

Dee May  
Vice President  
Federal Regulatory



May 17, 2007

1300 I Street, NW, Suite 400 West  
Washington, DC 20005

**Ex Parte**

Phone 202 515-2529  
Fax 202 336-7922  
dolores.a.may@verizon.com

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloops, WC Docket No. 01-338**

**Telecommunications Services Inside Wiring, Customer Premises Equipment, CS Docket No. 95-184**

**Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, MM Docket No. 92-260**

Dear Ms. Dortch:

Yesterday afternoon, Will Johnson and I met separately with Ian Dillner, Legal Advisor to Chairman Martin, and Scott Bergmann, Legal Advisor to Commissioner Adelstein, to discuss the above proceedings. We reiterated the arguments set out in our comments in each of these proceedings.

As for the Commission's further notice of proposed rulemaking concerning whether cable wiring located behind sheet rock should be considered "physically inaccessible" for purposes of determining the demarcation point, we emphasized that that it should be. Accessing wiring located behind sheet rock is disruptive and expensive. And, as a practical matter, cutting into sheet rock walls or ceilings in order to attach to existing home wiring is impossible in many multiple dwelling unit properties ("MDUs") because MDU owners often will not permit competitive entrants to perform such work. Therefore, consistent with its previous findings on this issue and in order to encourage video competition, the Commission should again conclude that competitive providers need not cut into sheet rock in order to access the demarcation point for cable home wiring.

With respect to the declaratory ruling petition filed by Cox Communications, Inc. ("Cox") concerning permissible methods for accessing inside wire subloops, we

addressed several problems with Cox's arguments in its recent *ex parte* filing.<sup>1</sup> Although the *Cox Ex Parte* is inaccurate in several respects,<sup>2</sup> we focused on three primary issues. First, Cox's request for a declaratory ruling is inconsistent with the Commission's rules and precedent, which leave to state commissions the authority to determine technically feasible points and methods of access to unbundled subloops in multiunit premises. Numerous states have exercised this authority in various subloop unbundling decisions, the vast majority of which were decided years ago without complaint from the parties involved. Second, although Cox's petition should be denied for the reasons set forth by Verizon and other parties, any relief granted by the Commission should be limited solely to the decision of the Oklahoma Corporation Commission that is the subject of the petition. The Commission should not upset other state decisions that are not the subject of the current dispute, particularly when any new subloop unbundling policy that fundamentally changes the manner by which the industry has previously been regulated should be effectuated by a rulemaking under the Administrative Procedure Act ("APA") instead of a declaratory ruling. Third, even if the Commission could legitimately grant the broader relief in the petition, which it cannot and should not, the Commission should not disturb the safeguards adopted by those state commissions that have permitted CLECs to directly access ILECs' terminal blocks.

**Cox's Request Is Inconsistent With The Commission's Rules And Precedent.**

As Verizon has previously explained, Cox's petition is an impermissible collateral attack on a decision of a state commission that acted in accordance with the Commission's rules and precedent, which leave to state commissions the authority to determine technically feasible points and methods of access to unbundled subloops.<sup>3</sup> Rather than seeking "clarification," Cox wants the Commission to establish national standards for methods of accessing unbundled subloops – standards that do not currently exist and that the Commission previously eschewed adopting.

---

<sup>1</sup> Letter from J. G. Harrington, Counsel, Cox Communications, Inc., to Marlene Dortch, Secretary, FCC (May 2, 2007) ("*Cox Ex Parte*").

<sup>2</sup> For example, Cox continues to insist that "[t]here is no credible evidence" that "direct access" to ILEC terminals in multi-tenant premises has ever "caused damage to an ILEC's network," *Cox Ex Parte* at 2, even though the record in this proceeding clearly establishes otherwise. *See SBC's Opposition to Cox's Petition for Declaratory Ruling*, WC Docket No. 01-338, at 12-13 (filed Dec. 6, 2004) (noting that "Cox's technicians caused pervasive damage to SBC-Oklahoma's network, including damage to 7,100 of SBC-Oklahoma's terminals, caused more than 3,000 recorded instances of trouble on SBC Oklahoma's network, and over 9,000 hours of service outages to SBC Oklahoma's customers") (citing Affidavit of William E. Weydeck).

<sup>3</sup> Reply Comments of Verizon in Opposition to Cox's Petition for Declaratory Ruling, WC Docket No. 01-338, at 9-11 (filed Dec. 21, 2004).

The Commission's rules are explicit concerning the role of state commissions in determining issues relating to access to unbundled subloops in multiunit premises. Although ILECs are required to provide nondiscriminatory access to subloops at any technically feasible point, the Commission's rules leave it to the state commissions to resolve disputes "as to whether it is technically feasible ... to unbundle a copper subloop or subloop for access to multiunit premises wiring at the point where a telecommunications carrier requests."<sup>4</sup> Likewise, the Commission has authorized state commissions to decide whether an ILEC has satisfied its burden of establishing that it is not technically feasible to unbundle subloops at a designated point where another state commission has determined that such unbundling is technically feasible.<sup>5</sup>

Here, the Oklahoma Corporation Commission did precisely what this Commission expected and what the Commission's rules authorized it to do. When Cox and SBC Oklahoma could not agree about the technical feasibility of subloop unbundling in multiunit premises, the Commission resolved this disagreement in the context of a section 252 arbitration. The Commission did so after hearing evidence and developing an extensive record about network reliability and security and the relevant network architectures.<sup>6</sup>

---

<sup>4</sup> 47 C.F.R. § 51.319(b)(3)(i). Earlier this month, the Third Circuit Court of Appeals confirmed the role state public service commissions play in arbitrating and enforcing interconnection agreements, just as the Oklahoma Corporation Commission did here. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, No. 06-2419, slip op. (May 9, 2007). In upholding the Commission's determination that disputes arising from interconnection agreements are within the states' responsibility under section 252, the court of appeals concluded that allowing parties to circumvent the state commissions "would undermine the Act's sense of cooperative federalism, *under which the states were given primary responsibility over interconnection agreements.*"

<sup>5</sup> 47 C.F.R. § 51.319(b)(3)(ii). According to Cox, the Commission "has held that 'once one state has determined that it is technically feasible to unbundle [sic] subloops at a designated point, it will be presumed that it is technically feasible for any incumbent ILEC, in any other state.'" Cox *Ex Parte* at 2. However, Cox neglects to mention that, under the Commission's rules, an ILEC can overcome this presumption, and it is for the state commission to decide whether the ILEC has done so.

<sup>6</sup> Final Order Adopting and Modifying the Arbitrator's Report, *Application of Cox Oklahoma Telecom LLC for Arbitration of Open Issues Concerning Unbundled Network Elements*, Order No. 491645, at 45 & 46 ( Okla. Corp. Comm'n June 28, 2004) (finding that the method of access to unbundled subloops "must be chosen with issues of network integrity and operational concerns in mind" and considering location of demarcation point in SBC Oklahoma's network); see 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, 17192-92 ¶ 350, n.1057 (2003) ("To the extent there is disagreement with respect to what is 'technically feasible' with respect to subloop access at a multiunit premises, this issue is left to the

In this case, dissatisfied with the Oklahoma Corporation Commission's resolution of its subloop unbundling dispute with SBC Oklahoma, Cox is asking the Commission to ignore its rules and precedent giving state commissions the authority to determine technically feasible points and methods of access to unbundled subloops and to circumvent state commission responsibility over interconnection agreements. The Commission should not condone such efforts and should deny Cox's petition.

**Any Relief Granted Cox Should Be Limited To Oklahoma.**

Although Cox's petition should be denied, any relief that the Commission may be inclined to grant Cox should be limited solely to Oklahoma. First, as Cox has pointed out, the decision of the Oklahoma Corporation Commission to which it objects was based in part upon Oklahoma law. In particular, Cox complains that the Oklahoma Commission's conclusion concerning access to unbundled subloops in multiunit premises was "based on an Oklahoma-specific definition of the NID that is inconsistent with the Commission's definition."<sup>7</sup> As a result, the issue before the Commission is a narrow one – namely the extent to which the Oklahoma Commission erred in applying state law in a manner inconsistent with federal law. There is no reason for the Commission to decide this case on any broader grounds, even assuming it were disposed to grant Cox's request for relief rather than leaving these issues for the standard judicial review of state commission decisions on interconnection agreements.

Second, the only other state commission decision referenced in Cox's Petition to which Cox objects is an arbitration order by the Georgia Public Service Commission resolving a dispute between BellSouth and the former AT&T.<sup>8</sup> However, that order was issued in 2001, Cox was not a party to that arbitration proceeding, and neither of the parties in interest sought judicial review of the Georgia Commission's decision. Accordingly, it would be beyond strange, not to mention procedurally improper, for the Commission to conclude that the Georgia Commission's order somehow violates Commission rules, as alleged by Cox.<sup>9</sup>

Third, notwithstanding Cox's suggestion to the contrary, numerous state commissions have resolved disputes related to technically feasible points and methods of

---

state in the context of particular interconnection arrangements pursuant to section 252 of the Act, which can take into account the particular incumbent LEC's network architecture as well as the requesting carrier's network"), *rev'd in part on other grounds, United States Telecom. Ass'n v. FCC*, 359 F3d 554. (D.C. Cir. 2004).

<sup>7</sup> Cox Petition for Declaratory Ruling at 13 (noting that "the Commission defines the NID differently than does the [Oklahoma Corporation Commission]").

<sup>8</sup> Cox Petition for Declaratory Ruling at 18 (citing *Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Order, Docket No. 11853-U (Ga. Public Service Comm'n 2001).

<sup>9</sup> Cox *Ex Parte* at 2.

access to unbundled subloops in multiunit premises and, in so doing, have rejected the sort of unmediated and unmitigated access to ILEC terminal blocks requested by Cox. These states include Alabama,<sup>10</sup> Florida,<sup>11</sup> Kansas,<sup>12</sup> and North Carolina,<sup>13</sup> just to name a few. The Commission should not upset these settled issues from other states and open a Pandora's box of litigation concerning such issues when the parties subject to these various state commission decisions did not seek judicial review or provide any evidence

---

<sup>10</sup> See *Generic Proceeding To Establish Prices For Interconnection Services And Unbundled Network Elements*, Order, Docket No. 27821, 2002 Ala. PUC LEXIS 261, at \*175 (Ala. Public Service Comm'n 2002) (finding that the "direct access requested by the CLECs is not necessitated by the prevailing regulatory requirements and would in fact place the BellSouth network at risk for unnecessary disruptions of service").

<sup>11</sup> *Petition For Arbitration of Amendment to Interconnection Agreements with Certain Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Florida by Verizon Florida Inc.*, Docket No. 040156-TP; Order No. PSC-05-1200-FOF-TP, 2005 Fla. PUC LEXIS 571, at \*241 (Fla. Public Service Comm'n 2005) (finding that house and riser cable cutovers should be conducted by Verizon technicians in order to protect Verizon's "network from inadvertent mistakes, acts of sabotage and misuse," finding "no support in the record to weigh AT&T's statement concerning unnecessary delays and increased cost in providing service to its customers").

<sup>12</sup> *Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996; Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996; Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone, L.P. d/b/a SBC Kansas for an Interconnection Agreement that Complies with Sections 251 and 271 of the Federal Telecommunications Act; Petition of Navigator Telecommunications, LLC. for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB; Docket No. 05-AT&T-366-ARB; Docket No. 05-TPCT-369-ARB; Docket No. 05-NVTT-370-ARB, Opinion and Order No. 16, 2005 Kan. PUC LEXIS 868 (Kan. Corp. Comm'n) (2005) (noting that "SBC has provided evidence that its NID which separates the network from inside wire subloops in MTE buildings is located at the customer premises and that allowing access at the outside wall terminal would give Cox access to subloops for all customers in the building," which posed an unacceptable risk of network damage given that "network security and reliability are at stake").

<sup>13</sup> *Generic Proceeding to Determine Permanent Prices for Unbundled Network Elements*, Recommended Order, No. P-100, Sub. 133d, at 87 (N.C. Util. Comm'n 2001) (adopting BellSouth's use of an intermediate access terminal to provide access to subloops, finding persuasive "BellSouth's arguments regarding network reliability and security" and expressing agreement "that these are legitimate concerns").

of problems resulting from implementation of such decisions. Thus, the Commission lacks both a rationale and a record to support such a sweeping result.

Moreover, to the extent the Commission seeks to adopt uniform standards for technically feasible points and methods of access to unbundled subloops in multiunit premises, the Commission should conduct a rulemaking. Under the APA, a rulemaking is the appropriate procedural vehicle for the Commission to consider a new future policy to apply to a regulated industry, particularly when doing so would require the Commission to make fundamental changes in the manner by which that industry has previously been regulated.<sup>14</sup>

The courts have recognized that when the Commission seeks to adopt a new regulatory policy, a "rulemaking is generally a better, fairer, and more effective method" of doing so rather than a declaratory ruling.<sup>15</sup> The Commission itself has long recognized that "issues of general applicability are more suited to rulemaking than to adjudication," and it has refused to develop broad new rules in an adjudicatory context on numerous occasions.<sup>16</sup> Likewise, an agency's subsequent interpretation of a rule that results in the

---

<sup>14</sup> See 5 U.S.C. § 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ... and includes the approval or prescription for the future of ... facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing") (emphasis added).

<sup>15</sup> See [Community Television of Southern California v. Gottfried](#), 459 U.S. 498, 511 (1983); see also [Shell Offshore Inc. v. Babbitt](#), 238 F.3d 622, 627-28 (5th Cir. 2001); [Pfaff v. Department of Housing & Urban Development](#), 88 F.3d 739, 748 (9th Cir. 1996) ("The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable per se, this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward.").

<sup>16</sup> See *In the Matter of Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz Band*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9699 ¶ 218 (2002) (issues having "far-reaching implications ... should be addressed in a rulemaking proceeding in the first instance instead of in an adjudication or waiver proceeding"); [Stockholders of Renaissance Communications Corp. and Tribune Co., Memorandum Opinion & Order](#), 12 FCC Rcd. 11866, 11887-88 ¶ 50 (1997) (requests to modify newspaper cross-ownership rule should be resolved in rulemaking).

adoption of an entirely new regulation is unlawful without the notice and comment required by the APA.<sup>17</sup>

Here, the Commission's unbundling rules do not establish national standards for technically feasible points and methods of access to unbundled subloops in multiunit premises, leaving to the state commissions the authority to make these determinations. To the extent the Commission is inclined to change this approach by establishing national standards, it must do so through a rulemaking, not by issuing a declaratory ruling.

**In Those States That Have Authorized Direct Connections to ILEC Terminal Blocks, The Commission Should Not Upset State Commission-Adopted Safeguards To Protect The Network**

The danger of service disruptions caused by direct access to ILEC terminal blocks in multiunit premises has caused commissions in numerous states – including the few states that have allowed some form of direct access -- to take affirmative steps to protect network security while at the same time facilitating competitive entry. For example, the New York Public Service Commission, whose approach to unbundled subloop access Cox has endorsed, adopted safeguards to address network security and related concerns that arise when CLECs directly access ILEC terminal blocks, given the potential disruption that could result to ILEC network facilities and to services being provided to other customers.<sup>18</sup> After observing the results of a “trial” under which CLECs were given direct access to Verizon’s terminal blocks in multiunit premises, the New York Commission recognized that safeguards were appropriate to address legitimate network integrity and related concerns. First, the New York Commission required that a requesting carrier seeking direct connection to a terminal block in multiunit premises must first identify itself to the owning carrier and indicate, in writing that it intends to access directly the owning carrier’s subloop facilities. Second, a requesting carrier must complete training in the standards and practices used by the owning carrier, and the requesting carrier is responsible for training its technicians to ensure compliance with such standards and practices. Third, requesting carriers are required to negotiate billing and payment procedures as well as auditing

---

<sup>17</sup> See, e.g., [Caruso v. Blockbuster-Sony Music Entertainment Centre, 193 F.3d 730 \(3rd Cir. 1999\)](#) (holding that notice and comment was required before adopting “interpretation” of existing rule that imposed a requirement not contained in original rule).

<sup>18</sup> Order Granting Direct Access Cross-Connections to House and Riser Facilities, Subject to Conditions, *Staff’s Proposal to Examine the Issues Concerning the Cross-Connection of House and Riser Cables*, Case 00-C-1931, 2001 N.Y. PUC LEXIS 358 (2001) (“*New York Order*”); see also *Cox Ex Parte* at 2 (asserting that the *New York Order* mandates “direct access in accordance with Commission precedent”).

Marlene H. Dortch

May 17, 2007

Page 8

procedures with owning carriers, which must “include methods for verifying that pairs used are paid for.”<sup>19</sup>

At a minimum, if the Commission is otherwise inclined to grant Cox some relief on its Petition, the Commission not upset the safeguards adopted by state commissions to mitigate the adverse impacts to network security and integrity resulting from CLECs having direct access to ILEC terminal blocks.

Sincerely,

A handwritten signature in cursive script that reads "Dee May".

cc: S. Bergmann  
I. Dillner  
T. Navin  
R. Harold  
M. Desai  
C. Shewman  
R. Clarke

---

<sup>19</sup> *New York Order*, 2001 N.Y. PUC LEXIS at \*8-9.