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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Policy and Rules Concerning the
Interstate, Interexchange Marketplace

Implementation of Section 254(g) of the
Communications Act of 1934, as amended

CC Docket No. 96-61

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NYNEX COMMENTS

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SUMMARY

The Commission's Notice of Proposed Rulemaking (“NPRM”) does not go far enough in forbearing from enforcing unnecessary restrictions on out-of-region interexchange services by the local exchange carriers (“LECs”). Section 10(a) of the Act requires the Commission to forebear from enforcing its rules and the provisions of the Act insofar as enforcement is not necessary to protect the consumer or competition. While the Commission proposes to forebear from requiring non-dominant interexchange carriers to file tariffs, it maintains unnecessary restrictions on the LECs’ provision of interexchange services.

The Commission should retain the definitions of geographic and product markets for interexchange services that it adopted in the *Competitive Carrier* proceeding. In that proceeding, the Commission defined a single nationwide geographic market for interexchange services, and it defined the relevant product market as all domestic, interexchange telecommunications services. These definitions are still valid, and they should not be revisited simply because the Bell Operating Companies (“BOCs”) will enter the in-region interexchange market. Even if the BOCs retain their market power in the provision of access services, this will not change the nature of the interexchange market when they provide in-region services. Moreover, the Commission's price cap rules, as well as the safeguards imposed by the Telecommunications Act of 1996, would prevent the BOCs from using any control over local access facilities to affect the price or availability of interexchange service.

The Commission should not rely on its findings about the geographic and product markets for interexchange services when analyzing competition in the local exchange market. The LECs market local exchange services in specific market areas, and new entrants into the local exchange usually target specific areas and types of services. Therefore, the Commission should more narrowly focus its analysis of the local exchange market in determining if the LECs retain market power.

It would be inconsistent with both the letter and the spirit of the Telecommunications Act of 1996 for the Commission to retain separation requirements for the BOCs' out-of-region interexchange services. Congress specifically decided to require separate subsidiaries only for in-region interexchange services by the BOCs, and then only for a limited time period. It is inconceivable that the BOCs could exercise market power in the out-of-region interexchange market, starting with a zero market share and facing competition from large, well-entrenched incumbents. Removal of the separation requirements would relieve the BOCs from unnecessary costs and regulatory restrictions, and it would allow them to compete more effectively in the interexchange market. This would be consistent with the Congressional intent to provide a pro-competitive, deregulatory environment for all telecommunications services.

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NYNEX COMMENTS

The NYNEX Telephone Companies¹ ("NYNEX") hereby file their comments on Sections IV and V of the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.²

I. Introduction.

In the *NPRM*, the Commission proposes to exercise the forbearance authority granted by the Telecommunications Act of 1996³ to reduce its

¹ The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

² In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Notice of Proposed Rulemaking, FCC 96-123, released March 25, 1996. The Commission requested comments on the *NPRM* in two phases. Comments on Sections IV, V, and VI are due on April 19, 1996; comments on all other Sections are due on April 25, 1996.

³ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Section 401 (adding Section 10 to the Communications Act of 1934, as amended ("the Act")).

regulatory oversight of interstate, interexchange services by non-dominant carriers.⁴ The Commission proposes to adopt a mandatory detariffing policy for domestic services of non-dominant interexchange carriers, and to eliminate the prohibition against bundling of customer premises equipment and interstate, interexchange services by these carriers. In Section IV, the Commission reexamines the definitions of relevant product markets and relevant geographic markets for purposes of determining if a carrier is dominant or non-dominant. Section V seeks comments on whether the Commission should modify or eliminate the separation requirements for non-dominant treatment of interstate, interexchange services by local exchange carriers (“LECs”) outside of their local exchange areas.⁵

The Commission's proposals are generally consistent with the pro-competitive thrust of the Telecommunications Act of 1996, and they are a natural outgrowth of the Commission's past efforts to facilitate competition in the long-distance market. However, in applying its forbearance authority, the Commission should bear in mind that forbearance is not discretionary -- it is mandatory where the conditions set forth in Section 10(a) of the Act are met. Section 10(a) states that the Commission shall forebear from applying any regulation or any provision of the Act to a class of telecommunications carriers or services if enforcement is not necessary (1) to ensure that rates and practices

⁴ See *NPRM* at para. 4.

⁵ For the Bell Operating Companies (“BOCs”), these service areas are designated “out-of-region services.” See Section 271(b)(2).

are just and reasonable and not unjustly or unreasonably discriminatory; (2) to protect consumers; and (3) to protect the public interest.⁶ This establishes a firm policy that unnecessary regulatory restrictions should be eliminated as soon as the conditions for forbearance are met.⁷ The Commission recognizes that the Act requires it to forebear from requiring non-dominant interexchange carriers to file tariffs for domestic services. However, it does not take affirmative steps to forebear from enforcing unnecessary restrictions on the BOCs' interexchange services.

While the Commission has found that all of the major facilities-based interexchange carriers are non-dominant, it still considers the LECs dominant in the interexchange market, even where their share of that market is minuscule and their market power is non-existent. This anomaly stifles competition, and it harms the consumer. The interexchange market operates today as an oligopoly, as demonstrated by the fact that the largest interexchange carrier, AT&T, was able to raise its long distance rates in 1995 at the same time that the LECs were implementing a \$1.2 billion reduction in their access charges. New entry by the

⁶ See 47 C.F.R. Section 10(a); S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. 184-85 (1996). In addition, Section 10(b) states that, in making these determinations, the Commission shall consider whether forbearance will promote competition. Section 10(d) states that the Commission may not forebear from enforcing Sections 251(c) or 271 until it determines that the requirements of those sections have been fully implemented.

⁷ Section 10(c) provides that a telecommunications carrier may petition the Commission to exercise its forbearance authority, and that such a petition shall be deemed granted if the Commission does not deny the petition within one year, unless the Commission grants a 90 day extension.

BOCs can only improve competition in this market and provide more choices to the consumer.

The Telecommunications Act of 1996 was designed to reduce the market power of the incumbent carriers in all telecommunications markets by promoting competition. That goal is as important in the long distance market as it is in the local exchange market. The Commission should adopt a policy of eliminating regulatory restrictions on the LECs' interexchange services where it cannot be shown that they are necessary to protect competition or the consumer.

II. The Commission Should Retain The Definitions Of Geographic and Product Markets For Interexchange Services That It Adopted In The *Competitive Carrier* Proceeding.

In assessing the market power of interexchange carriers, the Commission proposes to adopt "more sharply focused" definitions of the product and geographic markets for interexchange services than it adopted in the *Competitive Carrier* proceeding.⁸ The Commission tentatively found that this would help in evaluating whether the BOCs possess market power with respect to the provision of in-region interLATA services, and that it would provide a "more refined analytical tool" for evaluating market power for certain services.

⁸ See *NPRM* at para. 40, citing *Fourth Report and Order*, 95 FCC 2d 554, 563 (1983). In the *Competitive Carrier* proceeding, the Commission found that, for purposes of assessing the market power of interexchange carriers, (1) interstate, domestic, interexchange telecommunications services comprise the relevant product market; and (2) the United States comprises the relevant geographic market for this product, with no relevant submarkets.

Specifically, the Commission proposes to follow the Department of Justice/Federal Trade Commission 1992 Merger Guidelines (the “Guidelines”) for defining relevant markets.

The Commission proposes to define a relevant product market as an interexchange service for which there is no close substitute or a group of services that are close substitutes for each other but for which there are no other close substitutes.⁹ The Commission does not propose to delineate specific interexchange product markets at this time, but to address the issue only if there is credible evidence of a lack of competitive performance with respect to a service. The Commission proposes to define the relevant geographic market for domestic interexchange services as the aggregate of all point-to-point markets encompassing all points in the United States.¹⁰ However, the Commission proposes to examine particular point-to-point markets for the presence of market power if there is credible evidence of a lack of competition, or if geographic rate averaging would not sufficiently mitigate the exercise of market power. The Commission observed that it might apply this analysis to the BOC provision of in-region interexchange services.

The Commission should retain the *Competitive Carrier* definitions of the relevant product market and the relevant geographic market for interexchange service. The Commission adopted these definitions on the basis of a substantial

⁹ See NPRM at paras. 41, 46.

¹⁰ See NPRM at paras. 50-51.

record, and they remain useful tools in evaluating competitive conditions in the interexchange market. The Commission should not change its definitions merely because the Telecommunications Act of 1996 will encourage entry by the LECs in general, and by the BOCs in particular, into the interexchange market. That entry will not change the characteristics of the product and geographic markets for interexchange service.

The Commission observes that it currently defines the geographic market for domestic interexchange services as a single national market, because geographic rate averaging reduces the likelihood that a carrier could exercise market power in a single point-to-point market.¹¹ However, it questions whether this would be true if a BOC's interexchange customers were concentrated in one region.¹² In that case, the Commission speculates that a BOC might find it profitable to raise its prices above competitive levels, even if geographic rate averaging caused the BOC to lose market share outside that region. However, there is nothing unique about the BOCs in this respect. There are many interexchange carriers today that offer services that are concentrated in a particular region, state, or city. Yet, the Commission does not propose to redefine the relevant geographic market for all regional interexchange carriers. The fact that the BOCs are not likely to begin offering interexchange service with

¹¹ See *NPRM* at para. 51. The Commission found that geographic rate averaging would inhibit an interexchange carrier from raising prices for service between two particular cities where it had market power, because it would lose market share in other parts of the nation where it did not have market power.

¹² See *NPRM* at para. 53.

ubiquitous, nationwide networks is no basis for re-defining the interexchange market.

The Commission also states that the BOCs' control of access facilities in their local service regions may require the Commission to examine those regions individually to determine if the BOCs have market power with respect to in-region interexchange services.¹³ However, the Commission's price cap rules, as well as the safeguards imposed by the Telecommunications Act of 1996,¹⁴ would prevent the BOCs from using any control over local access facilities to affect the price or availability of interexchange service in the in-region markets. Moreover, the issue of control will eventually be a moot point, because the Telecommunications Act of 1996 will promote competition in the access market, which will enable interexchange carriers to use alternative sources of interstate access services, or to provide their own access services.

The Commission seeks comments on defining geographic markets based on local exchange areas, Major Trading Areas ("MTAs"), Basic Trading Areas

¹³ *See id.* The Commission also states that a firm's ability to raise the price for access service above the competitive level, or to prevent competitors from assembling inputs to provide retail interexchange service, could enable a firm to unilaterally raise the retail price for interexchange service and thereby exercise market power. *See NPRM* at para. 52. However, this does not imply market power in the interexchange market. The Commission's example only illustrates the exercise of market power in the access market. It is also an unrealistic example, as the Commission's rules restrict a LEC's ability to control the price or availability of access services in that manner.

¹⁴ *See, e.g.*, 47 C.F.R. Sections 251 (interconnection standards); 271 (conditions on BOC entry into interLATA services); 272 (separate affiliate safeguards).

("BTAs"), or Metropolitan Statistical Areas ("MSAs").¹⁵ For the reasons set forth above, none of these geographic areas would be relevant to the interexchange market. However, they could be used in determining whether the LECs retain market power in the local exchange market. The local exchange market is fundamentally different from the interexchange market. While the interexchange market is comprised of calls between literally millions of pairs of locations, which together make up the nationwide market, the LECs market local exchange services based on a customer's specific location. In addition, new entrants into the local exchange market tend to build networks in specific areas in which they intend to market competitive services to certain classes of customers and/or classes of services. Because new entry is initially concentrated in dense urban areas and in business markets, the LECs face varying levels of competition by service and by area. The intensity of competition in each area, and for each class of customer or service, will determine whether a LEC retains market power in a local exchange market. Therefore, the Commission should define the local exchange product and geographic markets more narrowly, using the Guidelines test, in evaluating whether the LECs remain dominant in those markets.

¹⁵ See *NPRM* at para. 54.

III. It Would Be Inconsistent With The Telecommunications Act of 1996 To Retain Separation Requirements For The BOCs' Out-Of-Region Interexchange Services.

The Commission seeks comments on whether it should modify or eliminate the separation requirements that it has imposed as a condition for non-dominant treatment of interstate, interexchange services provided by the independent LECs, and by the BOCs, outside their local serving areas.¹⁶ NYNEX submits that this inquiry has already been answered by Congress in the Telecommunications Act of 1996. Therein, after literally years of debate and discussion (from every conceivable perspective), Congress decided not to place any such requirements on BOC "out-of-region" long distance services. Indeed, the very definition of "out-of-region services" was designed by Congress to exclude application of the constraints applied to "in-region" long distance services.¹⁷

Removal of the separation requirements would be consistent with the overall purpose of the 1996 Act;

to provide for a *procompetitive, de-regulatory national policy framework* designed to accelerate rapidly private sector deployment of advanced

¹⁶ See NPRM at paras. 61-63.

¹⁷ See Section 272 of the Act, which places regulatory separation safeguards only on certain BOC services, and then only for a limited period of time. Although neither Congress nor NYNEX speaks directly to the separation requirements that the Commission should apply to independent LECs, there would appear to be no reasonable basis to distinguish between other large LECs and the BOCs. Indeed, the acronym "BOC" itself will shortly become anachronistic as the requirements of Sections 271-271 are met, and all such carriers become simply "incumbent local exchange carriers" (see Subsection 251(c)).

telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ¹⁸

In addition, Section 10(a) of the Act, which specifically directs the Commission to eliminate unnecessary regulatory constraints, is further evidence that Congress did not intend for the Commission to impose regulatory restrictions where Congress specifically omitted such restrictions from the Act. For these reasons, the Commission should interpret the absence of a separation requirement in the Telecommunications Act of 1996 for out-of-region services as evidence that Congress did not intend for the Commission to impose it.

This Congressional determination is thoroughly consistent with the Commission's own historical analyses and policies. By the Commission's traditional criteria, the BOCs would clearly be non-dominant participants in these markets.¹⁹ The Commission has defined a "dominant carrier" as a carrier that possesses "market power" and, conversely, it has defined a "non-dominant" carrier as a carrier not found to be dominant (i.e., one that does not possess market power).²⁰ The Commission has also stated that the basic element of

¹⁸ S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. 113 (1996) (emphasis supplied).

¹⁹ There is no reason to interpret the Commission's statement in the *Competitive Carrier* proceeding, cited in the NPRM at para. 59, as implying that the Commission made any findings regarding BOC dominance in the interexchange markets. That statement clearly indicates that the Commission's findings regarding the separation requirements for independent LECs did not apply to the BOCs, and that the Commission was not fully persuaded as to "what degree of separation, if any," would be necessary for the BOCs. See *Competitive Carrier, Fifth Report and Order*, 98 FCC 2d 1191, 1198 (1984).

²⁰ See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, Order (released October 23, 1995) ("*AT&T Non-Dominant Order*") at para. 4.

market power is “the ability to raise prices by restricting output” (citing Areeda & Turner) or, alternately, “the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable” (citing Landes & Posner).²¹ Simply stated, the BOCs do not have the ability to control prices for interexchange services, let alone to raise prices above competitive levels.²² In its recent order classifying AT&T as “non-dominant,” the Commission examined four factors; the carriers’ market share, the supply elasticity of the market, the demand elasticity of the customer base, and the carriers’ cost structure, size and resources.²³ All of these factors would show that the BOCs are non-dominant in the interexchange market -- the BOCs have a minuscule share of the in-region interexchange market,²⁴ the supply elasticity and demand responsiveness of the interexchange market would be the

²¹ Fourth Report and Order, 95 FCC 2d at 558 (1983), cited with approval in *AT&T Non-Dominant Order*, at para. 4.

²² As noted above, the ability to control one or more of the input prices (such as interstate access rates) is not the same thing as power over the output prices in the market. The former is independent of the latter, and the latter is a function of competitive conditions in the output market. For example, steel companies may be able to raise the prices of cars by raising the price for steel, but this does not show that they have any market power in the automobile market. Moreover, to the extent that the LECs or BOCs have some measure of market power over access services as an input to interexchange service, either the Commission's price cap regulation, or increasing competition in the local exchange and access markets, will effectively control the ability of the LECs and BOCs to influence interexchange competition through the setting of rates for access services.

²³ See *AT&T Non-Dominant Order*, at para. 38.

²⁴ The BOCs are currently limited to small corridor and interstate, intraLATA markets that were allowed as exceptions to the MFJ interLATA prohibition at the time of divestiture.

same, and the BOCs would enter the out-of-region interexchange market with no nationwide facilities, no economy of scale, and a zero market share.²⁵

The issue in this proceeding, therefore, is whether the separation requirements imposed in 1984 on LEC-affiliated long distance carriers should be continued as somehow required by the public interest. The simple answer is that they should not. Neither BOC nor independent LEC affiliated long distance carriers could be shown to possess market power in today's interexchange market. The long distance market is much more competitive today than when the *Competitive Carrier* restrictions were adopted in 1984, as evidenced by the Commission's determination to classify AT&T as a non-dominant carrier. And there are numerous new entrants providing local exchange services, with both interexchange carriers and cable companies either providing, or indicating their

²⁵ See NYNEX Comments, CC Docket No. 96-21, *In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, filed March 13, 1996, at pp. 8-9. Importantly, it would also be contrary to the public interest to apply "dominant carrier" regulations to these BOC-provided services. To do so would require the BOCs: (1) to obtain Commission approval under Section 214 for the facilities used to provide out-of-region interstate, interexchange services; (2) to file tariffs announcing marketplace pricing plans upon 14, 45 or 120 day advance notice to its competitors; and (3) to disclose detailed cost information about its business to its competitors. Each of these requirements would impede rather than enhance competition, thereby failing to meet the Commission's fundamental goal in this proceeding "to promote competition by reducing or eliminating existing regulations that may no longer be in the public interest in the increasingly competitive interexchange marketplace" (*NPRM* at para. 4). See, e.g. *Fourth Report and Order*, 95 FCC 2d at 580 (indicating that the application of the Section 214 approval process to non-dominant carriers "would be an unnecessary regulatory burden, impair competition, and be contrary to the public interest."); *Fifth Report and Order*, 98 FCC 2d at 1199 n. 24 (1984), citing *Further Notice of Proposed Rulemaking*, 84 FCC 2d 445, 453-55 (1981)(describing how prior tariff review is detrimental to the public interest).

intention to provide, competitive alternatives. It is inconceivable that the BOCs could establish market power in the long distance market for out-of-region services in competition with established carriers, including facility-based carriers such as AT&T, MCI, Sprint and LDDS WorldCom.

The BOCs have neither the incentive nor the opportunity to “cross-subsidize” their long distance services. Their rates for access services are subject to price cap controls, and the Commission's rules control the allocation of costs between interexchange and access services.²⁶ Further, as the Commission has properly observed, the price cap regulation (even with sharing) “substantially curtails the economic incentive to engage in cross-subsidization.”²⁷

Given these non-structural safeguards against discrimination and cross-subsidization in the provision of interexchange service, additional separation requirements are unnecessary. The Commission should remove these constraints in order to fulfill the common expectation of Congress and the Commission that BOC entry will “intensify competition in the interstate, domestic, interexchange market.”²⁸

²⁶ See 47 C.F.R. Section 69.301 et seq.; *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, 2714 (1991). The LECs use Part 69 cost allocations to remove their interexchange costs from their costs for access services. In addition, the Commission's rules require the LECs to impute to their interexchange services the same access rates that they charge to other carriers for in-region services

²⁷ *In the Matter of Policy and Rules Concerning Rates For Dominant Carriers*, CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 FCC Rcd 2873, 2924 (1989).

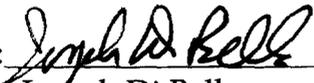
²⁸ NPRM at para. 1.

IV. Conclusion.

The Commission should carry out the intent of the Telecommunications Act of 1996 by eliminating unnecessary regulatory restrictions and by adopting rules that would carry out the specific requirements of the Act. The Commission should resist efforts to impose additional restrictions on the LECs in general, and on the BOCs in particular, that are antithetical to the overriding Congressional intent to adopt a "competitive, deregulatory national policy framework" for telecommunications services.

Respectfully submitted,

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