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December 7, 2004

Ex Parte

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

Re: Ex Parte Presentation, *Unbundled Access to Network Elements*, WC
Docket No. 04-313, CC Docket No. 01-338

Dear Ms. Dortch:

I am writing to reiterate the need for the Commission in its order in this proceeding to remind incumbent local exchange carriers ("LECs") of their obligations to work expeditiously and in good faith to implement all necessary interconnection agreements ("ICA") modifications to implement changes to unbundling rules that were promulgated in the *Triennial Review Order* more than a year ago and that were not disturbed by *USTA II*. In addition, the Commission should make clear that state commissions must act in a nondiscriminatory manner to resolve long pending change in law disputes arising from the *Triennial Review Order* before any change in law dispute proceedings initiated in the wake of the Commission's order in this proceeding.

To date, the incumbent LECs have steadfastly refused to implement the revised unbundling obligations adopted by the Commission in the *Triennial Review Order* and that were not disturbed by *USTA II*. For example, incumbent LECs have refused to allow EELs conversions that unquestionably are mandated by the *Triennial Review Order* use restriction modifications. Similarly, BellSouth has refused to modify its ICAs with AT&T to remove unlawful commingling restrictions despite the fact AT&T was proposing language that was drawn directly from BellSouth's post-*Triennial Review Order* SGAT.¹ At the same time, the incumbent LECs have urged the state commissions – and now urge this Commission – to abrogate voluntarily negotiated and state-approved ICA change in law provisions to allow them

¹ See 5/7/04 AT&T Ex Parte at 2-3.

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immediately and unilaterally to reform their ICAs to limit and eliminate access to unbundled elements.

To ensure that the change of law process is conducted by state commissions in a fair and nondiscriminatory manner, the Commission should issue a rule that requires state commissions, to the extent consistent with ICA change in law provisions, to (i) act on pending change in law requests arising from the *Triennial Review Order* before acting on subsequent requests filed in the wake of the remand order in this proceeding, and (ii) to act on all change in law requests under a particular ICA filed in the wake of its remand order at the same time.² That would prevent state commissions from acting on change in law requests favorable to one segment of the industry, while slow-rolling action on change in law requests favorable to another segment of the industry. Of course, the Commission's rule would not require the state commission to find that any particular change in law request was valid or that any specific language proposed by a party was appropriate or otherwise to override the change in law processes established in particular ICAs.

The Commission has authority to adopt such a modest rule. The Supreme Court in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78, (1999) made clear that the Commission's general rulemaking authority applies to the provisions of the Telecommunications Act of 1996 codified in Title II of the Communications Act, including 47 U.S.C. § 252. Here, the Commission would simply be requiring that the state commissions not discriminate in exercising the authority vested to them under § 252.

The rule change requested by AT&T stands in stark contrast to the radical changes requested by the incumbents. They ask for the Commission to issue rules that would gut § 252 by effectively making the state commission role in reviewing change in law proposals "ministerial" and would constitute wholesale abrogation of ICA change in law provisions.³ The incumbent LECs ask that the Commission issue rules that would allow them to demand reformation of ICAs immediately upon issuance of the remand order, notwithstanding contractual change of law obligations that require the *status quo* to be maintained pending any appeals of that order.⁴ Indeed, they ask that the Commission issue rules that would mandate that the incumbent's "sample interconnection agreement [be deemed] effective when filed with a

² AT&T further suggest this rule be codified in Subpart I of the Commission's Part 51 rules.

³ 11/18/04 SBC Ex Parte at 12.

⁴ *Id.*

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state commission.”⁵ Finally, they ask that the Commission issue rules that would give state commissions no meaningful opportunity to review the incumbents’ proposed modifications.⁶

Tellingly, the incumbents are unable to cite *any* statutory provision that gives the Commission authority to adopt such rules. That is because there is none. What the incumbents seek is the virtual repeal of state commission authority over the reformation and enforcement of ICAs that is expressly assigned under § 252. Under § 252 of the Act, it is state commissions, not the Commission, that ultimately determine the legal relationships between incumbent and competitive carriers.⁷ Of particular importance here, § 252 “gives the state commission authority to interpret and enforce agreements when post-approval disputes arise.”⁸ Although the Commission has authority to issue rules that “fill in the gaps” of ambiguous statutory provisions, it has no authority to issue rules that eliminate the states’ lead role in ICA formation and enforcement.

The incumbents’ proposals are also flawed for a second, independent reason. The Act permits state commissions to apply state law, as well as federal law, in reviewing and enforcing ICAs.⁹ The incumbents’ proposals incorrectly assume that the only source of unbundling

⁵ *Id.*

⁶ *Id.* at 13.

⁷ See *Southwestern Bell Tel. v. Public Util. Comm’n*, 208 F.3d 475, 484 (5th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000).

⁸ *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 583 (6th Cir.2002); *S.W. Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497 (10th Cir.2000) (by giving state commissions the power to accept or reject interconnection agreements, § 252 necessarily implies their authority to interpret and enforce such agreements); *S. W. Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir.2000) (same); *MCI Telecomms. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir.2000) (same); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1276 (11th Cir. 2003) (“[n]o court has held or suggested that a state commission does not have the authority to interpret and enforce interconnection agreements after they have been approved.”); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 573 (7th Cir.1999) (the state commission “was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements.”); *In re Starpower Communications, LLC*, 15 FCC Rcd. 11277, 11280, ¶ 7 (2000) (finding that § 252 requires state commissions to interpret and enforce ICAs).

⁹ See 47 U.S.C. § 252(g) (“Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.”); *id.* § 252(e)(3) (“nothing in this [§ 252]

(continued . . .)

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authority is federal law, and that state commissions are tasked only with implementing the requirements of federal law.¹⁰ The Commission simply has no authority to mandate that state commissions “review” disputes about ICAs in ways that would preclude them from “establishing or enforcing requirements of State law.”¹¹

Very truly yours,

/s/ C. Frederick Beckner III
Counsel for AT&T Corp.

(... continued)

shall prohibit a State commission from establishing or enforcing other requirements of *State* law in its review of an agreement.”) (emphasis added).

¹⁰ 11/18/04 SBC Ex Parte at 12-13.

¹¹ See also, e.g., AT&T Comments at 196-204; AT&T Reply at 143-48; 5/7/04 AT&T Ex Parte at 1-4; Opposition of AT&T To BellSouth Pet. for Waiver, (filed in CC Docket No. 01-338, March 19, 2004) (“AT&T Opp.”).