May 10, 2004

VIA E-MAIL AND U.S. MAIL

The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Abernathy, Commissioner
The Honorable Jonathan Adelstein, Commissioner
The Honorable Michael Copps, Commissioner
The Honorable Kevin Martin, Commissioner
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, D.C. 20554

Dear Chairman Powell and Commissioners:

The undersigned competitive local exchange carriers ("CLECs"), the Association for Local Telecommunications Services ("ALTS"), CompTel/ASCENT, and The PACE Coalition are disturbed by SBC's attempts over the past few days to circumvent fair procedures in the context of the pending negotiations. The CLECs and the associations urge the Commission to stand firm in supporting the requirements of the Communications Act of 1934, as amended (the "Act"), including the disclosure and filing requirements in Section 252 of the Act. SBC's recent letter to the Commissioners and its self-styled "Emergency Motion" are a smokescreen designed to cloak the negotiations in an ILEC controlled veil. Pursuant to the Act, ILECs must comply with the filing and disclosure requirements of Section 252, which are vital to ensure nondiscriminatory treatment of all competitors. The Commission must reject SBC's efforts to rewrite the Act for its own benefit.

In calling upon the telecommunications industry to begin good-faith negotiations consistent with the goals of the Act, the Commission explicitly affirmed its objective to "restore certainty and preserve competition in the telecommunications market."[1] There is no question that the agreements that the CLECs are attempting to negotiate are subject to Sections 251 and

[1] Letter to John D. Windhausen, Jr., President, Association for Local Telecommunications Services, from the Chairman and the Commissioners (Mar. 31, 2004); Letter to H. Russell Frisby, Jr., President & CEO, Competitive Telecommunications Association, from the Chairman and the Commissioners (Mar. 31, 2004).

252 of the Act. As an initial matter, the agreements that the CLECs are negotiating specifically pertain to interconnection, *services,* and network elements as contemplated by Section 251(c)(3) of the Act. Section 252(e)(1) requires any "interconnection agreement adopted by negotiation" to be filed with the state commissions for approval.[2] Therefore, Section 252 clearly establishes that any agreement that addresses interconnection, network elements, or services, as those terms are explicitly or implicitly defined in the Act is an agreement that, consistent with Section 252(i), must be filed with state commissions.

Although SBC claims that its agreement is a "commercial" agreement negotiated outside the requirements of the 1996 Act, the FCC has left it up to the states to make those determinations on a case-by-case basis.[3] The Commission has made clear, however, that any agreements that establish "ongoing obligations" with respect to the subject matters identified in Section 251 are "interconnection agreements" that must be filed with state commissions.[4] SBC's attempt to avoid any scrutiny of its agreement – which it has publicly touted as an example of the "success" of negotiations – flies in the face of these requirements.

Moreover, it is critical that all agreements be made publicly available in the manner provided by the Act. As this Commission has recognized, Section 252(i) is "a primary tool of the 1996 Act" for preventing discrimination.[5] Indeed, in a unanimous decision, the Commission recently found that Qwest willfully and repeatedly violated Section 252(i) of the Act by failing to file numerous interconnection agreements with the appropriate state commissions, and proposed a $9 million fine on Qwest for engaging in this conduct.[6] It is unconscionable that SBC, just one month after the Commission's order, is blatantly disregarding not only Section 252 of the Act, but also the Commission's pronouncement in the *Qwest Order*, which clearly requires that all such agreements be filed with the state commissions.

Accordingly, to preserve competition in the marketplace, it is essential that all ILECs, including SBC, file negotiated agreements with the appropriate state commission in

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[2] *See also* 47 U.S.C. § 252(a)(1) (any agreement pertaining to "interconnection, services, or network elements pursuant to section 251" is an interconnection agreement that falls within the scope of section 252 of the Act).

[3] *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), Memorandum Opinion and Order*, 17 FCC Rcd 19,337, ¶ 10 (2002) ("*Qwest Declaratory Ruling*") ("[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected").

[4] *Id.* ¶ 8.

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 ,* 11 FCC Rcd 15499, ¶ 1296 (1996) ("*Local Competition Order*").

[6] *Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, FCC 04-57 (Mar. 12, 2004).

accordance with their nondiscrimination obligations. Absent compliance with this fundamental requirement, there is no way to assess the terms and conditions upon which SBC has agreed to provide network elements to carriers, and no way to determine whether SBC is making its "commercial arrangements" available to all carriers equally. Many of the undersigned CLECs are small CLECs who rely on Section 252(i) to ensure they are not placed at a competitive disadvantage with respect to other CLECs. Filing of the agreement is a fundamental component of SBC's nondiscrimination obligations.

There is no merit to SBC's claim that filing negotiated agreements would "taint" other negotiations.[7] Acting in accordance with its nondiscrimination obligations only would further the Commission's goals of restoring certainty and promoting competition. The Commission already has stated that the obligation to engage in good faith negotiations precludes a party from preventing disclosure to federal or state regulators or in support of arbitration petitions.[8] It is hard to fathom how disclosure consistent with this good faith obligation could possibly taint negotiations. Furthermore, under the Act, ILECs are required to file executed agreements with the applicable state commissions. As such, SBC's claim that disclosing negotiating positions would taint other negotiations is simply immaterial to its filing obligations under Section 252(e)(1) of the Act.

The CLECs, ALTS, CompTel/ASCENT, and The PACE Coalition strongly urge the Commission to reject SBC's contention that the agreements at issue are not subject to the Act. Competition will flourish and bring benefits to consumers throughout the United States only to the extent that all parties continue to comply with their nondiscrimination obligations under the Act.

Respectfully submitted,

/s/	/s/
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CEO	General Counsel
AccessOne, Inc.	Advanced TelCom, Inc.

[7] *See* Letter to Chairman Powell and Commissioners from James C. Smith, Senior Vice President, SBC (May 3, 2004).

[8] *Local Competition Order*, ¶ 151.

/s/
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Don Aldridge
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