

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers)	CC Docket No. 01-338
)	
Implementation of the Local Competition Provisions of Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Deployment of Wireless Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	

**OPPOSITION OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION
TO JOINT PETITION FOR STAY**

Pursuant to 47 C.F.R. § 1.45(d), the Cellular Telecommunications & Internet Association (“CTIA”)¹ hereby files its opposition to the Joint Petition for Stay Pending Judicial Review (“Joint Petition”) filed by BellSouth Telecommunications, Inc., Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association, and “the Verizon telephone companies” (collectively, “Joint Petitioners”) on September 4, 2003 in the above-captioned proceedings. Specifically, CTIA opposes the Joint Petition to the extent it seeks to stay access of dedicated transport by Commercial Mobile Radio Service (“CMRS”) carriers on a technology-neutral basis as required by the Telecommunications Act of 1996 (“1996 Act”), as further discussed herein.

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

I. THE COMMISSION RE-DEFINES AND LIMITS AVAILABILITY OF “DEDICATED TRANSPORT”

Because the Joint Petitioners did not adequately explain the issues regarding access by CMRS carriers to dedicated transport, some background explanation is required. On August 21, 2003, the Commission released its Triennial Review Order (“Order”).² Among other things, the Order addressed the definition of dedicated transport as a network element and its availability to competing carriers under section 251(c)(3) of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(3). Specifically, the Commission found:

We limit our definition of dedicated transport under section 251(c)(3) to those transmission facilities connecting incumbent LEC switches and wire centers within a LATA.

Order at ¶ 365. This re-definition of dedicated transport is a radical reduction to the incumbent LEC facilities eligible for unbundled dedicated transport over the past seven years since the Commission issued its *Local Competition Order*. Prior to the Order, the Commission had defined dedicated transport to include:

incumbent LEC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

Order at ¶ 365; *see also* 47 C.F.R. § 51.319(d)(1)(i). Thus, under the longstanding definition, dedicated transport has consistently included transmission facilities between incumbent LEC (“ILEC”) and competitor wire centers, or between ILEC and competitor switches. Under the Commission’s revised definition, only transmission facilities between ILEC switches and wire centers may be considered dedicated facilities subject to unbundling under section 251(c)(3). In

² Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.* (Aug. 21, 2003).

other words, the Commission restricted dedicated transport to *intra*-ILEC network facilities, rather than including *internetwork* facilities, which had previously been the case. In making this modification, the Commission opines that its earlier definition had been “overly broad,” Order at ¶ 365, and that the new definition is more narrowly tailored in order to include only those elements that are “inherent” to the ILEC’s local network. *See* Order at ¶ 366.

In addition to modifying the definition of dedicated transport, the Commission clarified that access to unbundled dedicated transport is not dependent on the technology used by requesting telecommunications carriers to offer telecommunications services. The Commission recognized that incumbent LECs have consistently denied the requests of CMRS providers for *any* unbundled transmission facilities, despite the undeniable requirement of incumbent LECs to provide such facilities under section 251(c)(3) to all telecommunications carriers. *See* Order at ¶ 362. The Commission therefore clarified that the revised definition of dedicated transport applies “to all competitors alike, including intermodal competitors.” *Id.* at ¶ 368. Thus, as the Commission explained: “all telecommunications carriers, including CMRS carriers, will have the ability to access transport facilities within the incumbent LEC’s network, pursuant to section 251(c)(3), and to interconnect for the transmission and routing of telephone exchange service and exchange access , pursuant to section 251(c)(2).” *Id.*

On September 4, 2003, Joint Petitioners filed the Joint Petition requesting a stay of various aspects of the Order, including CMRS carriers’ access to dedicated transport as newly defined by the Commission. *See* Joint Petition at 23-25.

II. THE JOINT PETITIONERS’ REQUEST FOR STAY IS WITHOUT LEGAL MERIT.

The factors to be addressed by the Commission when considering a request for stay are well established. To succeed in their request, the Joint Petitioners must demonstrate:

- (1) their substantial likelihood of success on the merits;
- (2) that they will suffer irreparable harm absent a stay;
- (3) that grant of a stay would not substantially harm others; and
- (4) the stay would be in the public interest.³

In a case where the last three factors “strongly favor interim relief” the D.C. Circuit has clarified that Commission may exercise its discretion to grant a stay only if the petitioner has made a “substantial,” rather than a mathematically probable, case on the merits. In other words, “the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors.” *Holiday Tours*, 559 F.2d at 843-44.

In light of the *Holiday Tours* test, the Joint Petitioners’ request should be denied. First, Joint Petitioners have failed to make any credible showing of irreparable harm absent a stay of the Order as it pertains to CMRS access to unbundled dedicated transport. Second, the Joint Petitioners fail to meaningfully address the factors of harm to others or the public interest as they pertain to such access. Finally, the balance of the equities heavily tips in favor of CMRS carriers in denying the incumbent LEC’s request for a stay.

A. The Joint Petitioners Fail to Show Irreparable Harm

The Joint Petitioners fail to show that they would be irreparably harmed by the dedicated transport determinations as they relate to CMRS carriers. Essentially, the Joint Petitioners make only unsubstantiated, conclusory statements that access by CMRS carriers to unbundled transport would cause them financial harm. *See* Joint Petition at 27. No other discussion of irreparable harm with respect to CMRS dedicated transport is offered.

³ *See Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *In the Matter of the Boeing Company*, 18 FCC Rcd 1405, n.44 (2003); *In the Matter of Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, 17 FCC Rcd 19746, 19753 (WTB 2002); *In the Matter of the Applications of Cumulus Licensing Corp, et al.*, 16 FCC Rcd 1052, 1054 (2001).

This mere conclusory statement simply does not constitute a showing of irreparable harm. As a threshold matter, it is well settled law that monetary harm, without more, does not constitute irreparable harm to support injunctive relief. *See, e.g., Virginia Petroleum Jobbers*, 259 F.2d at 925 (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).

Second, the Joint Petitioners plainly ignore that they most certainly will enjoy a significant net benefit from the Commission’s wholesale re-definition of the dedicated transport rules. Prior to the effective date of the Order, incumbent LECs have been required to provide dedicated transport to all telecommunications carriers under the previous, more expansive definition of dedicated transport, reaffirmed by the Commission’s 1999 *UNE Remand Order*. *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3842-43 (1999). Those rules required the Joint Petitioners to provide dedicated transport not only within their own networks, but also between their networks and the networks of their competitors. *See id.*; *see also* Order at ¶ 365. Under the Order, the Joint Petitioners appear to no longer be required to provide any dedicated transport between incumbent LEC networks and the networks of their competitors. In fact, the Order declares "moot" a petition by AT&T Wireless Services, Inc. and VoiceStream Wireless Corporation for a declaratory ruling that the duty of incumbent LECs to provide nondiscriminatory access to unbundled dedicated interoffice transport included transport to and from CMRS base stations.⁴ *See* Order at ¶ 368 n.1124. Therefore, the overall unbundling obligations of incumbent LECs to provide dedicated transport to all telecommunications carriers (an obligation that the incumbent LECs have unlawfully refused to CMRS carriers before now)

⁴ Petition for Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 (filed November, 2001).

under the Order are significantly curtailed. The Joint Petitioners cannot make the requisite showing of irreparable harm under these circumstances.

B. Joint Petitioners Fail to Discuss Harm to Others

The Joint Petitioners fail to make any argument regarding the potential harm to CMRS carriers or others if a stay of the relevant portion of the Order is granted. *Cf.* Joint Petition at 27 (discussing CLEC access only). Because the Joint Petitioners fail to even address this factor for injunctive relief, the Joint Petition should be denied.

C. The Joint Petition is Not in the Public Interest

The Joint Petitioners summarily argue that if the stay is not granted, the public interest will suffer because “overly expansive unbundling rules create significant costs, ‘spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.’” Joint Petition at 27-28 (citations omitted). It is unclear what the Joint Petitioners are attempting to say here. However, Congress is a more reliable source to identify the public interest. Congress made clear that the public interest underlying the 1996 Act is to promote rapid development of local competition by making unbundled access available to *all* telecommunications carriers. As the Commission states, dedicated transport will only be available on an unbundled basis where such transport interconnects an ILEC’s wire centers and switches, *i.e.*, transport already within the ILEC’s local network. The Joint Petitioners offer little to no discussion of the effect of denial of access to CMRS carriers, including the effect upon intermodal competition, advancing wireless buildout and entry into new markets, and meeting mobile users’ demand for ubiquitous service (unlike that needed by CLEC customers).

D. The Balance of the Equities Favors CMRS Carriers and a Denial of the Joint Petition

As discussed above, under the four-factor test of *Holiday Travel*, the Commission may, in its discretion, only grant a stay if a petitioner has made a “substantial” argument on the merits and the remaining three factors weigh in favor of a stay. However, as shown above, with respect to access to dedicated transport by CMRS carriers, the Joint Petitioners have not made a persuasive argument in support of the final three requirements for a stay. In addition to the those discussed above, there are two additional reasons why the Joint Petition should not be granted.

First, any objective balance of the equities clearly favors CMRS carriers. Contrary to the Joint Petitioners' assertions that CMRS access to dedicated transport is a “new” obligation, the Commission clarified that its requirement is in response to the ILECs' persistent refusal to provide unbundled network elements to CMRS carriers, in flagrant contravention of Section 251(c)(3). *See* Order at ¶¶ 362, n. 1104, 368. Thus, CMRS access to dedicated transport is not a new obligation—it is one which the Joint Petitioners have been flouting. Thus, the equities in weigh overwhelmingly against a stay. To grant a stay would only allow the Joint Petitioners to continue to flout the law and to violate their obligations under section 251(c)(3) by denying CMRS carriers equivalent unbundled access to dedicated transport as other telecommunications carriers receive. This would harm the ability of intermodal competitors to offer services in competition with the incumbent LECs.

Second, the Joint Petitioners do not allege that the provision of more limited dedicated transport to CMRS carriers, as opposed to other competitors such as CLECs, would be unfeasible or would otherwise result in injury. The Joint Petition simply attempts to brazenly segregate CMRS carriers from other telecommunications carriers eligible for unbundled dedicated transport. The Commission, however, has determined that a “technology-neutral

approach best comports with the statute” and best suits the development of competition. *See* Order at ¶ 369. The Joint Petitioners’ technology-specific approach—to separate CMRS from other telecommunications carriers—violates the letter of the 1996 Act and Commission implementation of the 1996 Act’s goals to promote local competition.

III. CONCLUSION

For the foregoing reasons, the Joint Petitioners’ request for a stay of the Order with respect to CMRS carrier access to dedicated transport should be denied.

Respectfully submitted,

/s/ Michael Altschul

Michael Altschul
Senior Vice President and General Counsel
Cellular Telecommunications & Internet
Association
1250 Connecticut Avenue, NW, Suite 800
Washington, DC 20036
(202) 785-0081 Telephone
(202) 785-0721 Facsimile

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by first-class mail, postage prepaid, on the following persons at the address listed below:

Michael K. Kellogg
Mark L. Evans
Sean A. Lev
Colin S. Stretch
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, DC 20036

/s/ Christopher R. Day

Christopher R. Day
September 11, 2003