Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	**WC Docket No. 04-313**
	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	**CC Docket No. 01-338**

Initial Comments of the Arizona Corporation Commission

I. Introduction

On August 20, 2004, the Federal Communications Commission ("FCC" or "Commission") released an Order and Notice of Proposed Rulemaking[1] addressing interim unbundling requirements and seeking comment on permanent unbundling rules in response to the U S Court of Appeals for the District of Columbia ruling in *USTA II*.[2] The FCC's Order establishing interim unbundling requirements, attempts to bring some needed certainty to telecommunications markets given the D.C. Circuit Court of Appeal's *USTA II* Decision. The FCC's Order is currently the subject of a Mandamus Petition at the D.C. Circuit Court of Appeals filed by Qwest, Verizon and the United States Telephone Association. Thus, it appears that the much needed certainty sought by the FCC as well as others, including the Arizona Corporation Commission ("ACC" or "Commission"), may be short-lived.

In its Notice of Proposed Rulemaking ("NOPR") the FCC seeks comment on a number of important issues. These include how to respond to the D.C. Circuit's *USTA II* decision in establishing sustainable new unbundling rules under Section 251(c) and 251(d)(2) of the

[1] *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order and Notice of Proposed Rulemaking (Rel. August 20, 2004)("*Interim Unbundling Order*" and "*Unbundling NOPR*").
[2] 359 F.3d 554 (D.C.Cir. 204)("*USTA II*"), pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

Telecommunications Act of 1996 ("Federal Act"), which specific network elements the Commission should require ILECs to unbundle, how to treat commercially negotiated agreements, the relationship between UNEs and tariffed offerings, as well as BOC section 271 obligations, and various petitions now pending before the Commission including Qwest's Petition for Rulemaking to adopt interim unbundling rules.

Following are the initial comments of the Arizona Corporation Commission. We appreciate the opportunity to file comments, the focus of which is on the need to bring certainty to telecommunications markets and for a strong State role in crafting and implementing competitive telecommunications policies involving local markets.

II. Discussion

A. Permanent Unbundling Rules Should Provide for a Strong State Role and Federal State Partnership and Bring Certainty to Telecommunications Markets

1. One of the Commission's Primary Goals Should be to Bring Certainty to Telecommunications Markets

We believe that one of the Commission's primary goals in developing permanent unbundling rules should be to bring some needed certainty to telecommunications markets. The Arizona Commission and its Staff expended tremendous resources in the Section 271 process to create a level playing field in the local exchange market, following existing FCC rulings and Federal law in the process. The FCC used the comprehensive record developed by the ACC to authorize Qwest to enter the long distance market. The value of all of this work has been significantly eroded by the current climate of uncertainty and the questions now surrounding one important form of entry into the local market widely used by CLECs, the Unbundled Network Element Platform ("UNE-P).

Within the last several months, two new large competitors in the Arizona local exchange market, AT&T and MCI, stopped actively marketing local and long distance service to new residential customers. While all of the reasons for these carriers'departure from the local market

remains unknown, it is likely that the current uncertainty surrounding the future of UNE-P played some role.

It is only by bringing some needed certainty to these markets that growth and investment in the industry will be encouraged. To attain this much needed certainty, neither the FCC nor the States should be predisposed to any particular outcome, but rather should make a good faith effort to follow the Federal Act's and D.C. Circuit Court of Appeal's direction in making any future unbundling determinations. Granular input from the States is important in this process.

Another goal should be to further a more effective partnership between the FCC and the States in this process, so that the strengths of both levels of government can be put to resolving these difficult issues in the most effective manner possible. The Commission's *Triennial Review Order*[3] recognized the critical role played by States in the transition to competition within their respective jurisdictions and attempted to create a strong partnership between the States and the FCC, at least with respect to determinations involving wholesale narrowband wireline offerings. While the D.C. Circuit Court of Appeals found the "sub-delegation" unlawful, other mechanisms exist which have been utilized by the FCC and States in the past to ensure input by both levels of government.

The Federal Act itself is based upon a scheme of cooperative federalism and the FCC should build upon the foundation created by Congress. The Federal Act encourages the development of broad guidelines by the FCC with the implementation and fine-tuning of those guidelines to fit local conditions performed by the States. When considering permanent unbundling rules, the FCC should remain mindful that the D.C. Circuit Court did not say that State input was inappropriate or unimportant; to the contrary, the Court's ruling found fault with only the form in which the State input was to be provided. The Court laid out what it believed

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. o1-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), corrected by Errata, 18 FCC Rcd 19020 (2003)(collectively "*Triennial Review Order*") vacated and remanded in part, affirmed in part, *United States Telephone Association v. FCC,* 359 F.3d 554 (D.C.Cir. 2004).

would constitute permissible forms of State input, which are discussed in the next section of these comments.

Finally, another objective, of course, should be for the Commission and States to give due regard to the findings of the D.C. Circuit Court in its *USTA I* and *USTA II* Decisions and to fully respond to the deficiencies identified therein. In this respect, we believe granular findings are important in order to recognize the unique characteristics of different State markets, and that a *USTA II* sanctioned method for State collaboration should be utilized. Another important example is the finding by the D.C. Circuit Court requiring consideration of tariffed offerings in the impairment analysis. When interstate or intrastate tariffed offerings are utilized as part of the analysis, the degree to which these are actually viable alternatives needs to be considered.

2. Section 252 Contemplates a Continuing Role by State Commissions in Crafting and Implementing Competitive Policies Involving the Local Exchange Market and the FCC's Permanent Rules Should Recognize This.

In establishing permanent unbundling rules under Section 251, the FCC should remain mindful that under Section 252 of the Federal Act, States are to play a major role in crafting and implementing competitive policies within their respective jurisdictions.

The D.C. Circuit Court of Appeals offered several lawful means of incorporating State input into Federal impairment and unbundling determinations under 47 U.S.C. Section 251(d)(2)(B).[4] The Court of Appeals recognized the following legitimate outside party input into agency decision-making processes: (1) establishing a reasonable condition for granting federal approval; (2) fact gathering; and (3) advice giving. The first method involves a federal agency entrusted with broad discretion to permit or forbid certain activities. The case law provides that the federal agency may lawfully condition its grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable

[4] The Arizona Commission believes that the delegation provisions contained in the FCC's original Triennial Review Order were lawful and has filed a petition for certiorari along with NARUC challenging this portion of the D.C.Circuit's Decision.

connection between the outside entity's decision and the federal agency's determination.[5] The second method recognized by case law is that a federal agency may use an outside entity, such as a state agency or a private contractor, to provide the agency with factual information.[6] Finally, the third method sanctioned by existing case law involves a federal agency using an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself.[7]

With respect to granular impairment determinations by the FCC under 251(d)(2)(B), we believe that it is important that the FCC continue to utilize the States extensive fact-finding processes, and rely upon their advice and policy recommendations when making these types of important determinations. As current events demonstrate, these determinations will have a significant impact upon local markets and the degree of competition in those State markets. This is consistent with the scheme of cooperative federalism underlying both Sections 251 and 252 of the Federal Act. It is also consistent with the vehicles for State input specifically sanctioned by the Court. We believe that this will result in a more balanced approach and will bring needed certainty and stability to local markets.

Pursuant to the provisions of the Triennial Review Order, the Arizona Commission opened a Docket to address the impairment issue on a more granular level in Arizona markets. Like many other State proceedings, the ACC's proceeding was suspended sometime after the D.C. Circuit Court of Appeal's Decision issued. The ACC did not rule on the issues raised due to the D.C. Circuit Court of Appeal's Decision. We believe that the FCC's stated intent to incorporate State specific information to make its impairment and unbundling determinations under Section 251(d)(2)(B) is appropriate, and recognizes that there are many vehicles for obtaining State input, besides "sub-delegation".[8]

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[5] *USTA II* at p. 15.
[6] *USTA II* at p. 16.
[7] *USTA II* at p. 17.
[8] Given the status of the existing Arizona record and confidentiality concerns, we are uncertain whether and to what degree the information in our case would be useful to the FCC's determinations and are still trying to make a determination in this regard. If the Commission decides to make a submission, it will be through a separate filing.

Alternatively, the FCC could also rely upon the access regulations of those State commissions choosing to act under State law and the savings provisions of Section 251(d)(3). State unbundling requirements that are not inconsistent with the pro-competitive requirements of the Act are specifically sanctioned under Section 251(d)(3). In this way, the States could make market specific determinations and only if nationwide problems erupted would the FCC need to act to resolve those issues.

On more generic competition issues which do not involve individual market considerations, such as intercarrier compensation, we recommend use of a Federal-State Joint Board. The FCC and States can function as equal partners each having the opportunity to provide input into critical determinations which will affect the provision of a vital service within the States' jurisdictions.

2. Preemption or Forbearance Which Has the Effect of Eliminating State Regulation Would Be Inappropriate And Will Not Restore Certainty to Telecommunications Markets.

As discussed earlier in these comments, we do not believe that the D.C. Circuit's Decision should be interpreted, as some parties apparently are doing, as requiring preemption or elimination of State involvement in this process. It is important that parties recognize, particularly those advancing the State preemption arguments, the current uncertainty and disruption in the market is not the result of any State decision or State action or inaction.

Rather than preempting States, the Commission should recognize that the States have traditionally been innovators in this area, providing an important basis for FCC action at times. The States are also an important backstop ensuring that national policymaking "works" given the unique and varied characteristics of local markets. The States also perform a critical role in interfacing with consumers in their markets and addressing their problems and concerns.

Rather than preempting the States, the Commission should further policies to ensure that State enactments under Section 251(d)(3) are given full recognition. It is important that the FCC put in place a process which gives recognition to State unbundling under this provision where

granular determinations within the State support such findings and are not inconsistent with the pro-competitive policies of the Federal Act. In other words, if the more granular evidence from a State supports unbundling, this should not be deemed to be inconsistent with Federal requirements. This approach is both consistent with the Federal Act and the D.C. Circuit's holding.

We do not believe that any industry can flourish when there is a high degree of uncertainty and confusion regarding the rules that apply, the services that are available and the rates applicable to those services. We believe that the preemptive actions being advocated by some, would only compound the problems and uncertainty that now exists. The Arizona Commission has always favored a strong State role in the telecommunications area and continues to believe that given the importance of telecommunications to the local economy and infrastructure, States should continue to play a strong, leading role in these issues.

Finally, we also believe that the cooperative federalism approach underlying Sections 251 and 252 of the Federal Act should be not be disregarded. This approach recognizes and incorporates the strengths of both levels of government. The Federal government is best at providing a broad overall framework for use by the States. The States, with their proximity to local markets, can attune the Federal framework to accommodate the variations and uniqueness of their individual markets.

B. The States Are In the Best Position to Determine Whether An Agreement Must Be Filed Under Section 252 of the Act.

Another important issue raised by the FCC's NOPR pertains to the issue of commercially negotiated agreements (including the issue of Section 271 access obligations) and whether those agreements must be filed under Section 252 of the Federal Act. Since these issues have been raised in several proceedings currently before the ACC, we are unfortunately unable to offer comment at this time on the specific issues raised. To the extent we are in a position to offer comment at a later date on these important issues, we will do so.

We do believe, however, that the States are in the best position to determine whether an agreement must be filed under Section 252 of the Act. The FCC should allow States to make these determinations and only if a conflict arises should the FCC provide further guidance to the States on these issues.

III. Conclusion

The Arizona Corporation Commission appreciates the opportunity to offer comment on the important issues raised in the FCC's NOPR. The ACC looks forward to further participation on these issues and working in partnership with the FCC to resolve them.

RESPECTFULLY SUBMITTED this 4th October, 2004.

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