Sprint

Susan S. Masterton
Attorney

Law/External Affairs
FLTLH00107
Post Office Box 2214
1313 Blair Stone Road
Tallahassee, FL 32316-2214
Voice 850 599 1560
Fax 850 878 0777
susan.masterton@mail.sprint.com

February 10, 2006

Ms. Blanca Bayó
Director
Division of Administrative Services and Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 041464-TP
Notice of Supplemental Authority

Dear Ms. Bayó:

Sprint-Florida, Incorporated files this Notice of Supplemental Authority to bring to the Commission's attention a recent federal district court decision, *CBeyond Communications of Texas, LP v. The Public Utility Commission of Texas*, Case No. A-05-CA-862-SS, issued by the United States District Court for the Western District of Texas on January 18, 2006. The decision is relevant to the Commission's consideration of Issue No. 22 in this proceeding. The decision is included as an attachment to this Notice.

Please feel free to contact me regarding the attached at 850-599-1560.

Sincerely,

Susan S. Masterton

Cc: Parties of Record (by electronic and U.S. mail)
PSC Staff (by electronic and U.S. mail)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**CBEYOND COMMUNICATIONS OF TEXAS, L.P.; WESTERN COMMUNICATIONS, INC., d/b/a Logix Communications; and XO COMMUNICATIONS SERVICES, INC.,**
**Plaintiffs,**

**-vs-**

**Case No. A-05-CA-862-SS**

**THE PUBLIC UTILITY COMMISSION OF TEXAS; PAUL HUDSON, in His Official Capacity as Chairman of the Public Utility Commission of Texas; JULIE PARSLEY, in Her Official Capacity as Commissioner of the Public Utility Commission of Texas; BARRY SMITHERMAN, in His Official Capacity as Commissioner of the Public Utility Commission of Texas; and SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC Texas,**
**Defendants.**

---

# ORDER

BE IT REMEMBERED on the 1st day of December 2005, the Court called the above-styled cause for a hearing, and the parties appeared through counsel. Before the Court were Plaintiffs Cbeyond Communications of Texas, LP ("Cbeyond") and XO Communications Services, Inc.'s ("XO") Motion for Partial Summary Judgment on DS1 Transport Cap Issue [#13 in this case, and #8 in the consolidated action, A-05-CV-865-SS], joined by Western Communications, Inc. d/b/a Logix Communications ("Logix"). Having considered the motions, responses, and replies, the arguments of counsel at the hearing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.



55
AP

## Background

Cbeyond, XO, and Logix are competitive local exchange carriers ("CLECs") doing business in the telecommunications industry. This action is an appeal of an adverse determination by the Public Utility Commission of Texas ("the PUC") interpreting the requirements of federal law with respect to what services (and at what rates) an incumbent local exchange carrier, or ILEC, (here, Defendant Southwestern Bell Telephone L.P., d/b/a SBC Texas ("SBC")) must make available to CLECs.

The Federal Telecommunications Act of 1996 (in the provisions codified at 47 U.S.C. § 251) requires incumbent local exchange carriers like SBC to negotiate in good faith with CLECs for agreements wherein the CLECs can purchase access to the ILEC's network and resell that access directly to customers. The incumbent's duties, in addition to the duty to negotiate in good faith, include the duty not to charge discriminatory or unreasonable rates, as well as the duty to provide access to the elements of its network on an unbundled basis. The Act's unbundling requirement basically means that the incumbent must give the CLECs the opportunity to purchase certain network elements, like access to the physical wiring that runs to a person's home, without purchasing every other piece of the network that the incumbent owns. The term used in the industry to describe such a piece of the network is "unbundled network element" or "UNE." ILECs must provide UNEs to CLECs at substantially discounted, cost-based rates.

In determining whether a particular service should be offered as a UNE, Congress directed the FCC to consider whether "access to such network elements as are proprietary in nature is necessary" for CLECs and whether "the failure to provide access to such network elements would

impair the ability of" CLECs. 47 U.S.C. § 251(d)(2). This has come to be known as the "necessary and impair" standard. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 391–92 (1999).

Two of the UNEs ILECs must make available to CLECs are "loops" and "interoffice transport." The loop is the wiring that connects a particular individual's home or business to the nearest central office or "wire center." Interoffice transport describes the connections achieved using "transport circuits," which consist of the wiring that connects wire centers together. To illustrate the function of loops and transport circuits, Plaintiffs give the following example of an Austin resident calling a Round Rock resident. When the call is made, it first travels over the local loop that runs from the home of the Austin resident to the nearest wire center. Then, the call travels over a transport circuit from the local Austin wire center to a second wire center in Round Rock. From that wire center, the call travels over a second local loop to the home of the Round Rock resident.

In its *Triennial Review Remand Order*, the FCC established a new scheme for determining the conditions under which an ILEC is required, among other things, to provide loops and transport circuits as UNEs to CLECs. *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*"). The approach adopted by the FCC is based on the volume of business being done in a particular area and the extent to which competition is present. *See id.* at ¶¶ 93–95. The theory behind the FCC's approach is that when enough money can be made by a CLEC in a particular area, the CLEC has the incentive to install and operate its own fiber facilities, and thus, there is no reason to require the ILEC to provide them. *Id.* In accordance with this theory, the FCC has established a regulatory scheme creating three tiers of wire centers. *Id.* at ¶ 111. Within Tier 1 are the biggest

wire centers with the most business lines and the most "collocators."[1] *Id.* at ¶ 112. Tier 3 has the fewest, and Tier 2 is in the middle. *Id.* at ¶ 118, 123.

The parties' dispute in this case centers around the intended scope of a cap the FCC imposed with respect to the availability of certain transport circuits as UNEs. In the order, the FCC dealt with two different types of transport circuits—DS1 and DS3. A DS1 transport circuit is a relatively small capacity circuit, and a DS3 circuit is a large one. It takes 28 DS1 circuits to equal the capacity of a DS3 circuit. *Id.* ¶ 128. The FCC determined that the question of whether CLECs should be required to offer DS1 and/or DS3 transport circuits in particular contexts should be made to depend on the size of the two wire centers being connected. The general rationale for the scheme is that when two large (or Tier 1) wire centers are connected, an ILEC need not provide any transport as a UNE since the CLEC's incentive to install its own transport circuits (or to lease them from a CLEC that has already done so) is sufficiently great. *Id.* ¶ 126–27; 129–130. When both wire centers are at least Tier 2 wire centers, the ILEC must provide DS1 transport as a UNE, but it need not do so with respect to DS3 transport. *Id.* In that case, the FCC reasoned that most CLECs would find it to be economically efficient to install their own large-capacity DS3 facilities (or otherwise obtain access to such facilities from another CLEC), but it would not likely make financial sense for them to install their own small-capacity, DS1 circuits. *Id.* Finally, whenever a small, Tier 3 wire center is involved, the ILEC must provide both DS1 and DS3 transport as a UNE since CLECs would not find it economically efficient to build their own facilities with respect to contexts with such small potential revenues. *Id.*

[1] Collocation refers to the process of a CLEC installing its own fiber and equipment in an ILEC's wire center.

The following chart describes when particular transport circuits must be made available on an unbundled basis:

| Scenario | | must DS3 be provided as a UNE? | must DS1 be provided as a UNE? |
|---|---|---|---|
| 1 | Tier 1—Tier 1 | No | No |
| 2 | Tier 2—Tier 2 | No | Yes |
| 3 | Tier 1—Tier 2 | No | Yes |
| 4 | Tier1—Tier 3 | Yes | Yes |
| 5 | Tier 2—Tier 3 | Yes | Yes |
| 6 | Tier 3—Tier 3 | Yes | Yes |

**Discussion**

The dispute in this case relates to a cap the FCC imposed on the number of DS1 circuits that must be made available to CLECs. Plaintiffs in this case challenge the PUC's interpretation of an FCC regulation on the basis that the PUC has failed to read it in the context of the FCC order giving rise to the regulation.

The regulation reads, in pertinent part, as follows:

> (B) Cap on unbundled DS1 transport circuits. A requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis.

47 CFR § 51.319(e)(2)(ii)(B). The PUC and SBC contend that this provision means exactly what it says. That is, whenever DS1 is available as a UNE, a CLEC may obtain no more than 10 circuits. Plaintiffs, on the other hand, contend that in so interpreting the regulation, the PUC ignored the

underlying FCC order, which served as the basis for the regulation. The relevant passage of the order provides as follows:

> Limitation on DS1 Transport. On routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits. This is consistent with the pricing efficiencies of aggregating traffic. While a DS3 circuit is capable of carrying 28 uncompressed DS1 channels, the record reveals that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s. When a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply.

*Triennial Review Remand Order* at ¶ 128.

Plaintiffs contend that because the sentence in the underlying order appears to limit the scope of the DS1 transport cap to those routes for which DS3 need not be provided as a UNE, the cap may not appropriately be applied in cases in which DS3 is available as a UNE. Referring back to the chart, Plaintiffs essentially argue that the DS1 cap should not apply in scenarios 4,5, and 6—those cases in which a Tier 3 wire center is involved.

The Court initially notes that each side attempts to argue that both the order *and* the regulation supports its position. First, Defendants argue that although paragraph 128 of the order makes reference to the specific class of cases in which DS3 is not required to be provided as a UNE, the sentence does not use any particular words of exclusion, and thus, the sentence leaves open the possibility that the FCC intended the cap it announced in that sentence to apply in other cases—namely, on those routes for which ILECs must provide DS3 as a UNE.

Plaintiffs, for their part, argue that although the regulation ultimately promulgated by the FCC "[u]nfortunately . . . does not explicitly address the [DS3 unbundling] limitation on the applicability of the DS1 transport cap," the regulation can still be read in harmony with the order.

Despite the efforts of each side to read ¶128 of the order and § 51.319(e)(2)(ii)(B) as being consistent with one another (albeit through directly opposed constructions of each provision), the plain text of the two contested sentences at issue is facially irreconcilable. As Plaintiffs point out, the first sentence of Paragraph 128 suggests, by its plain language, that the FCC intended the DS1 cap to apply only "[o]n routes for which [the FCC has determined] that there is no unbundling obligation for DS3 transport," (*i.e.*, when DS3 is unavailable as a UNE). Although SBC and the PUC contend that Plaintiffs' reading of this sentence requires the insertion of the word "only" at the beginning of the sentence, Defendants' own construction does even more violence to the sentence. That is, while Plaintiffs' reading arguably requires the addition of a single word,[2] Defendants' construction requires one to read out the entire clause, "[o]n routes for which [the FCC has determined] that there is no unbundling obligation for DS3 transport."

Plaintiffs' position with respect to *the regulation*, on the other hand, is untenable in light of the plain language at issue there. The regulation states unequivocally and without exception that a CLEC "may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis." 47 CFR § 51.319(e)(2)(ii)(B). The rule is stated in general terms, and there is no language on which one could reasonably base a conclusion that any exceptions were intended.

[2] Arguably, the word "only" is implied by the context in which the phrase is used. After all, paragraph 128 is the first and only place in the actual order in which the DS1 transport cap is mentioned. Thus, the sole reference to the cap in the order is limited to the particular situation in which DS3 is not required as a UNE. While the sentence does not use express language to limit the cap's applicability to the single context mentioned, it certainly does not, by its terms, impose the cap anywhere else.

Apparently aware of the grave difficulties the text of the regulation creates for their position, Plaintiffs begin their argument by citing cases for the proposition that an agency's interpretive guidance on its own regulations is entitled to deference. *See, e.g., Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144,150–51 (1991). Although this uncontroversial statement of the law is true as far as it goes, it does little to aid Plaintiffs' position in this case. There is no colorable argument that the FCC's statements in paragraph 128 of the *Triennial Review Remand Order* were meant *as an interpretation* of the rule the Commission ultimately promulgated. Rather, it appears that what has occurred here is the FCC gave an indication in the body of the order that it would be creating one rule, but then ultimately determined that a different rule was more appropriate. In any event, there is no colorable argument that the statements made in paragraph 128 were an interpretive gloss on the regulation. The order and the regulation are simply inconsistent.

In the alternative to their consistency argument, Plaintiffs contend that even if the rule unambiguously caps DS1s as UNEs without an exception for DS3 unbundling, the Court may import such an exception from the underlying FCC order. In support, Plaintiffs rely on the Supreme Court's decision in *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002). There, the Supreme Court looked to an underlying FCC order to interpret what scope the FCC intended to give the term "technical feasibility" in a particular regulation. *Id.* at 536. *Verizon* provides no support for Plaintiff's position. As Defendants point out, the high court was faced there with assigning meaning to an ambiguous term left undefined by the regulations.[3] The Court found it appropriate to look to the underlying

[3] Although, as Plaintiffs argue, the Court did not expressly "find" that the term "technical feasibility" was ambiguous, the ambiguity was apparent from the Court's discussion. The Court noted the multiple possible meanings of the term, and it relied on the underlying order to determine which supplied the most appropriate definition for the term in the context of the regulation. *Verizon*, 535 U.S. at 536.

order to ascertain the actual meaning intended by the FCC. *Verizon* did not stand, however, for the much different proposition that an underlying agency order can be read not to interpret, but to *change* the meaning of a regulation's text. The Court has not been presented with any authority that stands for that proposition, nor has it uncovered any such authority in its own research.

Thus, the Court is faced squarely with a significant question, left largely unaddressed by the parties, about the relative weight of administrative rules and underlying orders. Namely, when a rule promulgated by an agency is in direct and unambiguous conflict with the underlying order giving rise to it, which of the two is controlling? Happily, this particular situation is rare enough that it appears not to have given rise to many legal disputes. Unfortunately for this Court, the situation's rarity means there is almost no published authority on the question presented here.

First, the Court notes that an argument can be made that the order and the rule are entitled to equal weight. After all, the regulations attain their force and authority from the same place the the order does—the grant of power conferred on the agency by the Congress. Furthermore, the regulations and the order in this case are the product of the same notice-and-comment rulemaking. Indeed, the regulation at issue was promulgated by one of the ordering clauses in the underlying order itself. *See Triennial Review Remand Order* at ¶ 239 (amending Part 51 of the FCC's rules as set forth in an appendix to the order).

Nonetheless, there are substantial problems with treating the order and the regulation as being of equal weight. First and most obvious, to so treat them would render the problem presented by the present case insoluble. If the FCC's two inconsistent positions are equally valid, neither the parties nor the Court would have a basis on which to decide which of the two rules must be followed.

The second problem with assigning the regulation and the order equal weight is that it would be inconsistent with the ordinary expectations of the parties. Although the FCC's orders generally give guidance about the policies and the reasoning behind its regulatory acts, parties rightfully look first to the Code of Federal Regulations itself to determine what the FCC has ultimately decided to require of them. Parties should be permitted to presume that these regulations are the most carefully drafted of the agency's statements on the subject, and further, that they are the culmination of its deliberative efforts.

The FCC itself has suggested that this is the appropriate approach. In a case cited by Plaintiffs,[4] the Third Circuit rejected a call in a particular case to read a specific standard into a regulation when the standard was discussed in an underlying FCC order but not mentioned in the text of the regulation ultimately adopted. *SBC Inc. v. FCC*, 414 F.3d 486, 500 (3d Cir. 2005). In deciding the case, the court quoted the following material from one of the FCC's orders on the dispute over construction of the regulation:

> SBC also argues that section 51.711(a)(3) of our rules must be interpreted to require both a functional equivalence test and a comparable geographic area test based on the discussion in the Local Competition Order addressing this issue. As the [Attwood Letter] correctly noted, however, the Commission has previously addressed the import of this language in the [NPRM] and stated that "*although there has been some confusion stemming from additional language in the text of the [Local Competition Order ] regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic area test.*" We reaffirm this interpretation.

*Id.* (quoting *Cost-Bases Terminating Compensation for CMRS Providers*, 18 FCC Rcd 18441, 2003 WL 22047787 at 9 ¶ 21, released on September 3, 2003) (emphasis added). Essentially, the FCC

[4] Plaintiffs cite *SBC* for the proposition that exceptions discussed in an order may be imported into an unambiguous rule. Pls.' Mot. Part. Summ J. at 15. Needless to say, the Court finds this interpretation of *SBC* to be wanting.

took the position that since the order and the regulation sent conflicting signals, it was appropriate for the parties to look to the regulation, rather than the order, for a clarification of its intent.

Consistent with the FCC's own approach, the Court holds that when the FCC makes inconsistent statements in an order and a regulation, it is the language in the order—not the regulation—that is controlling. In this case, the PUC correctly determined that the broad, exceptionless version of the DS1 cap is controlling in this case, and thus, Plaintiffs' arguments for a DS3 unbundling exception are unavailing.

Although the Court holds that the regulatory text and canons of interpretation are dispositive here, the Court also notes that the broad cap announced by the regulation is not inconsistent with the FCC's statements concerning the policy behind the cap. Plaintiffs take the position that the cap is only necessary to prevent gaming of the system by CLECs in cases in which no DS3 access is available. However, the actual order is not limited to this rationale. Rather, paragraph 128 evinces a strong policy for weening CLECs from DS1 UNEs *whenever* a certain level of business is obtained. The last sentence of the paragraph states, "[w]hen a carrier aggregates sufficient traffic on DS1 facilities such that it effectively could use a DS3 facility, we find that our DS3 impairment conclusions should apply." *Triennial Review Remand Order* at ¶ 128. Although the meaning of the last clause of this sentence is far from straightforward, the gist of the statement appears to be that when it becomes efficient for a CLEC to use DS3 facilities, the CLEC will be expected to rely on such facilities.

In any event, Plaintiffs' arguments in this case are not that the FCC's regulation should be overturned because it was unsupported by the agency record or by sound policy. Rather, they simply take the position that the PUC failed to apply the rule that the FCC actually adopted. However, as

the foregoing demonstrates, the Court is unconvinced by Plaintiffs' arguments and holds that the PUC did not err in construing 47 CFR § 51.319(e)(2)(ii)(B) to require a cap on DS1 transport circuits in all cases in which DS1 is available as a UNE.

**Conclusion**

In accordance with the foregoing:

IT IS ORDERED that Plaintiff Cbeyond's Application for Preliminary Injunction [#3] is DISMISSED AS MOOT pursuant to the agreement of the parties;

IT IS FURTHER ORDERED that Plaintiffs Cbeyond and XO's Motion for Partial Summary Judgment on DS1 Transport Cap Issue [#13 in this case, and #8 in the consolidated action, A-05-CV-865-SS] is DENIED.

SIGNED this the 18th day of January 2006.

SAM SPARKS
UNITED STATES DISTRICT JUDGE