

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)
)
Policy and Rules Concerning the)
Interexchange Marketplace)
)
Implementation of Section 254(g))
of the Communications Act of 1934,)
as amended)
)

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CC Docket No. 96-61

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

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**REPLY COMMENTS OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully replies to the comments submitted regarding Sections IV, V and VI of the Commission's *Notice of Proposed Rulemaking* ("Notice") issued in this docket.¹ The initial comments address two issues: implementation of Section 254(g) and classification of LEC out-of-region interLATA affiliates under the *Competitive Carrier* rules.

Regarding the geographic averaging and rate integration provisions of Section 254(g), the comments overwhelmingly confirm that Section 254(g) was intended only to codify existing FCC policies applicable to interexchange service rates, not to impose new obligations on interexchange carriers. The Commission should carry out this intent by

¹ FCC 96-123 (rel. March 25, 1996). Initial comments on these sections were filed on April 19, 1996. In this reply, all citations to comments refer to the initial comments filed on that date.

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adopting rules which permit carriers to maintain current rate practices, such as distance-sensitive rates, limited area promotions, and non-averaged contract tariffs.

Regarding the classification of LEC interLATA affiliates, the record here, like the record in the *BOC Out of Region* docket, confirms that more stringent safeguards are needed before BOC out-of-region affiliates could be classified as nondominant interexchange carriers. The proposal to reduce those safeguards, therefore, is premature and inadvisable. The Commission may classify BOC out of region affiliates as nondominant, but only upon more effective conditions to ensure they lack the ability to leverage their local exchange market power. As to the independent LECs, there is no evidence that the Commission's rules should be modified in any way at this time.

I. GEOGRAPHIC RATE AVERAGING

The comments in this docket uniformly recognize that Section 254(g) is intended only to codify existing FCC policies, not to impose new obligations upon interexchange carriers.² That is, Section 254(g) *incorporates* the FCC's current geographic rate averaging and rate integration policies; it does not create a new policy which voids existing interexchange carrier practices.³ It follows from this that the Commission should adopt rules permitting carrier practices that are permitted under the agency's current rate averaging policies.

² See, e.g., AT&T Comments at 31; LDDS WorldCom Comments at 13; MCI Comments at 26; Rural Telephone Coalition Comments at 2.

³ See H.R. REP. NO. 104-458, 104th Cong., 2d Sess. 132 (1996).

The initial comments identified a number of these practices. Several commenters noted, as did CompTel, that carriers should be permitted to introduce promotions in limited areas and to offer regional optional calling plans.⁴ Commenters also noted that individually negotiated customer contracts may contain regional-specific provisions or deaveraged rates.⁵ Similarly, carriers may charge distance-sensitive rates,⁶ apply surcharges to recover state or local taxes such as a gross receipts tax,⁷ and may differentiate private line rates by geographic region.⁸ The Commission's rules implementing Section 254(g) should permit each of these practices to continue.

Moreover, no commenter suggested that the rate averaging or rate integration provisions require a carrier to serve all geographic markets or to offer all of its services in all areas where it provides at least one service. As CompTel explained in its initial comments, Section 254(g) does not modify the prerogative of a carrier to determine the areas it will serve and the services it will offer in those areas.⁹ Regional carriers and regional service offerings are an integral element of a competitive interexchange market. Nothing in

⁴ AT&T Comments at 36; BellSouth Comments at 6; Cable & Wireless Comments at 5-6; Frontier Comments at 9; Sprint Comments at 15.

⁵ AT&T Comments at 37; Frontier Comments at 9; LDDS WorldCom Comments at 13; MCI Comments at 30.

⁶ CompTel Comments at 7; MCI Comments at 37; Sprint Comments at 25.

⁷ AT&T Comments at 35.

⁸ AT&T Comments at 36.

⁹ CompTel Comments at 8; *see also* Sprint Comments at 16.

the Commission's rules implementing Section 254(g) should impede the development of regional carriers or preclude carriers from developing products on a regional basis.

Finally, some commenters noted that the Commission could reach the same result by forbearing, in whole or in part, from applying Section 254(g) to nondominant carriers.¹⁰ If, for whatever reason, the Commission interprets Section 254(g) to prohibit regional promotions, optional calling plans, distance-sensitive rates, geographic-specific private line rates, or any of the other practices discussed above, CompTel agrees that forbearance would be appropriate. The Commission may forbear from applying any statutory provision or Commission regulation (except incumbent LEC interconnection obligations under Section 251(c) and BOC market entry conditions pursuant to Section 271) upon a finding that (1) enforcement is not necessary to ensure that charges and practices are just and reasonable, (2) enforcement is not necessary to protect consumers, and (3) forbearance is in the public interest.¹¹ These criteria are satisfied with respect to nondominant interexchange carriers. Nondominant carriers, because they lack market power, could not unreasonably discriminate among customers, charge unjust rates, or otherwise harm consumers in rural and high cost areas. Any deviation from averaged rates would be a direct result of differences in costs (including primarily LEC access charges) or of competitive pressures exerted in a particular

¹⁰ AT&T Comments at 37-39; BellSouth Comments at 6-7; MFS Comments at 9.

¹¹ 47 U.S.C. § 160 (added by the Telecommunications Act of 1996, Section 401).

area.¹² Therefore, the Commission should forbear from applying Section 254(g) if it interprets the statute to prohibit any of the practices described above.

II. CLASSIFICATION OF LEC INTERLATA AFFILIATES

Many commenters responded to the *Notice's* proposal to apply the Department of Justice's *Merger Guidelines* to identify the appropriate interexchange market or markets when classifying carriers as dominant or nondominant. CompTel takes no position regarding the relative merits of the current market definition compared to the *Merger Guidelines*, because either approach is sufficient to enable the Commission to assess the market power of existing interexchange providers and of new entrants, such as the Bell Operating Companies ("BOCs"). Regardless of which approach the Commission chooses, it is imperative, as MCI notes, "that the Commission equip itself with the analytical tools necessary to evaluate the nature and extent of the BOCs' market power in connection with their entry into the interstate, interexchange market."¹³

It is clear that, in the case of BOC interLATA services, this evaluation will turn on the BOCs' local exchange market power. The BOCs unquestionably possess market power in local services and in exchange access services. As demonstrated by CompTel and others,

¹² Thus, as some commenters note, "competitive necessity" is a permissible rationale for deaveraged rates. See AT&T Comments at 40; BellSouth Comments at 6-8; MCI Comments at 29-30.

¹³ MCI Comments at 4.

in this docket and in the *BOC Out of Region* docket,¹⁴ the BOCs could wield their local exchange market power against interexchange customers in their local service regions and against interexchange service competitors.¹⁵ The BOCs might exercise this power by subsidizing out-of-region expenses with local exchange monopoly revenues, by jointly marketing out-of-region services, and by manipulating access charges or service offerings to favor their interLATA affiliates.¹⁶ Thus, the focal point of any classification decision will not be the parameters of the interexchange market but "the extent to which the BOC has lost its monopoly power in local exchange and exchange access services."¹⁷ CompTel submits that the BOCs' present market power requires classification of their out-of-region interLATA affiliates as dominant carriers unless (1) the BOC provides out-of-region services that are physically and administratively separate, (2) the BOC does not jointly market local and out-of-region services, (3) the BOC provides its affiliate with Title II services only by tariff, (4) the BOC does not discriminate in favor of its affiliate in non-Title II services, and (5) the BOC treats transactions with its affiliate as transactions with nonregulated affiliates for accounting purposes.

¹⁴ *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21 (NPRM adopted Feb. 14, 1996).

¹⁵ *See, e.g.*, CompTel Comments at 4; AT&T Comments at 9-12; MCI Comments at 7; LDDS WorldCom Comments at 9-10.

¹⁶ *See, e.g.*, AT&T Comments at 24-26; MCI Comments at 14-17. As MFS notes, market power may be exercised through many non-price practices as well. MFS Comments at 4-5.

¹⁷ AT&T Comments at 8, 12.

The BOCs' objections to these conditions are without merit. Bell Atlantic and BellSouth contend that conditioning nondominant treatment on the BOCs' use of a separate affiliate is inconsistent with Section 271 of the Act.¹⁸ Section 271, however, deals with the conditions for BOC market entry; it does not address the regulatory treatment of the BOCs in markets for which entry is permitted. Congress simply was silent on this point. Thus, although the BOCs are allowed to enter the out-of-region market without a separate subsidiary, the Commission retains its ability to determine the level of scrutiny necessary to ensure the BOCs' services are just, reasonable, and nondiscriminatory.

Similarly, the BOCs are wrong in their claim that LEC price caps obviate any concerns regarding unfair cost shifting. Price caps do not eliminate the BOCs' incentive to mis-allocate costs, and improper cost-shifting continues to occur even under price cap regulation.¹⁹ Moreover, as MCI notes, any subsidy the BOC provides its affiliate through cost-shifting is an unreasonable discrimination, regardless of whether it is consistent with the price cap rules.²⁰ Further, MFS points out that many types of anticompetitive practices do not involve prices or cost-shifting.²¹ Obviously, LEC price caps do nothing to deter exercise of BOC market power in those situations. Accordingly, the BOCs retain the ability to leverage their local exchange market power in the interLATA market, even though they are subject to price cap regulation.

¹⁸ Bell Atlantic Comments at 3; BellSouth Comments at 24.

¹⁹ MCI Comments at 24-25.

²⁰ *Id.* at 18.

²¹ MFS Comments at 4-5.

Finally, no change should be made in the rules classifying the interLATA affiliates of the independent LECs. Several commenters noted that the "legal landscape" applicable to independent LECs had not changed significantly since the Commission adopted the LEC separate affiliate standard.²² Moreover, there is no evidence that the rules are inefficient or burdensome. Indeed, Sprint, which has been subject to the independent LEC rules since they were adopted, does not find the requirements burdensome at all.²³ As Sprint notes, the minimal conditions imposed for nondominant treatment follow naturally from the principle that a LEC may not discriminate in favor of any interexchange carrier's services.²⁴ Because the record does not reveal any relevant changes in circumstances since the independent LEC rules were adopted, the Commission should not revisit its conclusion that the rules are in the public interest.

CONCLUSION

For the foregoing reasons, the Commission should adopt rules implementing Section 254(g) that incorporate the Commission's existing rate averaging policies. The final rules should allow carriers to offer optional calling plans and promotions on a regional basis, to charge distance-sensitive rates, to impose state surcharges for gross receipts and other taxes, and to offer deaveraged contract tariffs. Further, regardless of how the Commission defines the interexchange market, it should recognize that BOC out-of-region services must be

²² AT&T Comments at 25; MCI Comments at 12.

²³ Sprint Comments at 8.

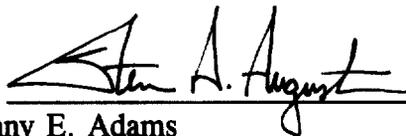
²⁴ *Id.*

regulated as dominant carrier offerings unless stringent safeguards are adopted. No change should be made in the Commission's rules for independent LECs.

Respectfully submitted,

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