

engage in cost-shifting, discrimination and other anticompetitive activities. The safeguards are especially important for CMRS, where the BOCs have additional incentives and a greater ability to engage in anticompetitive behavior. Moreover, the proposed safeguards are the minimum necessary to protect consumers and competition, and impose a very small burden on BOC provision of interexchange service. For all of these reasons, Vanguard Cellular Systems, Inc. urges the Commission to adopt rules in accordance with the Notice and the positions described herein.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: 

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March 13, 1996

Exhibit 2

REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Bell Operating Company Provision of Out-of-Region
Interstate, Interexchange Services

CC Docket No. 96-59

STAMP & RETURN

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Bell Operating Company)
Provision of Out-of-Region)
Interstate, Interexchange Services)

CC Docket No. 96-21

RECEIVED

MAR 25 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

To: The Commission

REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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March 25, 1996

SUMMARY

The record in this proceeding is more than sufficient to justify the safeguards proposed in the Notice for BOC provision of out-of-region interexchange services. The Commission has the legal authority to adopt safeguards and there is enough evidence to support adoption of safeguards more robust than those the Commission has proposed.

The Commission has the power to adopt safeguards. The Telecommunications Act of 1996 did not reduce the Commission's existing authority to require BOCs to offer interexchange service through separate subsidiaries; indeed, it contains a specific savings clause. Thus, there is no support for the BOC claim that the Commission's power to adopt a separate subsidiary was implicitly repealed. Even if the Commission could not impose a separate subsidiary, that is not what the Notice proposes. Rather, the BOCs will choose between dominant carrier regulation and separation of local and interexchange services.

There is ample evidence to support use of the Commission's authority in this case. Risks of cost-shifting and other anticompetitive behavior are great, and additional risks would arise from joint marketing, sharing CPNI and sharing equipment or facilities. The BOCs have particularly strong incentives to engage in anticompetitive activities in conjunction with their out-of-region wireless operations. BOC arguments that they do not have market power in interexchange services miss the point, because the BOCs retain market power in the local exchange. Price cap regulation does not eliminate the risks because BOCs retain the incentive to shift costs under the current price cap rules and because federal price caps do not affect other forms of anticompetitive behavior.

TABLE OF CONTENTS

SUMMARY i

I. **There Is No Legal Bar to Commission Adoption of Safeguards for Out-of-Region
BOC Long Distance Services.** 2

II. **The Comments Show that It Is Important for the Commission to Adopt
Safeguards for BOC Out-of-Region Services.** 4

III. **Conclusion** 7

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Bell Operating Company) CC Docket No. 96-21
Provision of Out-of-Region)
Interstate, Interexchange Services)

To: The Commission

REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding.^{1/} As described below, there is nothing in the comments filed in this proceeding that should dissuade the Commission from adopting the safeguards governing the provision of out-of-region interexchange service by Bell Operating Companies ("BOCs") and their affiliates that were proposed in the Notice.

Some, but not all of the BOCs raise various objections to the safeguards proposed in the Notice. They claim that the Commission does not have the authority to adopt any safeguards and that there is no need to protect consumers and competition from anticompetitive BOC behavior. In fact, the Telecommunications Act of 1996 (the "TCA") has no effect on the Commission's power to adopt the safeguards proposed in the Notice or any additional safeguards that may be necessary. At the same time, evidence presented by

^{1/} Notice of Proposed Rulemaking, *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Dkt. No. 96-21, rel. Feb. 14, 1996 (the "Notice"). The reply comment date for the Notice was based on Federal Register publication, which occurred on February 21, 1996. See 61 Fed. Reg. 6607 (Feb. 21, 1996). Thus, these reply comments are timely filed.

non-BOC commenters confirms that there is a need for safeguards as the BOCs, which still maintain their bottleneck monopolies over local exchange service, reenter the interexchange marketplace. Indeed, as Vanguard showed in its initial comments, there is reason to believe that more robust safeguards would be appropriate. Therefore, the Commission should not retreat from its proposal to require the BOCs to comply with the minimal requirements applicable to other LECs offering long distance service.

I. There Is No Legal Bar to Commission Adoption of Safeguards for Out-of-Region BOC Long Distance Services.

Several BOCs argue that the Commission cannot adopt the proposed safeguards because they are inconsistent with the requirements or the spirit of the TCA. *See, e.g., Bell Atlantic Comments* at 4-5. The TCA does not support this claim. Rather, the TCA leaves the Commission's existing power to adopt appropriate safeguards in place.

The focus of the BOC argument is new Section 272(a)(2) of the Communications Act, which provides that the separate subsidiary generally required by Section 272 for BOC interexchange services is not required for out-of-region services. 47 U.S.C. § 272(a)(2). In essence, the BOCs claim that this provision not only exempts out-of-region services from the Section 272 separate subsidiary, but prevents the Commission from adopting any separate subsidiary requirement for out-of-region services.

There are two significant flaws in this argument. First, there is nothing in either Section 272 or the TCA Conference Report that suggests that Congress intended to repeal the Commission's existing authority to require safeguards for LEC provision of interexchange service. Section 272 does not contain any language explicitly limiting the Commission's authority to adopt safeguards. In fact, Section 272(f) contains a specific savings clause for the Commission's authority "under any of the section of [the Communications] Act to

prescribe safeguards consistent with the public interest, convenience, and necessity.”^{2/}

Similarly, there is no language in the TCA Conference Report that suggests that Congress eliminated the Commission’s existing authority to adopt safeguards.^{3/}

In effect, the BOCs are asking the Commission to conclude that its existing authority to adopt safeguards has been repealed by implication by the Congressional decision not to require the Section 272 separate subsidiary for out-of-region services. Repeal by implication is highly disfavored, except where there is an irreconcilable conflict between the two statutes or where there is compelling evidence that Congress intended to repeal the prior statute.^{4/} In the absence of any evidence that the Commission’s authority was limited by the TCA, the Commission cannot conclude that it lost the power to adopt the safeguards proposed in the Notice.

Second, even if the Commission were precluded by Section 272 from requiring a separate subsidiary, that is not what the Notice proposes. The Notice gives BOCs a choice between a separate subsidiary and regulation of their interexchange operations under the

^{2/} 47 U.S.C. § 272(f)(3). Section 272(f) also addresses Bell Atlantic’s complaint that the safeguards proposed in the Notice are contrary to the tenets of the TCA because they are “open-ended,” while the in-region separate subsidiary required by the TCA is limited in duration. Bell Atlantic Comments at 4. The TCA actually gives the Commission the power to extend the life of the in-region separate subsidiary indefinitely if the Commission so chooses. 47 U.S.C. § 272(f)(1).

^{3/} See H.R. Rep. No. 458, 104th Cong., 2d Sess., at 150-152 (1996) (discussing history and requirements of Section 272) (the “TCA Conference Report”).

^{4/} See *St. Martin Evangelical Lutheran v. South Dakota*, 451 U.S. 772, 787-88 (1981) (where “legislative history does not reveal any clear intent to repeal” or “alter [the] meaning” of a provision, there is no repeal by implication) citing *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-56 (1976) (where “it is possible for the statutes to coexist,” even if it is inconvenient for them to do so, “they are not so repugnant to each other as to justify a finding of an implied repeal by this Court”).

Commission's rules for dominant carriers. Notice at ¶13. While the BOCs may not wish to operate under the dominant carrier rules, there is no credible argument that the TCA prohibits the Commission from treating them as dominant carriers.^{5/} This is especially obvious in light of the savings clause in Section 272(f)(3), preserving the Commission's authority to adopt any safeguards it deems appropriate. Consequently, offering the BOCs a choice between dominant carrier regulation and a set of less onerous safeguards, *i.e.*, a separate subsidiary, also is permissible.

Thus, the Commission has authority to adopt the rules proposed in the Notice for two distinct reasons. There is no merit in the BOC claims to the contrary.

II. The Comments Show that It Is Important for the Commission to Adopt Safeguards for BOC Out-of-Region Services.

The basic issue in this proceeding is whether the Commission should adopt safeguards for BOC entry into the out-of-region interexchange marketplace. The comments demonstrate that there are many reasons to adopt, at a minimum, the safeguards proposed in the Notice. Indeed, the risks of BOC entry into out-of-region interexchange markets would support adoption of more robust safeguards than those the Commission has proposed. BOC claims to the contrary ignore their bottleneck monopolies in the local exchange, which is intimately linked to the interexchange service market.

A variety of commenters identified significant risks to BOC entry into out-of-region interexchange markets. Vanguard described many of these risks in its comments. Vanguard

^{5/} SBC Communications argues that the proposals in the Notice would "frustrate" the intent of the TCA, but it does not demonstrate that dominant carrier regulation itself is impermissible. SBC Communications Comments at 4-6. While SBC appears to believe that no BOC will operate under dominant carrier rules, that claim is speculative. In any event, the Commission's proposal would leave that choice to the BOCs.

Comments at 2-6. Other commenters identified specific risks arising from joint marketing, sharing of CPNI between a BOC and its interexchange operations and sharing equipment or facilities. *See, e.g.*, Comments of AT&T at 7-8; Comments of CompTel at 5-7. These risks all arise from the dominance of the BOCs in their local exchange businesses. While these risks exist for all carriers, they are magnified by the size of the BOC presence in the local exchange market.

As Vanguard described in its comments, the BOCs' extensive interests in wireless services exacerbate the risks of their entry into the interexchange marketplace. Vanguard Comments at 4-6. The BOCs have significant out-of-region interests in cellular and PCS licensees. The BOCs have particularly strong incentives to engage in anticompetitive activity through their out-of-region wireless affiliates because both their wireless and out-of-region long distance operations could benefit from that activity. The risk is most obvious in the Bell Atlantic/NYNEX Mobile systems, all of which are "out-of-region" for either Bell Atlantic or NYNEX. *Id.* These concerns were echoed by the Telecommunications Resellers Association ("TRA") and by the Association for Local Telecommunications Services ("ALTS"). *See* TRA Comments at 14; ALTS Comments at 4-5. ALTS, in particular, noted that the close relationship between Bell Atlantic and NYNEX has blurred the distinction between in-region and out-of-region services. ALTS Comments at 5. The nature of the Bell Atlantic-NYNEX relationship makes the adoption of robust safeguards particularly important in their region of the country, which generates a disproportionately high percentage of the nation's interexchange traffic. *See* Vanguard Comments at 4-6.

The BOCs respond to these concerns by saying that their nascent long distance businesses could not possibly pose any risk to the interexchange marketplace. *See, e.g.*,

Pacific Telesis Group (“Pacific”) Comments at 5. The BOC response focuses on the wrong part of the market. The reason their entry into interexchange markets poses a risk is because they have monopolies in the local exchange business, on which all interexchange carriers depend. Considering the highly competitive nature of the long distance business, even a marginally successful strategy of cross-subsidy or other anticompetitive behavior could have a significant effect on a BOC’s market share in the out-of-region long distance market.

The other BOC response is to claim that price cap regulation ends all risk of cost shifting between the local exchange and interexchange businesses. *See Pacific Comments at 8.* It is doubtful that would be true even if “pure” price caps were in effect on the federal level because the BOCs would retain the incentive and ability to engage in cost-shifting at the state level and to engage in other anticompetitive behavior at both the federal and state level. More important, and as Pacific admits, the Commission has not adopted a pure price cap mechanism at this time. *Id.* Consequently, the BOCs retain the incentive and ability to engage in cost shifting at the federal level as well. Thus, price caps do not provide the necessary protection against BOC misbehavior.

Finally, it is important to put the BOC claims into context. The Commission is proposing to apply its existing rules for LECs providing interexchange service to the BOCs. The only reason the Commission has to take this action is that the BOCs were not providing interexchange service when the original rules were adopted. If the rules had been written to apply to all LECs, then they would have applied automatically to the BOCs when the TCA was adopted.^{6/} Thus, the BOCs — the largest and most powerful LECs in the country — are arguing that a rule that applies to the smallest LEC should not be applied to them. Given the

^{6/} Indeed, GTE is not a subject of this proceeding because the rules are written to apply to all independent LECs. *See Notice at ¶ 4.*

heightened risks that accompany BOC entry into the interexchange marketplace, it is evident that the least the Commission can do is apply the rules for other LECs to the BOCs.^{7/}

III. Conclusion

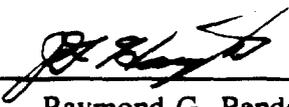
It is impossible to eliminate all risk of BOC anticompetitive behavior in the interexchange marketplace, but the Commission can minimize the risk by adopting safeguards to make such behavior more difficult. The safeguards proposed in the Notice are the minimum necessary to address the risks created by BOC entry into the out-of-region interexchange marketplace. The Commission has the power to adopt the proposed safeguards and, more important, the evidence shows that safeguards at least as robust as those proposed

^{7/} Pacific also suggests that any competitors to BOCs in local markets should be required to offer interexchange service through separate subsidiaries. Pacific Comments at 6. Pacific forgets that competitors, including CMRS providers, do not have any market power in the local exchange marketplace. Because they lack such market power, there is no reason to adopt safeguards for companies competing against LECs. Indeed, the market power of incumbent LECs provided the basis for the Commission's rules governing independent LEC provision of interexchange service. Notice at ¶ 9.

in the Notice are necessary to limit the potential for anticompetitive behavior by BOCs. For these reasons, Vanguard respectfully requests the Commission to adopt rules that are consistent with these reply comments.

Respectfully submitted,

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March 25, 1996

CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 19th day of April, 1996, I caused copies of the foregoing "Comments of Vanguard Cellular Systems, Inc." to be served via hand delivery to the following:

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