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June 24, 2004

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

Re: *BellSouth Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access by Requiring BellSouth To Provide Wholesale or Retail Broadband Service, WC Docket No. 03-251*

Dear Ms. Dortch:

I write on behalf of BellSouth to respond to AT&T's June 10, 2004 ex parte.¹ The preemption analysis in that filing is incorrect for multiple reasons.

First, and most basically, AT&T's arguments about the proper preemption standard under 47 U.S.C. § 251(d)(3) and the relationship between that provision and other statutory requirements disregard the fact that the *Triennial Review Order*² has *already* established the standards for preemption in this context. Under that decision, state commissions are "precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in [the *Triennial Review Order*]." *Triennial Review Order* ¶ 192. Even more to the point, state commission decisions to require an unbundling arrangement that the Commission has declined to impose will almost invariably be preempted: "If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has

¹ Ex Parte Letter from David L. Lawson, counsel for AT&T, to Marlene H. Dortch, FCC, WC Docket No. 03-251 (June 10, 2004) ("AT&T June 10 Ex Parte").

² 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 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

either found no impairment – and thus has found that unbundling that element would conflict with the limits in [section] 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such [a] decision would fail to conflict with and ‘substantially prevent’ implementation of the federal regime, in violation of section 251(d)(3)(C).” *Id.* ¶ 195; *see id.* ¶ 196 (“[W]e find that the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our framework and create disincentives for investment.”). In sum, as the Commission explained to the D.C. Circuit, its decisions in the *Triennial Review Order* “reflect[] a ‘balance’ struck by the agency between the costs and benefits of unbundling [an] element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption.”³

Nowhere in the *Triennial Review Order* did the Commission suggest, as AT&T does here, that, to be preempted, a state commission decision must do *more* than violate these standards.⁴ On the contrary, although AT&T relies heavily on section 252(e)(3) in its recent *ex parte* (at 2-3), the Commission expressly rejected AT&T’s reliance on that same provision in the relevant portion of the *Triennial Review Order*:

We are not persuaded by AT&T’s argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme. Section 252(e)(3) provides that nothing *in section 252* prohibits a state commission from imposing additional requirements of state law in its review of an interconnection agreement. We find nothing in the language of section 251(d)(3) to limit its application to state rulemaking actions. Therefore, we find that the most reasonable interpretation of Congress’ intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not “substantially prevent” its implementation [as required by section 251(d)(3)].

Triennial Review Order ¶ 194 (footnotes omitted). There is thus no support in this Commission’s binding order for AT&T’s novel argument.⁵

³ Brief for Respondents at 93, *United States Telecom Ass’n v. FCC*, Nos. 00-1012 *et al.*, (D.C. Cir. filed Jan. 16, 2004) (citations omitted).

⁴ Because, as the *Triennial Review Order* holds, the 1996 Act authorizes the Commission to preclude state commission determinations that “substantially prevent implementation” of the “purposes” of section 251, there is no question of implied preemption here. *Compare* AT&T June 10 *Ex Parte* at 4 (discussing 1996 Act § 601(c)(1), 110 Stat., 43).

⁵ Nor does 47 U.S.C. § 261 help AT&T here. *Compare* AT&T June 10 *Ex Parte* at 3. Even assuming (improperly) that the fact that a state commission decision substantially prevented implementation of the federal regime were insufficient for preemption, the state commission decisions at issue here would also be preempted under section 261.

Second, as BellSouth has explained in detail in prior filings – in arguments as to which AT&T has no tenable response – the Commission’s conclusion in the *Triennial Review Order* that states may not impose obligations that the Commission has declined to require applies directly here. The state commission decisions at issue here purport to require BellSouth to provide broadband services to CLEC UNE customers. In the *Triennial Review Order*, however, the Commission explicitly rejected CompTel’s request to impose just such an obligation (through the creation of a “low-frequency portion of the loop” UNE). *See id.* ¶ 270. As the Commission stated, instead of forcing ILECs to provide their broadband services to CLEC customers, CLECs should be encouraged to provide broadband services themselves or to engage in market-based line-splitting arrangements. *See id.* The Commission explained that requiring ILECs to provide functionalities on CLEC UNE loops was contrary to national policy. Such a mandate “would likely discourage innovative [line-splitting] arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs’ and the competitive LECs’ offerings. *We find that such results would run counter to the statute’s express goal of encouraging competition and innovation in all telecommunications markets.*” *Id.* ¶ 261 (emphasis added). The Commission has thus “already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and

Although AT&T stresses section 261(b), section 261(c) applies to “requirements” that are imposed on a “telecommunications carrier” by a state after passage of the 1996 Act and that are allegedly necessary to “further competition” in telephone exchange service or exchange access. Because state commissions have claimed that these post-1996 Act requirements are needed to advance competition in telephone exchange service, *see* AT&T June 10 Ex Parte at 3 n.2, section 261(c) applies here and expressly preempts state requirements that are “inconsistent” with this Commission’s “regulations.” For all the reasons BellSouth has discussed, these state commission determinations are inconsistent with those regulations; indeed, they negate the Commission’s policy of encouraging CLECs to provide their own broadband services or to engage in line splitting. In any event, section 261(b) cannot save these state requirements, because state violations of FCC rules and policies implementing the Communications Act are inconsistent with the “provisions of [the Act].” *See Triennial Review Order* ¶ 193 n.614 (“We find that Congress’ reference to the ‘implementation of the requirements of this section’ . . . means the Commission’s section 251 implementing regulations. AT&T’s argument that the validity of state unbundling regulations must be measured solely against the Act’s purposes fails to recognize that the Commission is charged with implementing the Act and its purposes are fully consistent with the Act’s purposes.”); *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1413 (D.C. Cir. 1995) (violation of Commission regulation was an action “prohibited” or “declared to be unlawful” by the “Act” for purposes of 47 U.S.C. § 206) (internal quotation marks omitted). Indeed, if the rule were otherwise, state regulations subject to section 261(b) could never be preempted under that provision no matter how blatant their inconsistency with this Commission’s binding rules.

innovation and thus harm consumers.” *Levine v. BellSouth Corp.*, 302 F. Supp. 2d 1358, 1371 (S.D. Fla. 2004).

Under the *Triennial Review Order*, states are not free to contravene the Commission’s specific decision refusing to establish a low-frequency portion of the loop UNE, nor can they thwart the Commission’s policy determination that ILECs should not be forced to provide functionalities on CLEC loops. And it cannot matter in this regard whether state commissions that impose such requirements refer to them as unbundling obligations or something else. *Compare* AT&T June 10 Ex Parte at 2. The substantive result is the same, and state commissions cannot circumvent federal requirements by simply avoiding the nomenclature of unbundling. *See* BellSouth Reply Comments⁶ at 11-14.

AT&T nevertheless argues that these state commission decisions are not preempted under this Commission’s established understanding of section 251(d)(3), because the Commission’s *Triennial Review Order* determination was merely a “delimitation of obligations,” not an affirmative requirement. AT&T June 10 Ex Parte at 4. Yet again, however, AT&T ignores directly relevant Commission precedent. As noted above, the Commission has already properly concluded that a state commission decision imposing an obligation that this Commission has *declined* to require is subject to preemption under section 251(d)(3)(C). *See Triennial Review Order* ¶ 195; *see also id.* ¶ 193 (“We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so.”).

Third, under ordinary preemption principles, a state decision to impose a regulation that this Commission has declined to require, and that contravenes this Commission’s policy of encouraging CLEC broadband deployment and line splitting, is preempted. For instance, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Supreme Court held that the Department of Transportation’s decision not to require the immediate installation of air bags preempted states’ attempts to impose such a requirement, because the federal agency’s decision to permit a variety of alternative safety mechanisms “embodie[d] the Secretary’s policy judgment.” *Id.* at 881 (quoting Brief for United States as Amicus Curiae at 25); *see Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (a federal regulation that “consciously has chosen not to mandate” a particular action preempts state law that would deprive an industry “of the ‘flexibility’ given it by [federal law]”). Consequently, under the general preemption jurisprudence that AT&T urges the Commission to apply, federal limits on unbundling “take[] on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,” and render inconsistent (and thus preempted even under AT&T’s analysis) any state attempt to impose such a requirement.

⁶ Reply Comments of BellSouth Telecommunications, Inc., WC Docket No. 03-251 (FCC filed Feb. 20, 2004) (“BellSouth Rely Comments”).

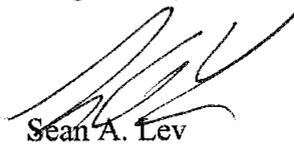
Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 774 (1947); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *United States v. Locke*, 529 U.S. 89, 110 (2000); *cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995).

Fourth, and independent of all these other points, AT&T's argument does nothing to negate the conclusion that state commissions are preempted as a matter of law from regulating what this Commission has already determined to be jurisdictionally interstate services. Thus, even if states were not already preempted from requiring incumbent LECs to provide broadband services to CLEC UNE customers, this issue would be within the exclusive authority of this Commission.

BellSouth has explicated this point in detail in other filings. *See* BellSouth Reply Comments at 22-31; BellSouth May 18 Ex Parte⁷ at 5-7. To summarize, BellSouth's DSL transmission service is offered under a federal tariff, and thus this Commission has exclusive authority over both that service and the information services that include that interstate transmission as part of a bundled offering. Multiple federal court cases so hold, *see, e.g., id.*, and AT&T itself has told the Supreme Court that, even if a federal tariff were in fact silent on an issue, creating a "gap," that gap must be "'filled in' *uniformly as a matter of federal law*," not through "state" law.⁸

Even beyond the existence of the tariff, under the Commission's recent *Pulver* decision, the Commission's jurisdiction is "exclusive" unless it is "practica[ble] . . . to separate interstate and intrastate components of a jurisdictionally mixed . . . service without negating federal objectives for the interstate component."⁹ Not even AT&T argues either that DSL transmission and DSL-based Internet access are "purely intrastate" or that it is "practica[ble] to separate interstate and intrastate components" of those services. Thus, state commissions have no authority to require the provision of broadband services to CLEC UNE customers.

Respectfully submitted,



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⁷ Ex Parte Letter from Glenn T. Reynolds, BellSouth, to Marlene H. Dortch, FCC, WC Docket No. 03-251 (May 18, 2004) ("BellSouth May 18 Ex Parte").

⁸ Brief of Petitioner AT&T Corp., *AT&T Corp. v. Central Office Tel., Inc.*, No. 97-679, 1998 WL 25498, at *33 (U.S. filed Jan. 23, 1998) (emphasis added).

⁹ Memorandum Opinion and Order, *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd 3307, ¶ 20 (2004).

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