

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:
(202) 326-7999

December 3, 2003

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

Re: 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 in the Telecommunications Act of 1996, CC Docket No. 96-98

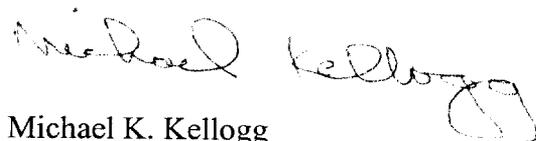
Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Ms. Dortch:

On behalf of the United States Telecom Association, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and the Verizon telephone companies, I am filing the enclosed "Joint Opposition to NARUC's Request for Clarification."

In accordance with this Commission's practice, we are filing this letter electronically through the Commission's Electronic Comment Filing System in each of the dockets listed above. Thank you for your assistance in this matter.

Sincerely,



Michael K. Kellogg

Enclosure

**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

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Advanced Telecommunications Capability

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JOINT OPPOSITION TO NARUC’S REQUEST FOR CLARIFICATION

The United States Telecom Association, BellSouth Corporation, Qwest Communications International Inc., SBC Communications Inc., and the Verizon telephone companies (collectively, “ILECs”) hereby file this joint opposition to the request of the National Association of Regulatory Utility Commissioners (“NARUC”) to delay the December 31 deadline for seeking a waiver of this Commission’s new rules governing enterprise switching.

The request should be denied for two reasons. *First*, NARUC offers no reason why its members cannot comply with this Commission’s deadline; indeed, it does not even argue that they will be unable to do so. Extending that deadline would thus unnecessarily prolong the six-month transition period the Commission provided for CLECs currently using unbundled switching with loops of DS-1 capacity and above. *Second*, as ILECs have explained to NARUC members throughout the country, the administrative stay issued by the Second Circuit – at a time when it no longer had jurisdiction over the underlying petitions for review – had no effect on the ultimate deadline for seeking a waiver, and certainly did not bind any of the states (who were not parties to the stay in the first place). Most state commissions seem to have understood this

perfectly well; indeed, many have already completed their proceedings to consider whether to seek a waiver of the Commission's finding of non-impairment.

1. NARUC does not claim that its members cannot meet the deadline established by this Commission for seeking a waiver of its finding of non-impairment with respect to enterprise switching. It does not explain how the temporary stay of this Commission's enterprise-switching rules had any effect on the ongoing proceedings – initiated by CLECs – to determine whether the state commissions can “make an affirmative finding of impairment showing that carriers providing service at the DS1 capacity and above should be entitled to unbundled access to local circuit switching in a particular market.”¹ And it does not identify any state commissions that discontinued their work or otherwise held their proceedings in abeyance during the period before the Second Circuit's stays were formally vacated. In fact, while NARUC may feel that the administrative stay had considerably more force and effect than it had, even NARUC does not contend that the stay had any impact at all on those state regulators who were not parties to the stay proceeding itself. NARUC has thus failed to “set forth clearly and concisely the facts relied upon” to justify any extension of the Commission's deadline. 47 C.F.R. § 1.41.

In opposing MetTel's and InfoHighway's motions to stay the enterprise-switching rules before the Second Circuit, this Commission argued that the public interest is “harmful by any unnecessary continuation of mandatory access to enterprise switching.”² And yet this is precisely the harm that would result from granting NARUC's request. In the *Order*, this

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17261, ¶ 455 (2003) (“*Order*”), *petitions for review and mandamus pending*, *United States Telecom Ass'n v. FCC*, Nos. 00-1012 *et al.* (D.C. Cir.).

² Opposition of the Federal Communications Commission to Manhattan Telecommunications Corp.'s and InfoHighway Communications Corp.'s Motions for Stay Pending Review at 14-15, *Manhattan Telecomms. Corp. v. FCC*, Nos. 03-40606 & 03-40608 (2d Cir. filed Oct. 14, 2003) (“FCC Stay Opp.”).

Commission found that CLECs are not impaired without access to enterprise switching – “in other words, that the costs imposed by requiring ILECs to make switching available at UNE prices exceed the benefits that the public as a whole stands to gain from a mandatory switching UNE.” FCC Stay Opp. at 14. The Commission has already given the CLECs at least six additional months of unbundled access to ILEC switching, notwithstanding its conclusion “that competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above.” *Order*, 18 FCC Rcd at 17258, ¶ 451.

NARUC’s request – to extend the deadline for another month – would impose an additional hardship on the ILECs that is unjustifiable. This Commission recognized that “the continuation of the ILEC obligation to provide switching at UNE prices,” in the absence of a lawful impairment finding, constitutes “harm,” FCC Stay Opp. at 14, and NARUC has offered no reason to extend this harm beyond the generous transition period already provided.

2. The Second Circuit issued the administrative stays at the prompting of two CLECs – InfoHighway Communications Corporation and Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications. Not only did the CLECs wait nearly six weeks after the release of the *Order* to file their petitions for review in the Second Circuit, but they filed their petitions two full weeks *after* the Judicial Panel on Multidistrict Litigation (“JPML”) had ordered all petitions for review of the *Order* (past, present, and future) transferred to the Eighth Circuit.³ The Eighth Circuit had already transferred all petitions for review to the D.C. Circuit by the time these CLECs filed their petitions.⁴ The CLECs, however, filed their motions for stay in the Second Circuit, hoping to take advantage of that court’s “administrative stay” procedure.

³ Consolidation Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Docket No. RTC-68 (JPML Sept. 16, 2003).

⁴ *Order, Eschelon Telecom, Inc. v. FCC*, No. 03-3212 (8th Cir. Sept. 30, 2003) (per curiam).

As the ILECs explained in their filings in the Second Circuit, once the JPML consolidated all petitions for review of the *Order* in the Eighth Circuit, “[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection,” were required to “transfer those proceedings to the court in which the record is so filed.” 28 U.S.C. § 2112(a)(5). After all cases were consolidated in the Eighth Circuit, that court determined, “[f]or the convenience of the parties in the interest of justice,” to “transfer the consolidated cases, including all docketed and undocketed cases transferred to the Eighth Circuit from other circuits, to the United States Court of Appeals for the D.C. Circuit. All pending motions, including the Motion to Stay, are included in this transfer order.”⁵ There is no dispute that the proceedings before the Second Circuit were “instituted with respect to the same order,” 28 U.S.C. § 2112(a)(5), so, by operation of law, that court no longer had jurisdiction over the petitions for review; transferring the petitions for review to the D.C. Circuit was a purely ministerial act. The combination of the consolidation order by the JPML and the transfer order by the Eighth Circuit meant that the only appropriate course was for the Second Circuit to transfer the petitions for review to the D.C. Circuit and to vacate the administrative stays. And that is exactly what it did.⁶

In any case, the Second Circuit’s stay was temporary on its face, designed only to allow the court sufficient time to address the merits. No state commission could reasonably have interpreted the stay as a determination on the merits. Moreover, even if the stay had been effective, it would have applied only to this Commission’s power to enforce the obligations

⁵ *Id.* at 2 (internal quotation marks omitted).

⁶ Order at 2, *Manhattan Telecomms. Corp. v. FCC*, Nos. 03-40606 & 03-40608 (2d Cir. Nov. 3, 2003) (transferring the petitions for review to the D.C. Circuit and ordering that “[t]he temporary administrative stays entered on October 6, 2003 and October 7, 2003 are accordingly vacated and the stay motions will be decided by the transferee court”). MetTel’s and InfoHighway’s stay motions remain pending before the D.C. Circuit.

imposed in the *Order*. In no respect did the stay even purport to prevent the state commissions from conducting the proceedings called for under the *Order*.

The ILECs explained all this to a number of state commissions during the period in which the administrative stays were still “in effect.” Unsurprisingly, then, the states for the most part continued the task set out for them in the *Order*. *See, e.g.*, Massachusetts Dep’t of Telecomms. and Energy Order Closing Investigation at 4 n.8, D.T.E. 03-59 (Mass. D.T.E. Nov. 25, 2003) (“Because nothing in the Second Circuit’s administrative stay order or in the underlying motions to stay involved a stay of the Department’s investigation, the Department directed all participants that withheld their pleadings as a result of the stay orders to file their pleadings by October 15, 2003.”) (citation omitted); Michigan Pub. Serv. Comm’n Order Closing Docket at 4, Case No. U-13895 (Mich. P.S.C. Nov. 25, 2003) (the Second Circuit’s “stay is no longer in effect and did not bind this Commission in any event”); Oregon Pub. Util. Comm’n Ruling at 2, No. UM 1110 (Or. P.U.C. Oct. 17, 2003) (“We have moved forward energetically to undertake and conclude such investigation in a timely manner. Were we to stay our proceedings, we would not progress on the task that the Petitioners themselves have sought to have us complete so promptly. In light of the uncertain status of the administrative stay, the investigation should go forward.”).

Many state commissions have now completed their review of CLEC claims of impairment with respect to enterprise customers.⁷ NARUC’s broad and indiscriminate request for an additional month completely ignores the fact that many states have already done exactly

⁷ The following states have completed their review under 47 C.F.R. § 51.319(d)(3)(i): Kentucky, Maine, Massachusetts, New Hampshire, and North Dakota. A number of other state commissions have decided (for different reasons) not to undertake any proceeding at all: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

what they were supposed to do. Even if, as NARUC suggests, some unidentified state commissions were “confused” by the Second Circuit’s administrative stay orders, most clearly understood that the temporary administrative stay had no effect on the 90-day deadline.

CONCLUSION

For the foregoing reasons, the Commission should deny NARUC’s request for an extension of the 90-day deadline to seek a waiver of the non-impairment finding with respect to local circuit switching used to serve enterprise customers.

Respectfully submitted,


MICHAEL K. KELLOGG

MARK L. EVANS
GEOFFREY M. KLINEBERG
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

*Counsel for BellSouth Corporation,
Qwest Communications International Inc.,
SBC Communications Inc., United States
Telecom Association, and the Verizon
telephone companies*

JAMES D. ELLIS
PAUL K. MANCINI
JOSEPH E. COSGROVE, JR.
SBC COMMUNICATIONS INC.
175 East Houston
San Antonio, Texas 78205
(210) 351-3500

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
JAMES P. LAMOUREUX
SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 400
Washington, D.C. 20005
(202) 326-8910
Counsel for SBC Communications Inc.

ANDREW CRAIN
ROBERT B. MCKENNA
CRAIG BROWN
JOHN S. FISCHER
QWEST COMMUNICATIONS INTERNATIONAL INC.
1801 California Street, 51st Floor
Denver, Colorado 80202
(303) 672-2861
*Counsel for Qwest Communications
International Inc.*

CHARLES R. MORGAN
JAMES G. HARRALSON
JONATHAN B. BANKS
THEODORE R. KINGSLEY
LISA S. FOSHEE
BELLSOUTH CORPORATION
1155 Peachtree Street, N.E., Suite 1800
Atlanta, Georgia 30309
(404) 249-2641
Counsel for BellSouth Corporation

INDRA SEHDEV CHALK
MICHAEL T. MCMENAMIN
ROBIN E. TUTTLE
UNITED STATES TELECOM ASSOCIATION
1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7300
Counsel for United States Telecom Association

MICHAEL E. GLOVER
EDWARD SHAKIN
KATHLEEN GRILLO
VERIZON
1515 North Courthouse Road, Suite 500
Arlington, Virginia 22201
(703) 351-3099
Counsel for the Verizon telephone companies

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