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January 31, 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:

On January 30, 2003, Thomas M. Koutsky, Vice President, Law and Public Policy, Z-Tel Communications, Inc. had an *ex parte* conversation with Daniel Gonzalez, Legal Advisor to Commissioner Martin, in which the attached materials were discussed. Z-Tel emphasized its prior submissions in this docket concerning the need for “granular” analysis in the identification of Unbundled Network Elements, and the relationship between that “granular” analysis and the statutory role that state commissions play in the section 251-252 process.

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.

Attachments

Z-TEL'S PROPOSED UNBUNDLED SWITCHING AND SHARED TRANSPORT FRAMEWORK

A key issue in the FCC's *Triennial Review* is the role of State commissions in assessing operational and economic factors that necessitate the availability of unbundled local switching and shared transport (UNE-P).

The attached proposed rule provides a comprehensive framework for addressing the state role. The proposed rules recognize that section 251 "impairment" for **analog, dialtone services** will exist until there are vibrant wholesale alternatives to ILEC-provided switching and shared transport. This proposed rule therefore builds upon Z-Tel's November 20, 2002 *A Five-Step Plan for Building Wholesale Markets* submission, and it provides a set of proxies for analysis as to whether wholesale alternatives exist. The proposal places the burden of proof on ILECs for analog dialtone services and on CLECs regarding impairment for digital services (above DS1).

The proposal provides a general State review process that could be applicable to any unbundled network element. State commissions have flexibility to consider a host of factors, yet are given specific and certain guideposts for many of these analyses. While it recruits State commissions to help the FCC in its federal "impairment" analysis, the proposal also preserves independent State authority under section 251(d)(3) and other provisions of the law.

- **General Process.** FCC establishes comprehensive UNE requirements; states can grant exceptions to these requirements upon a state finding of non-impairment. States are not required to engage in this process.
- **Market-Specific Impairment Standard.** Impairment exists if denial of unbundled access places substantial and non-transitory operational or economic impairments upon a CLEC's ability to provide service in any of the following service markets: the analog telephone mass market, the residential broadband market, the medium-sized business market (DS1-DS3 digital services), or the large business/enterprise market (OCx digital services). States may consider other factors unique to their states, such as relationship between unbundling and alternative or price-cap regulation.
- **Process.** If state decides ILEC fails to meet its burden of proof, ILEC barred from "re-applying" for a waiver from that UNE for 1 year

■ Specific Applicability to Switching and Shared Transport

- For large business/enterprise (OCx) and medium-sized business (DS1-DS3) services, State commission presumes non-impairment
- For analog dialtone market (up to 18 lines at a customer premises), State commission presumes impairment
- To overcome analog dialtone market presumption, ILEC must show that Operational and Economic factors related to UNE-L entry are resolved
- Operational Factors
 - *Quality*: Analog hot-cuts done in same time as ILEC retail POTS provisioning requirements; no performance measurement problem for at least 6 consecutive months; and
 - *Quantity*: ability to hot-cut 5% of all analog dialtone lines in relevant geographic area every month (e.g., ability to handle expected growth and churn).
 - ILEC can prove compliance with both Quality and Quantity requirements by providing **all** of its retail POTS orders in the geographic area through the CLEC UNE-L process for six months
 - Five independent sources of transport available to the CO
- Economic Factors
 - NRC for UNE-L commensurate with PIC change charge
 - No other substantial and non-transitory cost disparities exist between a CLEC with viable scale that would utilize UNE-L to provide analog dialtone service and the ILEC's cost of providing analog dialtone service
 - *Wholesale Market Analysis*. Any of following conditions met:
 - Five independent, viable, and stable wholesale providers of analog switching and transport capacity are collocated in the CO; or
 - Seven or more independent, viable and stable retail providers of analog dialtone services out of the CO and three of those providers provide wholesale analog switching and transport capacity out of that CO; or
 - The HHI for retail analog telephone service in the relevant geographic market is less than 1800

- **Migration**. State commissions have authority to approve and administer migration plans. Migration may begin without Wholesale Market Analysis for CLECs that already own a switch and transport in an office. ILECs have affirmative duty to cooperate in migration and provide full economic indemnification to CLECs if ILEC fails in that duty.

51.319. Federal Unbundling Standards

(a) List of unbundled network elements.

- (1) Incumbent local exchange carriers shall provide the following elements on a national basis, unless the State commission grants an exception, pursuant to subsections (b) and (c), for a particular element in a particular geographic area of that state for a particular service:

[list elements, OSS, etc.].

- (2) Bell operating companies shall be required to provide, without any restriction, unbundled access to any network element specifically enumerated in section 271(c)(2)(B)(iv), (v), (vii), and (x) of the Communications Act in any state in which that company or its affiliate has received authority to provide interLATA services, without regard to whether any network element is required by subsection (a)(1).

- (b) State commissions standard. A State commission may grant an exception to the requirements of subsection (a)(1) for non-proprietary elements with regard to a specific geographic area in its state only if the State commission determines, in a proceeding undertaken pursuant to subsection (c) of this section, that no requesting carrier would be impaired in providing the service it seeks to offer if the incumbent LEC is no longer required to provide unbundled access to a particular non-proprietary network element.

- (c) State commission determinations. In a State commission proceeding to determine whether to grant an exception from any of the unbundling requirements of subsection (a)(1) for any specific geographic area within that state, the State commission shall consider, at a minimum, whether denial of unbundled access to a network element would place substantial and non-transitory operational or economic impairment upon a CLEC's ability to provide service in any of the following service markets: the analog telephone mass market (up to eighteen analog dialtone lines at a particular customer premises), the residential broadband market, the medium-sized business market (DS1-DS3 digital services), or the large business/enterprise market (OCx digital services). In such proceeding, the State commission shall consider the impact of any such exception on small businesses and minimize the impact on small businesses. The State may also consider other factors, such as the relationship between unbundling requirements and any other requirement, practice, policy, rate structure, regulation, or service offered under, required, or provided for by State law.

- (1) State commissions shall not be required to make any determination under this subsection.

- (2) Burden of Proof. Unless otherwise stated specifically below, in any proceeding pursuant to this subsection, the incumbent LEC seeking an exemption shall have the burden of proof by clear and convincing evidence. In the event a State commission determines that a waiver of any of the requirements of (a)(1) is not warranted, the incumbent LEC shall be barred from seeking any further exception for that unbundling requirement for one year, or a longer interval established at the discretion of the State commission.
- (3) Unbundled switching and unbundled shared transport. The operational and economic impairment analysis for unbundled local switching and unbundled shared transport shall be made pursuant to the following process:
- (A) Presumptions. To serve the medium-sized business and large business markets (digital services from DS1-OCx), the State commission shall apply a rebuttable presumption that requesting carriers are not impaired without access to unbundled switching and shared transport. The State commission shall apply a rebuttable presumption, in the absence of clear and convincing proof to the contrary, that requesting carriers are impaired without access to unbundled switching and shared transport to serve the analog telephone mass market.
 - (B) Operational Factors. In making a determination pursuant to subsection (b) with regard to the availability of unbundled local switching and unbundled shared transport for the analog telephone mass market in any geographic area of the state, the State commission shall find that all of the following operational factors have been met in each central office in that geographic area:
 - (i) UNE-L Provisioning. (a) The incumbent LEC has provided in each of the preceding six consecutive months 99% of unbundled analog local loops to requesting carriers in the same interval (measured from the time the incumbent LEC receives an order from a requesting carrier to the time in completes provisioning of an order and activates service) and quality as it provides analog dialtone service to its own retail customers; and (b) the incumbent LEC proves that it can provide in that interval a sufficient quantity of unbundled local analog loops that is not less than 5% each month of the total installed base of analog switched access lines. An incumbent LEC may satisfy (a) and (b) by providing in each of the preceding six consecutive months all of its analog dialtone services in the geographic area through the same process utilized by requesting carriers to obtain unbundled local loops, including the pre-ordering, order, provisioning, maintenance and repair processes, and by agreeing to continue to provide all of its analog dialtone services through those processes;

- (ii) There is sufficient collocation space, cross-connect, riser, duct, and power capacity in the central office to satisfy re-connection of all unbundled loops then combined with unbundled local switching and unbundled shared transport to alternative switching and alternative transport, and that said re-connection can be provided cost-effectively within ninety calendar days;
 - (iii) The incumbent LEC has instituted a comprehensive performance measurement plan that ensures compliance with subsection (c)(2)(B)(i)-(ii) and objectively measures pre-order, provisioning, maintenance and repair, and billing performance on no less than 99% of all unbundled local loops ordered by requesting carriers, including all unbundled local loops ordered through integrated digital loop carrier systems and unbundled local loops provisioned through project or batch provisioning processes;
 - (iv) There are five independent sources of sufficient capacity of interoffice transport to that central office, so that a requesting carrier is not dependent upon the incumbent LEC for interoffice transport to connect unbundled loops terminating in that central office to switching equipment; and
 - (v) Any other operational issues related to the provisioning of analog telephone mass market services over unbundled local loops that come to the attention of the State commission have been satisfactorily resolved.
- (C) Economic Factors. In making a determination pursuant to subsection (b) with regard to the availability of unbundled local switching and unbundled shared transport for the analog telephone mass market in any geographic area of the state, the State commission shall find that all of the following economic factors have been met in each central office in that geographic area:
- (i) The incumbent LEC provides unbundled local loops to requesting carriers at a total nonrecurring charge no greater than the prevailing interstate PIC change charge;
 - (ii) There are no other substantial cost disparities between a requesting carrier that has achieved viable scale in providing analog dialtone service in that geographic market without access to unbundled local switching and unbundled shared transport and incumbent LEC's cost of providing analog dialtone service. Substantial cost disparities include all non-transitory cost

disparities that would reduce such requesting carrier's output by at least 5%.

(iii) Any one of the following conditions are met:

- (a) Five or more financially and operationally stable, homogeneous wholesale providers of switching and transport capacity are collocated in the central office and are actively providing alternative (non-ILEC) switching and shared transport that have sufficient capacity and ability to cost-effectively and efficiently combine unbundled analog two-wire local loops from the incumbent LEC with their switching and transport facilities to all requesting carriers that seek to serve the retail analog telephone mass market; or
- (b) Seven or more financially and operationally stable requesting carriers are collocated in the central office, purchase analog two-wire local loops, and utilize self-provided switching and self-provided transport to sell retail analog telephone mass-market services, no fewer than three of which are homogenous wholesale providers with sufficient capacity and ability to cost-effectively and efficiently combine unbundled analog two-wire loops from the incumbent LEC with their switching and transport facilities to all requesting carriers that seek to serve the retail analog telephone mass market; or
- (c) The HHI for retail analog telephone mass-market services is below 1800 in the relevant geographic market, calculated by summing the squares of the ratio of each carrier's active analog dialtone switch ports in the geographic market serviced by that carrier's switch, divided by the total number of active analog dialtone switch ports in the geographic market.

(D) Once a State commission determines all operational factors listed in subsection (c)(2)(B) and the economic factors of subsection (c)(2)(C)(i)-(ii) are satisfied in a central office, the State commission may require requesting carriers that currently own and operate a switch in the relevant geographic area and that have collocated equipment and arranged for interoffice transport in that central office to file and begin to implement a migration plan pursuant to subsection (d).

(E) Reinstatement. Upon a showing by a requesting carrier, if the State commission determines that any of the operational or economic conditions listed above are no longer met in a central office, the exception from the requirements of subsection (a)(1) for unbundled switching and unbundled shared transport shall immediately be lifted and the incumbent LEC shall immediately be required to provide

unbundled access to a combination of unbundled loops, unbundled switching and unbundled shared transport.

- (i) If reinstatement occurs due any economic factor, the combination of unbundled local loops, switching and shared transport shall be provided at the price for all three elements established pursuant to section 252(d)(2);
- (ii) If reinstatement occurs due to failure by the incumbent LEC to meet any of the operational conditions listed above, the combination of unbundled local loop, switching and shared transport shall be provided at the price of an unbundled local loop established pursuant to section 252(d)(2). Requesting carriers that have procured alternative sources of supply of switching and transport in reliance upon the incumbent LEC's operational performance shall be entitled to full and complete recovery of damages and economic indemnification in a litigation brought pursuant to sections 206 and 207 of the Act. Such recovery shall not act as a bar for any further claims requesting carrier might have under contract, antitrust laws, or other state or federal laws, regulations, or legal authority.

(3), (4) ...[list state-specific standards for other UNEs]

- (d) Migration Plans. Upon the effective date of any exception from the unbundling requirements for any particular network element, the State commission shall institute a migration plan proceeding that will consider, review and approve migration plans from all affected requesting carriers. Affected requesting carriers shall have no less than six months to prepare and submit an initial transition plan to the State commission. In administering any migration, the State commission shall specifically consider the impact migration would have on small businesses and minimize that impact. Affected requesting carriers shall retain unbundled access to such network element for current and new customers until its migration plan is submitted, approved, and fully implemented. The incumbent LEC shall have a duty to cooperate fully in implementing any requesting carrier's migration plan. Any impediment to that migration caused by the incumbent LEC, including actions that harm the business of the requesting carrier or alternative wholesale provider of the element, or the agreement between a requesting carrier and such alternative wholesale provider, shall be deemed a breach of this duty and such breach would support remedies of reinstatement of the element, full economic indemnification, and damages. All such remedies would be in addition to any remedies or actions available under state or federal law. A requesting carrier shall be permitted to apply to receive unbundled access to the element in question if it can prove to the State commission that its ability to serve customers in any market would be substantially and materially affected by its failure to obtain unbundled access.

- (e) Preservation of State Access Authority. Nothing in this subpart shall be construed to limit, alter, preempt, or otherwise affect state authority preserved by section 251(d)(3) or any other provision of state law.
- (f) Preservation of Enforcement Authority. Requesting carriers that implement the unbundling requirements of this subpart through interconnection agreements do not waive rights to seek any remedy under the Communications Act in court or before the Commission for violations of this rule or section 251 of the Communications Act.