

**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 the Telecommunications Act of 1996)	CC Docket No. 96-98
)	
Deployment of Wireless Service Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	

**OPPOSITION TO JOINT PETITION FOR STAY PENDING
JUDICIAL REVIEW**

AT&T Wireless Services, Inc. (“AWS”) files this opposition to the Joint Petition of BellSouth Telecommunications, Inc., Qwest Communications International Inc., SBC Communications Inc., the United States Telecom Association, and the Verizon telephone companies (collectively the “Petitioners”) to stay portions of the *Triennial Review Order* (“Petition”).^{1/} More specifically, AWS opposes the request to stay the Commission’s finding that CMRS carriers may obtain access to incumbent LEC interoffice transmission facilities. Petitioners are unlikely to succeed on the merits and have demonstrated no irreparable harm.^{2/} The Commission’s finding that CMRS carriers provide a qualifying

^{1/} Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (rel. Aug. 21, 2003) (“*Order*”).

^{2/} Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, *et al.*, *Opposition to Joint Petition for Stay Pending Judicial Review* at 24-25 (filed Sept. 4, 2003) (“*Petition*”).

service and are thus eligible to obtain dedicated transport subject to route-specific impairment findings is eminently reasonable. Moreover, the balance of equities clearly tips in favor of CMRS access. For years the incumbent LECs have forced CMRS carriers to purchase interoffice facilities from their overpriced special access tariffs and have steadfastly refused to provide such facilities as UNEs, even though the Commission held in the *Local Competition Order* that CMRS carriers are entitled to UNEs to the same extent as other carriers.^{3/} There is no reasonable basis to continue to deprive CMRS carriers of cost-based access to these incumbent LEC network elements.

I. PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS BECAUSE THE COMMISSION PROPERLY DETERMINED THAT CMRS CARRIERS ARE ENTITLED TO UNBUNDLED NETWORK ELEMENTS

A. The Commission Correctly Found that CMRS Carriers Provide a Qualifying Service

The Petition claims that the Commission erred in finding that CMRS carriers are entitled to obtain unbundled access to dedicated transport within the incumbent LECs' network because the Commission failed to make a separate impairment finding for CMRS carriers. According to the Petitioners, the presence of multiple CMRS carriers in many markets providing retail mobile wireless services confirms that CMRS carriers are not impaired without access to incumbent LEC UNEs. *Petition* at 24-25. These claims, predicated on a separate "wireless market," have no merit.

The Commission soundly and properly rejected incumbent LEC arguments that each telecommunications service must be subject to a separate impairment analysis.

^{3/} Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd. 15499, ¶ 993 (1996) (subsequent history omitted) ("*Local Competition Order*").

Order ¶¶ 138-39. Instead, based on a careful analysis of the purposes of the 1996 Act, and in particular the central goal of section 251 to open local markets to competition, the Commission reasonably determined that the impairment inquiry should encompass all those telecommunications services that competitors provide in direct competition with the incumbent LEC core services, such as local voice service. The Commission’s interpretation ensures that unbundling obligations “are focused on opening the bottleneck largely controlled by incumbent LECs.” *Order* ¶ 141.

The Petition makes no claim that the Commission’s determination to focus its impairment analysis on services that directly compete with traditional incumbent LEC services is unreasonable. Nor does it dispute the Commission’s finding that CMRS carriers are increasingly engaged in direct competition with incumbent LEC local services and are thus fulfilling the central goal of section 251 to open the local bottleneck to competition.^{4/} This finding is amply supported in the record.^{5/} Moreover, CMRS is bringing facilities-based competition to residential consumers, the market in which facilities-based intramodal competition is least developed.

Rather, the Petitioners completely side step these conclusions and instead argue that the Commission erred by failing to take into account the degree of competition among CMRS carriers for the provision of retail mobile wireless services. *Petition* at 25. Competition *among* CMRS carriers is irrelevant to the Commission’s impairment analysis, however. As the Commission correctly recognizes, the relevant point is that CMRS carriers compete with incumbent LECs in the provision of local services to the mass market.

^{4/} *Order* ¶ 140.

^{5/} *See, e.g., Order* ¶ 53. *See also* Comments of AT&T Wireless at 4-5.

In other contexts, the incumbent LECs fully recognize that it is the competition between wireless and wireline carriers that is relevant to the impairment analysis. Throughout this proceeding the incumbent LECs have argued vociferously that their statutory unbundling obligations must be reduced because of intermodal competition from wireless carriers. *See, e.g., Order ¶¶ 97 n.326* (citing incumbent LEC comments urging the Commission to take intermodal competition into account). The Commission has, in fact, taken such competition into account in its impairment analysis. *See Order ¶¶ 97*. The incumbent LECs cannot have it both ways, focusing on intermodal (wireless to wireline) competition when seeking to reduce their unbundling obligations to intramodal competitors, but ignoring this competition when the issue is impairment of the intermodal competitor itself.

Not only are Petitioners wrong in their analysis of the impairment standard, they also make no attempt to refute the substantial evidence in the record concerning the extent of reliance by CMRS carriers on incumbent LEC transport facilities. AWS and other carriers have demonstrated that they have no alternatives to incumbent LEC transport in the vast majority of instances and that self-deployment is not economically feasible.^{6/} The Commission has appropriately determined that actual marketplace evidence of the availability of alternatives is the most persuasive evidence of impairment. *Order ¶¶ 93*. Moreover, this evidence is fully consistent with the Commission's overall

^{6/} *See, e.g.,* Comments of AT&T Wireless at 10-13 (noting that more than 90% of transport costs go to paying ILECs for special access); Comments of Voicestream Wireless at 15 (noting that 96% of cell site to MSC circuits on are provisioned by ILECs); Nextel Reply Comments at 6 (“Due to the prohibitive expense faced by competing carriers, including CMRS carriers, to deploy their own dedicated transmission facilities, these carriers are left with no option but to obtain ILEC transport as a tariffed special access service”); Comments of Sprint at 49 (“The single largest network operating costs of Sprint’s mobile wireless division is the purchase of dedicated transport facilities.”).

finding that “competing carriers face sunk costs and other barriers to self-deploy facilities and that competitive facilities are not available in a majority of locations, especially non-urban areas.” *Order* ¶ 360. The Commission thus concluded that competing carriers are impaired on a national basis without access to DS1 and DS3 level transport, subject to state reviews on a route-by-route basis. This finding is fully applicable to CMRS carriers.

As a result of the lack of alternatives and the incumbent LECs’ refusal to provide CMRS carriers with access to UNEs, CMRS carriers are captive customers to incumbent LEC special access services. The Petition suggests that this forced reliance on special access service demonstrates lack of impairment. *Petition* at 24 (suggesting lack of impairment in the retail mobile wireless market because CMRS can use special access services). The Commission, however, specifically rejected arguments that competing carriers are not impaired just because they can use incumbent LEC special access services to provide their retail services. *Order* ¶ 102. As the Commission noted, “forcing requesting carriers to rely on tariffed offerings would place too much control in the hands of the incumbent LECs, which could subsequently alter their tariffs and thereby engage in a vertical price squeeze.” *Id.* The Petition proffers no argument as to why CMRS carriers should be singled out and forced to rely on special access services when all other competing carriers may have access to dedicated transport along routes that meet the impairment criteria.

B. The *Order* Appropriately Permits CMRS Carriers To Obtain Access to ILEC Interoffice Facilities as Unbundled Dedicated Transport

The *Order* provides CMRS carriers, like all other requesting carriers, with access to incumbent LEC transmission facilities that run between incumbent LEC switches and

incumbent LEC wire centers. As AWS has previously pointed out, a substantial portion of the transport links between cell sites and MSCs run between incumbent LEC wire centers.^{7/} Moreover, by lifting the onerous co-mingling restrictions, CMRS carriers will be able to cross connect the interoffice dedicated transport UNE to special access channel terminations or entrance facilities or to the third party transport providers. In this way, CMRS carriers will finally have access to the incumbent LECs' ubiquitous interoffice network that is such a critical input into CMRS services and to which wireline carriers have long had access as UNEs.

The Petitioners object to CMRS access to interoffice transport by making the mystifying claim that "this could allow CMRS providers to connect their MSCs to their cell sites or to interexchange carrier ("IXC") points of presence ("POPs") through the use of ILEC transport when the ILEC network would otherwise have nothing do [sic] with that connection." *Petition* at 24. Although not entirely clear, the Petitioners appear to object to providing dedicated transport, as now defined to include only links between incumbent LEC wire centers, on a stand alone basis. This is an ironic objection. After years of railing against having to provide combinations of UNEs, the incumbent LECs now object to providing a discrete network element on a stand-alone unbundled basis.

II. PETITIONERS WILL NOT BE IRREPARABLY HARMED ABSENT A STAY

The Petitioners have provided no evidence that they will suffer irreparable harm if the CMRS-access portions of the *Order* are permitted to go into effect. Petitioners' allegations of irreparable harm go almost exclusively to continued availability of UNE-P.

^{7/} See Comments of AT&T Wireless at 25.

The Petition alleges no harm from CMRS access except potential, unidentified economic losses, which do not constitute irreparable harm.^{8/}

III. THE BALANCE OF THE EQUITIES TIPS IN FAVOR OF CMRS CARRIERS

The *Order* does not change incumbent LEC legal obligations *vis a vis* CMRS carriers. To the contrary, it does nothing more than reaffirm the Commission's 1996 ruling that CMRS providers are entitled to UNEs to the same extent as competitive wireline carriers. The incumbent LECs have benefited for years by stonewalling and forcing CMRS carriers to pay exorbitant special access fees. If anything, the Commission should require incumbent LECs to refund their ill-gotten gains; it certainly should not reward them for violating the law by granting their requested stay.

^{8/} Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, *Memorandum Opinion and Order*, 12 FCC Rcd. 21872, ¶ 11 (1997) (“mere economic loss does not . . . constitute irreparable harm”) (internal citation omitted). *See also* National Exchange Carrier Association, Inc., 1997 Proposed Modifications to the Interstate Average Schedule Formulas, AAD 97-2, *Order*, 12 FCC Rcd. 8443, ¶ 7 (1997) (denying petition for stay because asserted harms were “mere monetary damages that are insufficient to satisfy the requirement of irreparable harm.”); *In re* Station KDEW(AM) Dewitt Arkansas, File No. BAL-940309EA, *Memorandum Opinion and Order*, 11 FCC Rcd. 13683, ¶ 7 (1996) (affirming denial of stay because alleged harms did not constitute irreparable harm because they were merely “temporary monetary losses for which adequate compensatory or other corrective relief will be available at a later date”).

CONCLUSION

The Commission's clarification that CMRS carriers are entitled to interoffice dedicated transport is eminently reasonable and the Petition provides no substantial basis for a contrary finding.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.

Howard J. Symons
Michael Pryor
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Of Counsel

/s/ Douglas I. Brandon

Douglas I. Brandon
Vice President - External Affairs
1150 Connecticut Avenue, N.W., #400
Washington, D.C. 20036
(202) 223-9222

September 11, 2003

CERTIFICATE OF SERVICE

I, Susan F. Duarte, hereby certify that on this 11th day of September, the foregoing AT&T Wireless Services, Inc.'s "Opposition to Joint Petition for Stay Pending Judicial Review" was filed electronically on the Commission's ECFS in accordance with the Commission's rules and copies were served by the method indicated below on the following:

Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistrionix, Inc.,
236 Massachusetts Ave., N.E., Suite 110
Washington, DC 20002

Via ECFS

James D. Ellis
SBC Communications Inc.
175 East Houston
San Antonio, Texas 78205

Via Federal Express

Lawrence E. Sarjeant
United States Telecom Association
1401 H Street, N.W.
Suite 600
Washington, DC 20005

Via Federal Express

William P. Barr
Verizon
1515 North Courthouse Road
Suite 500
Arlington, VA 22201

Via Federal Express

Sharon J. Devine
Qwest Communications International Inc.
1801 California Street
51st Floor
Denver, Colorado 80202

Via Federal Express

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, N.W.
Suite 400
Washington, DC 20036

Via Federal Express

Charles R. Morgan
BellSouth Corporation
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309

Via Federal Express

Gary L. Phillips
SBC Communications Inc.
1401 I Street, N.W.
Suite 400
Washington, DC 20005

Via Federal Express

Sheryl Wilkerson
Legal Advisor on Spectrum and International
Issues
Office of Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Via First Class Mail

Paul Margie
Spectrum and International Legal Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
pmargie@fcc.gov

Via Email

Barry Ohlson
Legal Advisor for Spectrum and International
Issues
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
bohlson@fcc.gov

Via Email

Matthew Brill
Senior Legal Advisor
Office of Commissioner Kathleen Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
mbrill@fcc.gov

Via Email

Bryan Tramont
Senior Legal Advisor
Office of Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
btramont@fcc.gov

Via Email

Jennifer Manner
Senior Counsel on Spectrum
Office of Commissioner Kathleen Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
jmanner@fcc.gov

Via Email

Samuel Feder
Legal Advisor on Spectrum and International
Issues
Office of Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
sfeder@fcc.gov

Via Email

Christopher Libertelli
Senior Legal Advisor
Office of Chairman Michael Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
clibertel@fcc.gov

Via Email

Lisa Zaina
Senior Legal Advisor
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
lzaina@fcc.gov

Via Email

Daniel Gonzalez
Senior Legal Advisor
Office of Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
dgonzale@fcc.gov

Via Email

Michelle M. Carey
Division Chief
Wireline Competition Bureau
445 12th Street, S.W.
Washington, DC 20554
mcarey@fcc.gov

Via Email

Jessica Rosenworcel
Competition and Universal Service Legal
Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
jrosenwo@fcc.gov

Via Email

William Maher
Bureau Chief
Wireline Competition Bureau
445 12th Street, S.W.
Washington, DC 20554
wmaher@fcc.gov

Via Email

Qualex International
445 12th Street, S.W.
Room CY - B402
Washington, DC 20554
qualexint@aol.com

Via E-mail

/s/ Susan F. Duarte

Susan F. Duarte