authority, as interconnection agreements plainly are. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 381, 380 (1999) ("§ 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). As the Court made clear in *Iowa Utilities Board*, state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest. *See id.* at 385 ("that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . do[es] not logically preclude the Commission's issuance of rules to [guide the state-commission judgments]") (second alteration in original). The state commissions must therefore apply this Commission's rules, and any public interest findings ensuring that its new rules are immediately and uniformly effective (rather than waiting variable periods depending upon the vagaries of existing agreements) would suffice to override any existing change-of-law provisions approved by a state commission.

Nor does the Commission's precedent under §§ 251 and 252 prevent it from furthering the public interest by adopting an orderly transition period. The question here is whether the Commission may take action to modify contracts that were entered into against the backdrop of FCC rules that have now been found unlawful and contrary to congressional intent *ab initio*. Put differently, the existence of provisions requiring extremely broad UNE access in existing interconnection agreements is a result of the Commission's prior misinterpretations of the 1996 Act. Since it is established that agencies have broad authority to correct the consequences of

their vacated rules, *Callery Properties*, 382 U.S. at 229; *Natural Gas Clearinghouse*, 965 F.2d at 1073, this case provides a particularly apt instance to invoke *Mobile-Sierra*. Or, to put it another way, even without *Mobile-Sierra*, *Callery Properties* alone provides all the authority the Commission needs to establish a uniform, national plan to transition from a regime in which existing contracts were negotiated against a backdrop of unlawful rules to a new regime with lawful unbundling rules. In this regard, the Commission's footnote statement in *IDB Mobile Communications, Inc. v. COMSAT Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n.50 (2001), that "*Sierra-Mobile* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements," is not only pure dicta – the case involved a satellite contract – but also does not address the circumstances where the agreement reflects the prior, vacated rules. In any event, that dicta is wrong even on its own terms. Section 252(e)(2) permits a state commission (1) to reject a negotiated agreement upon a finding that it either discriminates against a non-party carrier or is inconsistent with the public interest, convenience, and necessity; and (2) to reject an arbitrated agreement if it violates § 251. Assessing discrimination and protecting the public interest are the hallmarks of the *Mobile-Sierra* analysis, so there is no conflict there, and the Commission plainly has authority to interpret § 251 and to correct its own vacated interpretation of that provision, which is what it is doing here.

Accordingly, in order to effect an orderly transition to the new rules, the Commission has authority to, and should, establish a national regime designed to transition *all* existing interconnection agreements to uniform conformance with the Commission's revised mandatory unbundling list to be established in this proceeding, including any timetable the Commission may set regarding its effective date. In addition, the Commission should make clear that, at the very latest, when the D.C. Circuit's *USTA* decision is final and nonappealable, that creates the relevant change of law for the purposes of relevant contract provisions. Any existing change-of-law provision (or lack thereof) that could have the effect of blocking prompt implementation of its *Triennial Review* decision are against the public interest, and should be considered null and void.

2. If the Commission does not establish a national transition plan, then it should at least clarify how its new unbundling requirements will be implemented in the context of the *Triennial Review*. To the extent that interconnection agreements require parties to negotiate new contract language implementing intervening law, the Commission should make clear that such implementation must become effective within the time frame established by the Commission for its new rules. Although the statute allows a more extended period for the negotiation and arbitration of new interconnection agreements, there is a duty of good faith negotiation imposed upon both CLECs and ILECs alike, 47 U.S.C. § 251(c)(1), and it would plainly not require any extended period of time to implement, in good faith, an amendment embodying an FCC decision not to unbundle certain elements.

The Commission has ample authority to require the parties to act promptly in implementing such new requirements. When the Commission established national, default collocation intervals, it required ILECs to file tariff and SGAT amendments within 30 days (with the tariff amendments to take effect at the earliest time permissible under state law, and the

SGAT amendments to take effect 60 days after filing). It also required prompt good faith renegotiation of agreements to reflect those intervals. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 15 FCC Rcd 17806, ¶¶ 34-36 (2000). A similar requirement is appropriate here to require all parties to negotiate and implement new contract language, and for state commissions to approve such changes, in order to reflect the Commission's new unbundling rules within the strict time frames established by the Commission for implementation of those rules.[3] This requirement should also apply to the situation where the parties are currently negotiating a new interconnection agreement while operating under an expired agreement that continues in force pending those negotiations. The Commission should require either that the new negotiations be concluded in time for its *Triennial Review* UNE rules to be timely implemented pursuant to the new agreement, or that the old agreement be timely amended to implement those rules until the new negotiations are completed.

In some cases, states have also required the ILECs to file tariffs that reflect the UNE obligations established by this Commission. As the Commission did in the collocation context, it should require that ILECs amend such tariffs within 30 days to conform to the new rules, and further mandate that those tariffs be effective at the earliest time permissible under state law. Further, the Commission should make clear that, if a state commission refuses to allow the amendments of these tariffs to become effective, its decision will be contrary to federal law and thus preempted. As we have discussed at length in prior filings (for instance, the joint November 19, 2002 ex parte filed in this proceeding), Congress has given this Commission, not the states, the authority to determine the list of unbundled elements, and states cannot add elements to the list that this Commission has determined should not be offered. A state that refused to adopt appropriate, conforming tariff amendments would be doing exactly that, and the Commission should make clear that any such decision would be preempted.

3. Consistent with the above-described actions regarding change-of-law provisions, the Commission should make clear that CLECs are prohibited from artificially extending mandatory unbundling through use of the Commission's pick-and-choose rule, which permits a CLEC to opt into individual provisions of an approved interconnection agreement previously negotiated under § 252. *See* 47 C.F.R. § 51.809 (adopted pursuant to 47 U.S.C. § 252(i)). That result follows inexorably from the 1996 Act. Section 252 applies only to "a request for interconnection, services, or network elements *pursuant to section 251*." 47 U.S.C. § 252(a)(1) (emphasis added); *see also Local Competition Order* ¶ 1322 ("[s]ection 252(i) must be read in conjunction with section 252(a)(1)"). Thus, elements found not to meet the mandatory

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[3] After issuance of the *ISP Remand Order*, *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), some CLECs did not respond to repeated ILEC requests to implement the new intercarrier compensation rules for ISP-bound traffic. *See* Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC, Attach. at 10, Docket Nos. 01-338, 96-98, & 98-147 (Nov. 21, 2002). The Commission should act to prevent such opportunities for extending a UNE regime vacated by the D.C. Circuit and replaced by this Commission's Triennial Review order.

unbundling standards in § 251 cannot be within the scope of § 252, including § 252(i) opt-in rights. The Commission necessarily so held in its recent ruling that "only those agreements that contain an *ongoing* obligation relating to section 251(b) or (c) must be filed under section 252(a)(1)." *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, ¶ 8 n.26 (2002) (emphasis added); *cf. id.* ¶ 3 (noting Qwest had argued that § 252(a)(1) does not require the filing with state commissions of agreements pertaining to "network elements that have been removed from the national list of elements subject to mandatory unbundling"); Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, Attach. at 2, Docket No. 01-338 (Jan. 17, 2003) (advancing this argument in the context of urging the Commission to clarify that the pick-and-chose rule would not apply to delisted network elements).

Even if § 252(i) opt-in rights somehow attached to network elements that fail the mandatory unbundling standards of § 251, Commission precedent nevertheless permits abolishing those rights in order to give effect to its upcoming *Triennial Review* ruling. In adopting a new intercarrier compensation mechanism for ISP-bound traffic, the Commission specifically prohibited carriers from opting into inconsistent provisions from other agreements, because permitting opt-in would "seriously undermine" the Commission's effort to transition to the new regime. *ISP Remand Order* ¶ 82 n.154. In addition, the Commission noted that its opt-in rule requires that network elements be made available to CLECs "only 'for a reasonable period of time,'" which it held would "expire[] upon the Commission's adoption in [that] Order of an intercarrier compensation mechanism for ISP-bound traffic." *Id.* ¶ 82 n.155 (quoting 47 C.F.R. § 51.809(c)). The Commission should do the same here, by indicating that the reasonable period of time expires as of the date the Commission announces its *Triennial Review* ruling, and by prohibiting inconsistent opt-in rights as of the date that it adopts an order removing any element from mandatory unbundling requirements.[4]

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[4] Even if, contrary to this precedent, the Commission were to allow carriers to use opt-in to gain unbundling of a delisted network element, it should not allow carriers to use such rights to obtain more favorable change of law or contract expiration provisions. Moreover, the Commission should reaffirm that carriers may not directly or indirectly extend such provisions beyond the expiration date of the agreement opted into through, for example, the use of alternate change-of-law provisions or contract expiration provisions related to the continuation of operations while an expired agreement is being renegotiated. *See Bell Atlantic-Delaware, Inc. v. Global Naps South, Inc.*, 77 F. Supp. 2d 492, 503 (D. Del. 1999) ("The FCC has explained that a carrier opting into an existing agreement takes all the terms and conditions of that agreement [or the portions of that agreement] 'including its original expiration date.'") (quoting *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 23318, ¶ 8 n.27 (1999)); *see also Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 12530, ¶ 8 n.25 (1999) (same).

Ex Parte Presentation

In accordance with FCC Rule 1.49(f), this *ex parte* letter is being filed electronically through the Commission's Electronic Comment Filing System for inclusion in the above-referenced dockets pursuant to FCC Rule 1.1206(b)(1).

Thank you for your kind assistance with this matter.

Sincerely,

Michael K. Kellogg /SKO

Michael K. Kellogg

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