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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition For Rulemaking To Determine The	)	
Terms And Conditions Under Which Tier 1	)	RM - 8303
LECs Should Be Permitted To Provide	)	
InterLATA Telecommunications Services	)	
	)	

REPLY COMMENTS OF COMCAST CORPORATION

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September 17, 1993

SUMMARY

Comcast believes that the Commission should decline the BOCs' invitation to determine the terms and conditions under which the BOCs should be permitted to provide interLATA services. The removal of the interLATA restriction at this time is not in the public interest because non-structural safeguards cannot adequately protect against obvious and predictable BOC discriminatory and anticompetitive behavior. Notwithstanding the rhetoric of the BOC Petition, the BOCs continue to possess control of the local exchange bottleneck and have strong incentives to discriminate and cross-subsidize, particularly if they are permitted to provide end-to-end integrated service.

Moreover, the fact that the Commission has no authority to alter the Modification of Final Judgment, and may be preempted by Congressional or Court action, suggests that the proposed rulemaking not be initiated. The Commission should not be asked to strain its resources further in considering an issue over which it has no authority.

Finally, if BOC entry is permitted at all, it must be accompanied by strict safeguards designed to minimize the ability of the BOCs to use their monopoly power to the detriment of their competitors. These must include complete structural separation, effective equal access provisions, suitable annual auditing policies and procedures, and forceful CPNI rules. These measures must be fully examined and implemented prior to any consideration of the removal of the interLATA services restriction.

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REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast"), by its attorneys, hereby submits reply comments regarding the Petition for Rulemaking of five Bell Operating Companies ("BOCs") to determine the terms and conditions under which Tier 1 LECs should be permitted to provide interLATA services under the United States v. Western Electric Consent Decree.[1/]

I. INTRODUCTION

Comcast is a diversified telecommunications company holding interests in cable television, wireless telecommunications and competitive access providers ("CAPs"). Since the construction of its first cable system in the 1960's, Comcast has grown to be the fourth largest cable company in the United States. It currently provides service to more than 2.8 million cable subscribers. During the past three decades it has continued to develop and implement new

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1/ United States v. Western Electric Company, Inc., 552 F.Supp. 131, 226-34 (D.D.C. 1982) (Modification of Final Judgment ("MFJ")), aff'd., 460 U.S. 1001 (1983).

technologies, and in recent years has extensively deployed fiber optics technologies. In recognition of its efforts, CableVision magazine recently awarded Comcast its 1992 Innovator Award for Technology.

Comcast's success, however, is not limited to the cable industry. Comcast Cellular Communications, Inc., a wholly-owned subsidiary, is currently the fifth largest non-BOC controlled cellular operator in the United States, serving a population of over 7.3 million. Among other services, the cellular division has pioneered the integration of cellular and local competitive access facilities through its offering of Quicklink™, a service that permits cellular customers direct access to their company's private branch exchange ("PBX") without interconnection through the local exchange carrier ("LEC") facilities, and is currently conducting a trial of an advanced personal numbering service ("PNS") with BellSouth and Sprint -- the first such trial of its kind to be coordinated among a LEC, an interexchange carrier ("IXC") and a major cellular operator.

Comcast's commitment to the development and integration of new communications technologies and the provision of viable, low-cost competition to existing networks is further evidenced by its investments in Nextel Communications, Eastern Telelogic Corporation, and its participation in Teleport Communications Group, Inc., a leading CAP. Comcast is also conducting and sharing many of the results from its pioneering Personal Communications Services ("PCS") trials in Trenton, New Jersey, most recently integrating its current PCS trial with the PNS trial of its cellular division. Moreover, Comcast's United

Kingdom affiliates, Cable London, Birmingham Cable, and Cambridge Cable are serving both residential and business customers in the United Kingdom, providing both broadband cable services and direct competition to the local exchange monopoly through the integration of fiber optic/coaxial cable plant and fiber optic twisted pair plant.

Comcast continues to promote technological improvements and innovations that will enhance the prospects of robust competition in the telecommunications industry. It is for this reason that Comcast files its comments in this proceeding. Comcast provides only incidental interexchange services as a reseller, and therefore does not approach the BOC Petition with the same concerns as would a major facilities-based IXC. Rather, Comcast approaches the BOC Petition as an existing and prospective provider of local services and views the Petition with concern in light of the relief sought, the impact which the granting of such relief would have on the development of competition in the local loop, the lack of recognition that strict structural separation is required to diminish prospects for discrimination and cross-subsidy, and the lack of support for the BOCs' contentions of competitive hardships.

II. REMOVAL OF THE INTERLATA RESTRICTION IS NOT IN THE PUBLIC INTEREST BECAUSE NON-STRUCTURAL SAFEGUARDS CANNOT ADEQUATELY PROTECT AGAINST THE DISCRIMINATORY AND ANTI-COMPETITIVE POLICIES OF THE BOCS.

The generalized descriptions of alleged intraLATA competition offered in the BOC Petition, and the Petition's casual references to federal regulations that seek to protect competitors from anti-competitive BOC practices, do not alter the fact that the BOCs' continue to wield profound monopoly bottleneck power in the local loop -- power which they have not hesitated to use to disadvantage competitors and stunt the development of competition. At this time, there are no grounds that support formulation of rules to facilitate BOC entry into the interLATA market. Permitting the BOCs to provide interLATA interexchange service will further hamper the development of robust wireless and wireline competition to the local loop, and will ultimately recreate the market characteristics that necessitated the break-up of the Bell System, before competition has taken root.

A. The BOCs Continue to Possess Control of the Local Exchange Bottleneck.

It is ludicrous for the BOCs to suggest that the "residual core of the local exchange monopoly will not survive much longer."[2/] Such an assertion assumes that viable competitors to the local exchange monopoly exist and that those competitors are offering service substitutes or alternatives to the local loop

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2/ See BOC Petition of Rulemaking, at 24 [hereafter "BOC Petition"].

which have caused a large percentage of customers to drop altogether, or significantly decrease, their use of traditional local telephone services. No such phenomenon has occurred or will occur in the near future. No "competitor" identified by the BOCs offers a real threat to the BOCs' market position.

For example, notwithstanding cellular's exponential growth, for a variety of reasons (including cost of constructing cellular networks, the difficulty in receiving local approvals to construct cellular towers, issues of capacity and the distinction made by customers between mobile and land-based services), cellular simply has not developed into a substitute for local landline services. Moreover, any potential threat posed by cellular is minimized by that industry's total dependency on LECs for the provision of interconnection to provide cellular services, and by the fact that the cellular industry is dominated by LECs, who have no incentive to undermine their in-region landline affiliates.[3/]

Currently, cellular carriers use the BOCs' local exchange bottleneck to complete 99 percent of all their calls.[4/] This is unlikely to change significantly in the near term even with the advent of more advanced cellular networks such as currently being trialed by Comcast's cellular division.[5/] Finally, the threat of

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3/ See Footnote 21 infra.

4/ See Opposition of Capital Network System, Inc. at 19.

5/ It should also be noted that the development of those advanced intelligent networks for cellular and PCS application are dependent upon cost-based interconnection to unbundled service offerings of the LECs and IXCs.

cellular is contradicted by the BOCs' own prior statements regarding cellular's impact on landline services.[6/]

Although efforts are underway to authorize new Personal Communications Services, the licensing process has not yet commenced and PCS' competitive vigor will not be known for a number of years. PCS cannot seriously be considered a current competitor to the local loop. A decision to remove the interLATA restriction surely requires more than mere prospect that new services may be available in several years.

Similarly, competition from CAPs is limited to portions of only certain large cities and, based upon BOC unwillingness to provide interconnect or collocation, is limited to certain special access offerings. CAPs remain unable to compete with the BOCs for the bulk of local traffic and for switched access traffic, and are hampered from broadening their customer base in the special access market by unreasonably high interconnection rates reflected in the LEC tariffs

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6/ See Comments of Competitive Telecommunications Association at 10-11; Report of the Bell Companies on Competition in Wireless Telecommunications Services, 1991, October 31, 1991 at 184-85 (noting that the BOCs, the Department of Justice and the MFJ court all have recognized that mobile services occupy a market separate and distinct from landline services because of cost, capacity and market factors). Ironically, in the not too distant past, the BOCs were the parties claiming that direct cellular competition with landline services was "nowhere near imminent," based on the "vast discrepancy" in both price and penetration levels. Id.

currently under investigation by the Commission.[7/] Even where CAPs have taken hold, their services are rarely, if at all, obtained "in lieu" of LEC offerings.

Finally, the BOC Petition asserts that cable operators have aggressive plans for expansion into local telephone services.[8/] Even if this statement were true, this argument entirely overlooks the current barriers maintained by many state utility commissions against local exchange competition,[9/] and the freedom from regulation which BOCs have been able to obtain in many other states with respect to local services that are deemed competitive.

Moreover, companies which offer "alternative" services to the BOCs' are overwhelmingly dependant on BOC interconnections to serve their customers, and are prohibited from providing certain services in competition with the BOCs by law, rule or agency policy. Virtually all providers, including IXCs, must rely on

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7/ See Ameritech Operating Companies, Transmittal Nos. 697, et al., 8 FCC Rcd 4589 (Com.Car.Bur. 1993); Order Designating Issues for Investigation, CC Docket No. 93-162, DA 93-951 (released July 23, 1993). [Hereafter jointly referenced as "Tariff Investigation".]

8/ See BOC Petition at 21-24. These asserted plans notwithstanding, cable operators will not become the claimed threat the Petition postulates if the Petitioners succeed in their various oppositions to the efforts of cable operators to obtain state certificates to provide those services which are permitted under state law. See e.g. Comments of Chesapeake and Potomac Telephone Company of Virginia, Case No. PUC 9030016, filed September 15, 1993.

9/ See Comments of MFS Communications Company, Inc. at 3 n. 5. Indeed, even Ameritech's "Customer First" Petition acknowledged the existence of state legal barriers to full competition. Further, as the comments of Centex Telemanagement attest, substantial restrictions on the sharing and resale of local services present major obstacles to the initiation of competition. See Comments of Centex Telemanagement, Inc. at 4-9.

BOC facilities to originate and terminate all switched interLATA calls and the bulk of all special access service. No "new" local exchange carrier poses any realistic threat to the BOCs' dominant market position in the local exchange market.

The BOCs appear to believe that the mere presence of any other provider of any form of local service should result in the overall market being viewed as competitive. This position is in stark contrast to that taken by the Congress in the 1992 Cable Act.[10/] If the Commission were to apply the same standards for effective competition as those contained in the 1992 Cable Act, the BOCs would fall woefully short of proving any real competition exists. Plaintive

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10/ Under the Cable Act, cable television systems are rate regulated in the absence of "effective competition". "Effective competition" is defined by the Act to exist whenever:

> (1) fewer than 30% of the households in the franchise area subscribe to the cable service of a cable system; (2) the franchise area is served by at least two unaffiliated multichannel video programming distributors, each of which offers comparable video programming to at least 50% of the households in the franchise area, and more than 15% of the households in the franchise area subscribe to the programming services of video distributors other than the largest multichannel video distributor; or (3) a franchising authority for the franchise area operators a system that is available to at least 50% of the households in that franchise area.

Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(l)(1) (1992).

tone notwithstanding, the BOCs have not demonstrated that there is effective competition in the local exchange.

B. The BOCs Have Strong Incentives to Discriminate and Cross-subsidize and Will Do So If Permitted to Provide End-to-end Integrated Service.

Granting relief of the interLATA restriction while the BOCs continue to monopolize local telecommunications markets will only present greater opportunities for the BOCs to discriminate against developing local exchange competitors and to continue to cross-subsidize their operations to the detriment of competition. If the BOCs were allowed to provide interLATA service, they would be the only "integrated" providers of local, intrastate and interstate interexchange services, while competing companies would be forced to utilize the BOC bottleneck facilities in whole or in part and be subject to the BOCs' interconnection and access pricing policies.[11/]

1. Potential for Discrimination

Although the Commission has sought to design rules for detection of discrimination, current cost accounting and price cap rules do not adequately protect consumers and LEC competitors from the potential for discrimination by vertically integrated BOCs.[12/] If the Commission decides to allow the vertical

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11/ In contrast, cellular operators do not and cannot provide the full range of landline local, interstate and interstate offerings that the BOCs seek to provide on an integrated basis.

12/ Because there has been no review of LEC price caps since their implementation, their anti-competitive deterrent effects are speculative at best. It (continued...)

integration that the BOCs seek to introduce, combined with the local exchange bottleneck, Comcast would urge that the Commission require each BOC to demonstrate that all barriers to local exchange competition within its territory have been removed prior to their entry into the interLATA market. It is also essential that all BOC services required for competitors to be viable are unbundled and are being offered at competitive rather than monopoly prices. This demonstration cannot be made today. Indeed, the comments filed in this proceeding and the Commission's ongoing tariff investigation of the BOCs' expanded interconnection tariffs graphically illustrate the BOCs' unwillingness in practice to support the development of local exchange competition.[13/]

The BOCs' motivation to discriminate has not materially diminished since divestiture or as a result of Commission regulation. In fact, historically, the BOCs have repeatedly launched various schemes designed to undermine pro-competitive measures adopted by the Commission, not the least of which has been recent switched access waiver discount requests.[14/]

12/ (...continued)
is, therefore, premature to consider price caps as an effective check on BOC ability to discriminate. See generally United States v. Western Electric Co., 900 F.2d 283, 298 (D.C. Cir. 1990) (court appraisal of deterrent effect of rules to occur after DOJ's assessment).

13/ See generally Tariff Investigation.

14/ For example, NYNEX recently requested waiver of Part 69 of the Commission's Rules to offer the "Vermont Market Plan" in the state of Vermont for a three-year trial period. If granted, the Plan would delay the introduction of competition for access services. The implementation of the proposed discounts, in a state were no CAPs currently operate and where a CAP's application for
(continued...)

If the BOCs were permitted to enter the interLATA market under the current regulatory regime, they would also have the power to discriminate against competitors in areas other than pricing. For example, the BOCs' control over network design provides ample opportunity for anti-competitive conduct. The BOCs may delay the provision of interconnection for the introduction of new services until they could develop a similar offering, or may favor the central offices that serve their IXC affiliates in the deployment of new services. Similarly, the BOCS could price tandem-routed transport in a manner that drives out smaller IXCs in advance of their entry into the market, or strategically design volume discounts that bundle intraLATA and interLATA access in a manner attractive only to their captive IXCs.

In addition, the BOCs can act anti-competitively in respect to Customer Proprietary Network Information ("CPNI") by commanding early, and often exclusive, access to customer information. Based on this information, they can target large volume customers before their competitors, and use competitively sensitive information to their advantage in respect to the location, distribution and volume of traffic they plan to handle.[15/]

14/ (...continued)
authority to operate has been delayed by telephone companies, will provide artificial incentives for customers to direct traffic to NYNEX's switched network, making it difficult, if not impossible, for competitive providers to establish the customer base necessary for market success. GTE has filed a similar access discount request that would extend to all its markets.

15/ The potential for BOC anti-competitive action has been outlined in a 30-
(continued...)

2. Potential for Cross-subsidization

The inability of non-structural requirements to guard against cross-subsidization has been specifically recognized in the 1993 General Accounting Office Report to Congress.[16/] In addition to highlighting the lack of resources available to enforce Commission rules through periodic audits, the GAO Report found that the rules themselves have failed to deter the BOCs from illegally cross-subsidizing. In the few cases in which Commission audits have been performed, Commission auditors found instances of misallocations totalling $300 million in which LECs charged expenses to their regulated businesses and their affiliates overcharged regulated carriers for services and supplies.[17/] As recently as 1990, NYNEX was charged with buying equipment at inflated prices from an unregulated subsidiary, Material Enterprises Company ("MECO"), and siphoning

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15/ (...continued)
page booklet submitted in this proceeding by LDDS Communications, Inc. The report outlines in detail the various judicial actions, regulatory actions, and allegations that have been brought against each of the seven BOCs. The nature of the BOCs' activities include (1) overcharging and excess earnings, (2) inappropriate cross-subsidies, and (3) allegations of fraud and misrepresentation. See Attachment to Comments of LDDS Communications, Inc.

16/ United States General Accounting Office Report to Congressional Requestors, Telecommunications: FCC's Oversight Efforts to Control Cross-Subsidization (February 1993) [hereafter "GAO Report"].

17/ GAO Report at 12.

profits from its regulated to its unregulated subsidiaries.[18] Other companies have placed in the record additional accounts of BOC cost misallocations.[19]

As noted below, these threats to developing competition cannot be effectively addressed by application of existing non-structural safeguards to BOC participation in interLATA markets. Indeed, Comcast would recommend that the Commission consider strengthening the structural separation requirement on the BOCs with respect to wireless services, particularly as wireless service providers begin to experiment with more advanced networks, including PCS, which will be dependent upon provision of various LEC facilities and functions. If the Commission concludes that the BOCs should offer interLATA services, it must, as several commenters have recognized, abandon the joint cost rules in favor of strict structural separation between BOC local exchange and interLATA services.[20] Further, such procedures must be more detailed, stringent and specific than existing non-structural regulations.

18/ State of New York, Department of Public Service, Case No. 91-c-0102 - Proceeding to Investigate the Corporate Structure of New York Telephone Company and Its Affiliates, Plan for Comprehensive Restructuring of NYNEX and Its Affiliates, and accompanying material; Federal Communications Commission, Review of Affiliate Transactions Between NYNEX's LECs and Material Enterprises, December 29, 1989. These particular abuses continued from 1984 to 1988, despite a New York audit that had identified serious concerns about cross-subsidy in the NYNEX organization.

19/ See e.g. Comments of Competitive Telecommunications Association at 16; Comments of LDDS Communications, Inc..

20/ Comments of The Information Technology Association of America at 4-9; Comments of LDDS Communications, Inc. at 6.

The potential for BOC anti-competitive activity based on vertical integration is Comcast's chief concern. Non-LEC telecommunications providers have had recurring problems with the BOCs on issues such as interconnection, access pricing and the availability of advanced services, and Comcast is convinced that the BOCs' discriminatory practices will only intensify should the interLATA market be opened to the BOCs.[21/]

III. IF BOC ENTRY IS TO BE PERMITTED AT ALL, IT MUST BE ACCOMPANIED BY STRICT SAFEGUARDS DESIGNED TO MINIMIZE THE ABILITY OF THE BOCS TO USE THEIR MONOPOLY POWER TO THE DETRIMENT OF THEIR COMPETITORS.

Because safeguards can only facilitate the detection of illegal activity, and cannot prevent the BOCs from discriminating and cross-subsidizing completely, it is necessary to implement the most effective means of discerning and minimizing the BOCs' anti-competitive activities. Comcast believes that this can only be accomplished by requiring absolute structural separation, in this instance between the BOCs' local and interexchange operations. The establishment of separate subsidiaries is one of the most effective means of

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21/ Among other things, Comcast remains concerned with the ability of the BOCs and their LEC affiliates to first establish service "transfer" pricing between its network and cellular affiliates, and then impose such pricing upon competitive wireless providers under the guise of being non-discriminatory. While the interconnection or service rates may be nondiscriminatory as between the wireless service operators, the rate is nearly irrelevant to the BOCs' wireless affiliate as it is an intracompany transfer, while the cost represents a real operating expense to all other wireless providers.

preventing anti-competitive abuse, and must accompany any consideration of BOC entry into the IXC market.

In addition, priority must be given to the development of effective equal access provisions and suitable annual auditing policies and procedures. These protections are as vital as strict structural separation to assure that competitors are treated fairly. If rigorous supervision is not maintained, the BOCs will modify their services to favor their interexchange affiliates to the detriment of both cellular and landline competitors. The BOCs cannot be permitted to extend the impact of their anti-competitive practices to the interLATA market. Moreover, CPNI rules must be revised to ensure that CPNI is made available to competing providers of service on an immediate and non-discriminatory basis.

Finally, BOC affiliates in the interLATA market must be regulated as dominant carriers. The BOCs' statement that they will "start with no market share," because they are new entrants in the interLATA market, conveniently ignores the fact that market power is determined by more than a company's status as a new entrant. Regardless of the BOCs' claims, their ability to leverage their local exchange monopoly customer base is unmistaken, and will necessarily make them a dominant player in the interLATA market.

IV. THE BOC PETITION IS PREMATURE AND WASTEFUL OF THE COMMISSION'S RESOURCES.

In addition to the considerations discussed above, it must be recognized that, in fact, the Commission has no authority to modify the

interLATA restrictions contained in the MFJ. Barring Congressional action, it is the MFJ court which must determine whether the Commission's regulation effectively prevents the BOCs from using their monopoly power to impede competition in the interLATA market.

Only if Congress or the courts choose to remove the restriction will it be appropriate for the Commission to devote the resources to develop changes in regulatory policy necessary to protect the public interest. At that point, there will be sufficient time to consider the development and implementation of effective safeguards to protect against anti-competitive activity. Comcast submits that the Commission's time would be better spent considering Rochester Telephone's and Ameritech's proposals for unbundling the LEC bottlenecks in the intraLATA and interstate access markets. This issue, along with access charge reform, must be resolved before workable safeguards for BOC participation in the interLATA market can be designed.

Finally, it is widely known that the Commission's current lack of personnel and resources jeopardizes its ability to enforce existing regulatory requirements.[22/] It would be imprudent for the Commission to waste resources on an issue over which it has no authority, particularly when there exists the real possibility that any Commission proceeding would be preempted by congressional

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22/ See e.g. GAO Report at 4-7 (noting that the Commission's audit staffing level is not adequate to oversee cost allocations); See Comments of Capital Network System, Inc. at 13-15; Comments of LDDS Communications, Inc. at 3-4.

or judicial action prior to the completion of its inquiry. Efficiency concerns, therefore, dictate that the BOC Petition be denied.

V. CONCLUSION

For the reasons stated above, the Commission should decline the BOCs' invitation to proceed with a rulemaking in a policy vacuum and should dismiss and/or deny the BOCs' Petition for Rulemaking.

Respectfully submitted,

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September 17, 1993

CERTIFICATE OF SERVICE

I, Pamela Marie DuBost, hereby certify that today on this 17th day of September, 1993, I caused a copy of the REPLY COMMENTS OF COMCAST CORPORATION to be served by hand delivery or first-class mail, postage prepaid to the following:

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