

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

January 23, 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, and 98-147

Dear Ms. Dortch:

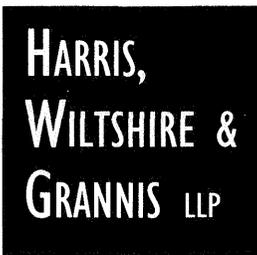
Attached for inclusion in the record of this proceeding is a letter to Chairman Powell and the commissioners concerning the consequences of failure to issue the Triennial Review decision by February 20, 2003.

In accordance with FCC rule 1.49(f), this *ex parte* letter and attachment are being filed electronically pursuant to FCC Rule 1.1206(b)(1).

Sincerely,

/s/

Christopher J. Wright
Counsel Z-Tel Communications, Inc.



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

January 23, 2003

Ex Parte

Honorable Michael K. Powell
Chairman
Honorable Kathleen Q. Abernathy
Honorable Michael J. Copps
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Commissioners
Federal Communications Commission
445 12th Street, S.W., Room 8-B201
Washington, DC 20554

Re: The consequences of failure to issue the Triennial Review decision by
February 20, 2003, CC Docket Nos. 01-338, 96-98, and 98-147

Dear Chairman Powell and Commissioners:

On behalf of Z-Tel Communications, I write to make one point: it is far more important to issue a *correct* decision in the Triennial Review proceeding than to issue a decision before the partial stay of the mandate in the *USTA* case expires on February 20, 2003.

The Commission's motion to extend the partial stay of the mandate explained that it is unlikely that the D.C. Circuit intended to vacate the *UNE Remand Order*.¹ The Commission stated that, in any event, an extension of the stay was warranted because (a) "the Commission lawfully could reinstate unbundling obligations with respect to at least some of the network elements" identified in that Order and (b) "vacatur could have disruptive consequences for the

¹ *Emergency Consent Motion of the Federal Communications Commission to Extend Partial Stays of Mandates, United States Telecom Association v. FCC*, Nos. 00-1012, *et al.* & 00-1015, *et al.* (Dec. 4, 2002). Following the nomenclature of the D.C. Circuit, the Commission's motion referred to the 1999 Order that is usually referred to as the "UNE Remand Order" as the "Local Competition Order."

competitive LEC industry and its customers.”² With respect to the possibility of disruption, the Commission noted that “[c]ertain unbundling obligations may continue (at least for a time) pursuant to existing unexpired interconnection agreements, state law requirements, or other federal requirements.”³ As is its usual practice, the court granted the unopposed motion in a brief order without explaining its reasoning.⁴

With respect to CLECs like Z-Tel that rely on the UNE platform to provide competitive service, this is *not* a situation like that recently faced by the Commission in the *Incumbent LEC Broadband Order* where “failure to reach agreement” in a timely manner would have led to a result that would be “incomprehensible in light of the record.”⁵ Rather, as suggested by the Commission in its motion, unbundling obligations would continue in force even if the Commission’s rules were vacated. Indeed, we think it unlikely that much would change, as a practical matter, if the Commission failed to issue a decision by February 20 and the D.C. Circuit vacated Commission’s unbundling rules.

That is because, as explained in Z-Tel’s recent letter concerning the role of the state commissions in making unbundling decisions,⁶ unbundling obligations ultimately are set forth in interconnection agreements that are arbitrated by state commissions when the parties cannot agree on what network elements must be provided or the price for those elements. Interconnection agreements typically have change-of-law provisions that call for renegotiation in the event of a material change in applicable law. While agreements vary, it is common that a party must provide notice of a material change in law, then negotiate in good faith, and, if no agreement is reached, invoke dispute resolution provisions set forth in the agreement. For example, Z-Tel opted into the agreement between AT&T and Pacific Bell that requires 30 days notice of a desire to renegotiate on account of a change of law, followed by a 90-day negotiation period, followed by use of the alternative dispute resolution procedures set forth in the agreement. Other agreements lead back to a decision by the state commission. For example, the Texas “T2A” agreement governing Z-Tel and many other CLECs provides that “Any dispute between the Parties regarding the manner in which this Agreement should be modified to reflect the affect of the appellate court decision shall be resolved by the [Texas Public Utilities] Commission.” Clearly, new entrants in states such as Texas or California are unlikely to be affected if the FCC did not issue its Triennial Review decision for weeks or even months after February 20 because, if the ILEC contended that the D.C. Circuit had vacated the FCC’s unbundling rules and triggered renegotiation, the renegotiation process would likely still be pending when the FCC issued its decision.

² *Id.* at 6, 7.

³ *Id.* at 7 n.6.

⁴ Order in No. 00-1015, *supra*, Dec. 23, 2002.

⁵ *In re Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, FCC 02-340 (Dec. 30, 2002) (Joint Statement of Commissioners Copps and Adelstein, concurring).

⁶ Letter from Robert A. Curtis and Thomas M. Koutsky, Z-Tel, to Chairman Powell and Commissioners Abernathy, Copps, Martin, and Adelstein (Dec. 20, 2002), CC Docket Nos. 01-338, 96-98, and 98-147.

Even if an applicable interconnection agreement expired, state commissions would ensure that new agreements contained appropriate unbundling requirements. The BOCs that have obtained section 271 authority are required by the checklist to provide loops, transport, switching, and signaling. Similarly, other ILECs would still be subject to the statutory requirement that they provide unbundled access to network elements pursuant to the requirements of section 251. Because the unbundling requirements of section 251(c)(3) and section 271(c)(2)(B) would remain in effect, as would the pricing rule of section 252(d)(1), we believe the vast majority of state commissions would require ILECs to continue to provide access to the platform of network elements at cost-based rates.

Cases arising after the Eighth Circuit invalidated the FCC's "combinations" rules (47 C.F.R. § 51.315(c)-(f), which require ILECs to combine elements they do not normally combine) illustrate that vacatur of an FCC rule does not prevent state commissions from stepping into the breach. For example, although the FCC's combinations rules had been vacated, the Fifth Circuit upheld the Texas Commission's decision to require ILECs "to combine elements for competitors even if it did not combine such elements for itself."⁷ Similarly, the Ninth Circuit required U S West to combine otherwise separate network elements at the request of a CLEC, even though it acknowledged that "[t]he Eighth Circuit's decision to vacate the FCC regulations certainly still stands."⁸ But "[a]ll this means," the court explained, was that the Act, as implemented by binding FCC rules, "does not currently mandate a provision [in an interconnection agreement] requiring combination."⁹ In another case, a district court upheld a similar decision by the California PUC and noted that the California commission "based its decision to impose a combination requirement on its independent authority under State law."¹⁰

Thus, in the unlikely event that the unbundling obligations set forth in the *UNE Remand Order* were vacated by the D.C. Circuit and applicable interconnection agreements expired, state commissions could still order ILECs to provide unbundled access to network elements and the D.C. Circuit's decision would present no bar to such arbitration decisions. That is particularly so because, as the Commission stated in its motion, "the *USTA* opinion did not even *address* directly the specific network elements" identified in the *UNE Remand Order*.¹¹ It certainly did not conclude that ILECs may not be ordered to provide loops, transport, switching, and signaling on an unbundled basis pursuant to section 251, and the requirements of section 271 were not at issue in *USTA*.

⁷ *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 820 (5th Cir. 2000).

⁸ *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000). The Eighth Circuit's decision subsequently was reversed by the Supreme Court in *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

⁹ *MCI Telecommunications Corp.*, *supra*, 204 F.3d at 1268.

¹⁰ *AT&T Communications v. Pacific Bell Telephone Co.*, 228 F. Supp. 1086 (N.D. Cal. 2002).

¹¹ *FCC Motion*, *supra*, at 6.

It nevertheless would be desirable for the Commission to issue an order resolving the Triennial Review sooner rather than later. Any resources expended debating whether the *UNE Remand Order* was actually vacated and the consequences of the absence of governing federal rules are resources expended wastefully. But this is not a situation in which a compromise decision that undermines competition is preferable to no decision at all.

Sincerely,

\s\
Christopher J. Wright

cc: Chris Libertelli
Matt Brill
Jordan Goldstein
Dan Gonzalez
Lisa Zaina
Bill Maher
Michelle Carey
John Rogovin