

The existence of an appropriate regulatory regime is only half the battle in preventing anti-competitive behavior by a monopolist. Absent consistent and effective enforcement efforts, the potential for BOC abuse is enormous. State and federal regulators often do not have sufficient resources to effectively monitor the BOCs. The fact that a mere scattering of enforcement proceedings uncover substantial anti-competitive behavior involving billions of dollars in costs to consumers raises important questions about the magnitude of anti-competitive behavior that never is exposed.

In this context, any assumptions about the ability of regulators to stem anti-competitive BOC actions are uncertain at best. Given the ineffectiveness of current regulation and enforcement in markets in which the BOCs participate today, there is no basis to assume, let alone conclude, that regulators can protect against monopoly abuse. When the additional incentives for abuse that would be created by entry into interexchange and equipment manufacturing markets are considered, it is plain that existing safeguards will be insufficient to protect against abuse and that such abuse is almost certain.

38/ (...continued)

accounting, customer proprietary network information use and other matters in the event the Decree were vacated. See Ameritech's Petition for Declaratory Ruling and Related waivers to Establish a New Regulatory Model for the Ameritech Region, FCC DA 93-481, filed March 1, 1993.

IV. ENTRY OF THE BELL OPERATING COMPANIES INTO NEW COMPETITIVE MARKETS CREATES SUBSTANTIAL POSSIBILITIES FOR ANTI-COMPETITIVE BEHAVIOR.

The primary goal of the Motion to Vacate is to enable the BOCs to enter the interexchange and manufacturing markets. Based on the experience of the BOCs in the information services market, BOC entry into other competitive markets is likely to be characterized by the same types of efforts to disadvantage competitors and captive ratepayers. Indeed, this type of anticompetitive behavior already has surfaced in the developing markets for video dialtone and PCS.

A. Provision of Video Dialtone By the BOCs Presents A Strong Likelihood of Anti-competitive Behavior.

In 1992, the Commission adopted rules permitting telephone companies to provide video dialtone, a common carrier video transport service.^{39/} In order to enter into the video dialtone market, the BOCs have proposed retiring the existing local loop plant and making significant investments in network upgrades. The BOCs universally have proposed that telephone ratepayers bear a substantial portion of the costs they have identified for these upgrades. Pacific Bell, for example, has proposed building an entirely new network that would cost \$16 billion.^{40/} Pacific Bell has argued that only those costs that are

^{39/} Telephone Company - Cable Television Cross-Ownership, Second Report and Order Recommendation to Congress and Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) ("Video Dialtone Order"), appeal pending sub. nom. Mankato Citizens Telephone Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 1992).

^{40/} Applications of Pacific Bell, File Nos. W-P-C 6913-6916 (filed Dec. 20, 1993).

"incremental" to video dialtone must be imposed on video dialtone customers, even though the only reason a network upgrade is necessary is so that Pacific Bell can enter into the video market.^{41/}

The conclusion that telephone ratepayers will be unfairly financing video dialtone is supported by the NARUC audit of Pacific Bell. The NARUC auditors found that Pacific Bell had never quantified the benefits to ratepayers that would result from its proposed \$16 billion investment in a broadband network. However, the auditors observed that these upgrades were not required for telephone services and that the main driver for this investment was the ability to offer unregulated competitive services.^{42/}

The Commission's regulatory regime for video dialtone is totally inadequate to prevent this cross-subsidization. Unlike the information services discussed in Section III, the Commission has not adopted accounting rules specifically intended to address potential subsidization of video dialtone. Instead, the Commission intends to apply the same rules that it applies to information services. Video Dialtone Order, 7 FCC Rcd at 5828.

These rules are not effective for video dialtone because there is no mechanism for separating regulated video dialtone costs from regulated telephone costs. Part 64 of the Commission's Rules requires BOCs to file Cost Allocation Manuals to demonstrate how costs will be allocated between regulated and unregulated services, but there is no comparable

^{41/} The potential impact of these video dialtone proposals on ratepayers explains why state regulators and consumer groups have almost universally opposed BOC video dialtone applications. See, e.g., Comments of the California Public Utilities Commission (filed Feb. 14, 1994).

^{42/} NARUC Audit at B-50 - B-51.

requirement for identifying and allocating regulated video dialtone costs. Instead, the Commission has given the BOCs discretion to propose any allocation scheme they prefer. While the Commission claims that it will scrutinize BOC cost allocations in reviewing video dialtone tariffs, the Commission's recent Video Dialtone Reconsideration Order demonstrates that the primary goal of the tariff process is to produce low video dialtone rates, not to protect ratepayers and competitors.^{43/}

Video dialtone also presents substantial opportunities for the BOCs to discriminate against unaffiliated programmers. Although video dialtone must be offered by LECs on a common carrier basis, the one application the Commission has approved proposed a relationship clearly intended to benefit a single favored programmer in which the BOC had an ownership interest. New Jersey Bell Telephone Co., 9 FCC Rcd 3677 (1994), appeal pending sub nom. Adelpia Communications Corp. v. FCC, Case No. 94-1616 (D.C. Cir. September 7, 1994). In that case, Bell Atlantic flaunted the Commission's common carriage requirement by proposing to allocate 94 percent of capacity to Future Vision of America, a programmer in which it holds an option to acquire an ownership interest. Although Bell

^{43/} "We emphasize that we are not seeking to saddle video dialtone with an unreasonable proportion of overheads and common costs . . . imposing excessive cost burdens on video dialtone could diminish demand." Telephone Company-Cable Television Cross-Ownership, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, CC Docket No. 87-266, FCC 94-269 at ¶ 220 (adopted October 20, 1994, released November 7, 1994), appeal pending sub. nom., National Cable Television Association v. FCC, (D.C. Cir. filed November 9, 1994 Docket No. 94-1696).

Atlantic amended that original proposal, the Commission still approved an arrangement that places no limits on the capacity that ultimately may be used by Future Vision.^{44/}

Although the Commission has imposed nondiscrimination requirements on access to the regulated Level 1 video dialtone platform, BOCs can provide unregulated Level 2 services, such as gateways and other enhanced services, on a discriminatory basis. Thus, because the BOCs are permitted to own up to 5 percent of a programmer on their video dialtone networks, there is a strong incentive to discriminate in the provision of Level 2 services in a manner that favors the affiliated programmer.^{45/}

There also is a strong incentive for BOCs to develop their video dialtone networks in a manner that favors affiliated programmers. For example, programmers using Bell Atlantic's Dover, New Jersey video dialtone network must utilize software to connect the programmer to the network. The software offered by Bell Atlantic for this purpose was licensed to Bell Atlantic by FutureVision of America, a video dialtone programmer in which Bell Atlantic holds an ownership interest. See New Jersey Bell Telephone Co., 9 FCC Rcd at 3689 (1994). This unregulated licensing agreement assures that FutureVision will be able

^{44/} In approving the Bell Atlantic/Future Vision relationship, the Commission essentially has permitted Bell Atlantic to operate as a cable operator without subjecting it to the panoply of regulations imposed on cable operators, including the requirement to obtain a local franchise.

^{45/} BOCs also may carry on their video dialtone networks programming owned by the BOC but provided by an "independent" packager. Given the ability of the BOC to provide Level 2 services on a discriminatory basis and own up to a 5 percent interest, there are substantial questions as to the independence of an unaffiliated program packager.

to interconnect with the network more efficiently than other programmers because Bell Atlantic will build the network specifically to be used with the FutureVision software.

Moreover, BOC access to customer proprietary network information (CPNI) can be used to disadvantage BOC competitors or unaffiliated programmers. For example, under the Commission's existing CPNI rules, a BOC may obtain a list of calls made to the customer service number of a competing cable operator or to the number used by the cable operator for pay-per-view orders. The BOC has no obligation to notify the operator that it may request that its CPNI not be released to BOC personnel.^{46/} Similarly, the BOC could monitor calls made to unaffiliated programmers or customer selection of particular programmers. The potential for abuse of this information by the BOCs is plain.

B. The BOCs Will Attempt to Leverage Their Local Exchange Monopoly in the PCS Market.

In recognition of Cox's efforts in developing and demonstrating the technical feasibility of cable-based Personal Communications Services, the FCC in December 1993, finalized the award of a pioneer preference to Cox and two other PCS pioneers.^{47/} The

^{46/} Moreover, while the BOC may use CPNI for its telephone customers (without their consent) to market competitive services, its potential competitors only may obtain access to CPNI with the consent of the customer. Thus, there is a significant imbalance in access to CPNI that materially disadvantages BOC competitors.

^{47/} "Cox was the first to propose using cable for backbone purposes and begin testing actual equipment... Cox has demonstrated that it has developed the capabilities or possibilities of the technology or service and has brought them to a more advanced or effective state as required by our rules..." Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd 1337, 1344-45 (1994).

Commission subsequently invited Cox to file its preference license application for the Los Angeles-San Diego Major Trading Area ("MTA"), the area Cox had consistently requested as its preference award.^{48/}

Starting from the moment the FCC announced its decision to award a preference to Cox for the MTA that includes southern California, PacBell launched an extensive and aggressive disinformation campaign designed to have Cox's PCS development efforts and its preference discredited. PacBell's motive is clear: if Cox's preference was overturned, PacBell would not face the possibility of early and direct competition from a wireless service provider.^{49/}

Among the more notable incidents in PacBell's anti-Cox crusade are its repeated appeals for emergency expedited review to the U.S. Court for the District of Columbia Circuit of the FCC's award of an MTA preference to Cox and the two other preference holders; a steady barrage of "emergency motions" filed with the Court for review of procedural rulings; the filing and prosecution of a complaint twice rejected by the FCC of improper lobbying influence by the preference holders to induce the FCC to award them

48/ See Commission Invites Filing Of Broadband Personal Communications Services Pioneer's Preference Application, released February 25, 1994; and Announcement of Acceptance of Broadband PCS Applications, Report No. CW-94-1, released August 25, 1994.

49/ PacBell supported the PCS preference program until the FCC tentatively denied PacBell a preference, Request for a Pioneer's Preference filed in GN Docket No. 90-314 on May 4, 1992, for its PCS development work, which apparently consisted of funding Bellcore's research and development of PCS systems that would remain dependent upon BOC infrastructure for interconnection and all network services and functions. See Third Report and Order, 9 FCC Rcd 1337, 1366 (1994).

preferences; a persistent campaign in Congress to convince legislators that Cox and other preference holders should either be stripped of their licenses or made to pay a premium above the market auction rate for the preference licenses under an auction-based formula; and PacBell's subsequent public attack on GATT legislation for imposing a more reasonable auction based payment formula on the PCS preference licenses.

PacBell has made no secret of its intention to be the successful bidder on the remaining 30 MHz MTA license to be auctioned for southern California. Perhaps because PacBell and the other BOC's were handed wireline cellular licenses for free in a wireline set-aside when cellular was initially licensed, PacBell is piqued at the notion of having to compete in the auction marketplace for a PCS license. Its aggressive actions that demonstrate reckless disregard for accuracy or balance show that it is unwilling to accept competition and that it will take any action it can to preserve its monopoly.

BOC entry into the PCS market also raises substantial concerns about BOC anticompetitive conduct with regard to interconnection arrangements. Under existing federal regulations, LECs are required to provide reasonable, non-discriminatory and fair interconnection in the same manner as the LECs provide interconnection to cellular operators, *i.e.*, pursuant to negotiated agreements, rather than tariffs. The Commission's reliance on the cellular model is extremely troublesome from the perspective of a future PCS operator, because the early implementation of cellular service was marked by difficult negotiations and sometimes the complete refusal by a BOC to provide interconnection even when the BOC already provided the same form of interconnection to itself. Even now, it

often is necessary for Commission staff to intervene before a reasonable interconnection agreement can be negotiated.^{50/}

The potential for the BOCs to use interconnection rates as a competitive weapon is substantial. In the absence of any form of tariff or reporting requirement, there is no way to determine whether the agreement negotiated by a particular operator is unreasonably discriminatory. More fundamentally, a nondiscrimination requirement is insufficient to promote competition because the BOC will "negotiate" a high interconnection rate with its cellular and PCS affiliates, and then impose that "nondiscriminatory" rate on unaffiliated competitors.

Consequently, unless the Commission regulates the reasonableness of interconnection rates there is no hope that PCS will ever be able to compete with BOC local exchange offerings. The Commission's current rules and proposals, which rely on a negotiated mutual compensation agreement that was never implemented in the cellular market, are ill-suited to this task because of the substantial difference in bargaining power between non-BOC PCS providers and the BOC. For the foreseeable future there will be a substantial imbalance of traffic between the BOC and the PCS provider because there will be far fewer PCS customers. This imbalance creates the incentive for the BOC to negotiate an artificially high mutual compensation rate, because the BOC will more often than not be receiving this amount for terminating traffic from the PCS provider, rather than paying it.

^{50/} CMRS Equal Access and Interconnection Obligations Pertaining to Competitive Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rulemaking at ¶ 112 (July, 1994).

The BOC has no incentive to be flexible in negotiating the compensation rate because it has far less to lose than the PCS provider in the event no agreement is reached.

It is revealing that the BOCs by and large opposed the FCC's mutual compensation requirement or offered interpretations of its scope and applicability that would gut its effectiveness. PacBell, for example, suggested that the FCC cannot set intrastate mutual compensation requirements and that PacBell will not pay interstate compensation. Even more troubling, PacBell has stated its intention of setting its own compensation rate for interconnection based on its view of the relevant costs, recreating in the PCS interconnection arena the same uneconomic cost quagmire that has stymied the FCC's expanded interconnection CAP initiatives.^{51/}

In addressing BOC participation in PCS, the Commission determined that adherence to existing cost allocation rules would be sufficient to prevent anti-competitive behavior. PacBell's statements plainly demonstrate its intention to load costs onto PCS providers who require interconnection. Neither FCC nor state regulators have the regulatory tools to ensure these same costs are imposed on PacBell's own PCS interconnection. More fundamentally, even if PacBell does not discriminate between its PCS business and its competitors in interconnection, it will set its prices strategically to limit its competitor's ability

^{51/} See Reply Comments of Pacific Bell, Nevada Bell and Pacific Bell Mobile Services, CC Docket No. 94-54, October 13, 1994 at 7-10. As demonstrated by the Commission's problems in the expanded interconnection proceeding, even the imposition of a tariff filing requirement for PCS interconnection would be insufficient to control unreasonable pricing by the BOCs.

to challenge its local loop monopoly. Regulators have not demonstrated their ability to halt BOC anti-competitive pricing.

Commission and state current rules and policies are plainly insufficient to prevent anti-competitive behavior by the BOCs in the PCS market. Until regulators demonstrate that they can effectively regulate rates for interconnection with BOC networks or until effective local exchange competition develops, there is no basis for vacating the Decree.

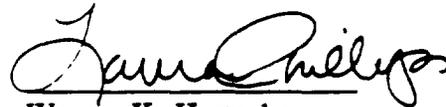
VI. CONCLUSION

The Motion to Vacate is premised on assertions about competition in, and regulation of, the telecommunications market that are not supported by the facts. Legal, economic and technical barriers to entry continue to perpetuate the BOC local exchange monopoly. The BOCs assert that state and federal regulation can prevent the BOCs from leveraging their local exchange monopoly in competitive markets, but Cox has demonstrated that cross-subsidization and discrimination remain pervasive problems notwithstanding the

best intentions of regulators. The BOCs have demonstrated a pattern of substantial and continuing anti-competitive conduct and only by preserving the Decree can this Court protect the public interest.

Respectfully submitted,

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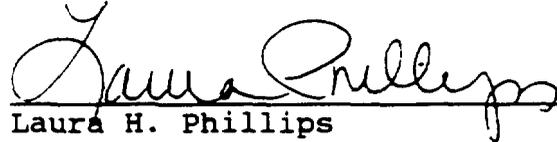
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I, Laura H. Phillips, hereby certify that on this 16th day of November, 1994, true and correct copies of Comments for Cox Enterprises, Inc. on the Motion of Bell Atlantic, BellSouth, NYNEX and Southwestern Bell to Vacate the Decree were mailed, first-class-postage paid, to all parties shown on the attached service list.



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List of Exhibits

- 1 Initial BellSouth BSE/CNS Offerings in Georgia
- 2 Georgia Public Service Commission: Order of the Commission Regarding its Investigation into Southern Bell Telephone and Telegraph Company's Trial Provision of MemoryCall Service
- 3 Summary from: Audit Report, Southern Bell Telephone & Telegraph Company, Cost Allocations (Regulated/NonRegulated) and Affiliated Transactions, September 1994. Conducted by the Utilities Division, Georgia Public Service Commission and Snavelly, King & Associates, Inc.
- 4 Georgians FIRST: A Georgia Price Regulation Proposal by BellSouth Telecommunications, Inc., June 22, 1994

Initial BellSouth BSE/CNS Offerings in Georgia

This chart shows the initial BSE and CNS offerings proposed in BellSouth's initial Georgia intrastate ONA tariff. It is arranged according to the profit margin for each service, ranging from the lowest margin to the highest margin. The last two rows compare the average margins for services used by BellSouth to the average margins for services that BellSouth does not use.

Service	Used by BS?	Profit Margin
Simplified Message Desk Interface (SMDI)	Yes	4.848%
Faster Signalling on DID	No	4.896%
Uniform Access Number (UAN), Custom Service Area (CSA), Automatic Number Identification (ANI) and Call Detail Information (as a group)	Yes	21.30%
Message Waiting Indicator - Audible (MWI)	Yes	31.58%
Surrogate Client Number	Yes	32.45%
Multiline Hunt Queuing	No	33.07%
Hot Line/Warm Line	No	106.3%
ESSX ^R Service/Digital ESSX ^R Service - Caller ID	No	164.3%
BCLID/Call Tracking	No	244.9%
Caller ID - Multiline	No	398.0%
Services Used by BellSouth	N/A	22.23%
Services Not Used by BellSouth	N/A	162.1%

Source: BellSouth Georgia ONA filings, 1992.

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ORDER OF THE COMMISSION REGARDING ITS INVESTIGATION
INTO SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY'S
TRIAL PROVISION OF MEMORYCALLSM SERVICE

Executive Secretary
Ga. Public Service Commission

IN RE: In the Matter of the Commission's Investigation
Into Southern Bell Telephone and Telegraph
Company's Provision of MemoryCallSM Service

Record submitted: April 24, 1991

Decided: May 21, 1991

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