

EX PARTE OR LATE FILED
DOCKET FILE COPY ORIGINAL

ORIGINAL
RECEIVED

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

MAY - 6 1996

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

MOTION TO ACCEPT LATE-FILED PLEADING

The Telecommunications Resellers Association ("TRA"), through undersigned counsel, hereby requests that the Federal Communications Commission (the "Commission") accept the attached "Reply Comments" in the above-captioned proceeding one business day late. As will be shown below, good cause exists for the grant of TRA's Motion.

Due to a computer system malfunction experienced late in the day on May 3, 1996, TRA was unable to retrieve, modify and print the above-referenced Reply Comments. Despite TRA's best efforts, the computer malfunction could not be resolved until after 5:30 p.m. on May 3, and TRA accordingly, was unable to file its Reply Comments in a timely manner. TRA has since corrected the problem and now seeks to submit its Reply Comments on the next business day following the filing deadline.

No. of Copies rec'd 0411
List A B C D E

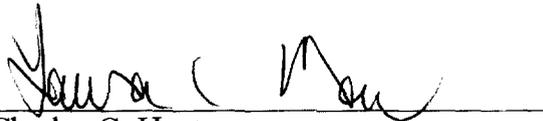
Grant of TRA's Motion would not result in harm to any party to this proceeding. Because the Reply Comments are being submitted on the business day immediately following the filing deadline, the delay involved is nominal. Furthermore, no party would be disadvantaged by acceptance of TRA's Reply Comments one business day late in this circumstance because no response to Reply Comments is contemplated under the Commission's Rules.

Good cause having been shown, TRA respectfully requests that the Commission grant its Motion and permit it to file Reply Comments in the above-referenced docket one business day late.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By:



Charles C. Hunter
Laura C. Mow
HUNTER & MOW, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

May 6, 1996

Its Attorneys

ORIGINAL

RECEIVED

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

MAY - 6 1996

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

REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Charles C. Hunter
Laura C. Mow
HUNTER & MOW, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

May 3, 1996

Its Attorneys

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION	2
II. ARGUMENT	5
A. The RBOC/LEC Commenters Have Failed To Demonstrate That Non-dominant Treatment Of Integrated RBOC/LEC Provision Of Out-Of-Region Long-Distance Services In The Public Interest	5
1. The RBOC/LEC Commenters Misapply The Commission's Dominant/Non-dominant Dichotomy	6
2. RBOC/LEC Control Of Local Exchange/Exchange Access "Bottlenecks" Can Be Leveraged To Disadvantage Rival Providers Of Interstate, Interexchange Telecommunications Services	8
3. Conditioning Non-dominant Regulatory Treatment Of RBOC/ LEC Provision Of Out-Of-Region Long Distance Services On The Use Of Structurally-Separate Affiliates Is Not Inconsistent With The Telecommunications Act of 1996	12
B. The Commission Should Adopt The More Sharply Focused Product And Market Definitions Proposed In The Notice	14
III. CONCLUSION	16

SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, offers the following reply comments in response to the initial-phase comments submitted by other parties:

- The RBOC/LEC commenters misapply the Commission's dominant/non-dominant dichotomy; the central analysis in assessing LEC market power in the provision of interstate, interexchange telecommunications services has been, and should remain, the extent to which an LEC can leverage its near-monopoly control of local exchange/exchange access "bottlenecks" to disadvantage competing providers of such services.
- Neither regulations nor market forces nor limitations on the provision of service to out-of-region long distance services adequately discipline RBOC/LEC market power; until such time as actual -- not merely theoretical -- local exchange/exchange access competition emerges, the RBOCs/LECs' "bottleneck" control will continue to provide them with the ability to act anticompetitively and whether the anticompetitive conduct takes the form of discriminatory access or other strategic price or service manipulation or misallocation of costs and/or assets between competitive and monopoly activities or other forms of cross-subsidization, the result will be the same -- competition in the interstate, interexchange telecommunications services market will be adversely effected and it will be the smaller carriers that comprise the rank and file of TRA's membership that will be most directly impacted and most seriously harmed.
- Limiting non-dominant regulatory status only to RBOC out-of-region long distance services that are provided through a structurally-separate affiliate is not inconsistent with the Telecommunications Act of 1996. The '96 Act did not deprive the Commission of its authority, or absolve it of its responsibility, to regulate interstate telecommunications and certainly was not designed or intended to afford the RBOCs an opportunity to undermine competition in the interstate, interexchange telecommunications market during the lag in time between the removal of legal and practical barriers to local exchange/exchange access competition and the emergence of such competition.
- The Commission should reject RBOC/LEC opposition to its use of more sharply focused product and market definitions in assessing market power in the provision of interstate, interexchange telecommunications services as transparent attempts to minimize or preclude consideration by the Commission in its market power analysis of the ability of individual RBOCs/LECs to leverage their control of "bottleneck" local exchange/exchange access facilities to prefer their own long distance affiliates and/or to disadvantage competitors.

RECEIVED

MAY - 6 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby replies to the initial-phase comments submitted by other parties in response to the Commission's Notice of Proposed Rulemaking, FCC 96-123 (released March 25, 1996), in the captioned proceeding (the "Notice"). As directed by the Notice, initial-phase comments addressed (i) the proposed exercise by the Commission of the "forbearance" authority granted in Section 401 of the Telecommunications Act of 1996 (the "'96 Act")¹ to modify or eliminate the structural

¹ Pub. L. No. 104-104, 110 Stat. 56, § 401 (1996).

separations requirements adopted in the Competitive Carrier Proceeding² as a precondition for non-dominant treatment of local exchange carrier ("LEC") provision of interstate, interexchange telecommunications services; (ii) the nature and scope of the product and geographic market definitions the Commission should use in assessing market power in the interstate, interexchange telecommunications services market; and (iii) the implementation of, and the advisability of forbearing from enforcing, the geographic rate averaging and rate integration mandates set forth in Section 254(g) of the '96 Act.³

I.

INTRODUCTION

In its initial-phase comments, TRA urged the Commission not only to continue to impose as a condition to non-dominant treatment of independent LEC provision of interstate, interexchange telecommunications services the requirement that such services be offered through a structurally-separate affiliate, but to extend this requirement to the provision by the Regional Bell Operating Companies ("RBOC") of interstate, interexchange telecommunications services originating outside (or in the case of "800" and private line services, terminating inside) their respective local service areas ("out-of-region long distance services"). Indeed, TRA

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, First Report and Order, 85 F.C.C.2d 1, ¶ 54 (1980); Second Report and Order, 91 F.C.C.2d 187 (1982), *recon. denied*, 93 F.C.C.2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 F.C.C.2d 554 (1983), *rev'd and remanded sub nom.*, American Tel. & Tel. v. FCC, 978 F.2d 7272 (D.C.Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993); Fifth Report and Order, 98 F.C.C.2d 1191 (1984); Sixth Report and Order, 99 F.C.C.2d 1020 (1985), *rev'd and remanded sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C.Cir. 1985) (collectively, the "Competitive Carrier Proceeding").

³ 47 U.S.C. § 254(g).

recommended strengthening in several key respects the separation requirements adopted in the Competitive Carrier Proceeding in order to ensure the meaningful separation between the local exchange/exchange access and interexchange operations of the RBOCs in particular. TRA expressed the view that structural-separation requirements should be retained, and accordingly, urged the Commission not to relax or eliminate these requirements, until such time as meaningful local exchange/exchange access competition has emerged.

TRA agreed with the Notice's assessment that the product and geographic market definitions employed by the Commission in the future to assess market power in the provision of interstate, interexchange telecommunications services should be more sharply focused and endorsed as well the practical manner in which the Notice proposed to apply these more refined product and geographic market definitions in conducting market power analyses. With respect to the geographic rate averaging and rate integration mandates set forth in Section 254(g) of the '96 Act, however, TRA urged the Commission to exercise caution in implementing these directives so as not to hinder the operation of a competitive interstate, interexchange telecommunications services market.

The vast majority of non-LEC/RBOC commenters agreed with TRA that the Common Carrier separation requirements should be retained as a condition to non-dominant treatment of an RBOC/LEC's provision of out-of-region long distance services and recognized the need to strengthen these separation requirements to ensure that RBOC/LEC out-of-region long distance services affiliates are effectively separated from the RBOC/LECs' local exchange/exchange access operations. In sharp contrast, the RBOC/LEC commenters generally called for elimination of structural separation as a condition for non-dominant treatment of their out-of-region long distance service offerings. The RBOC/LEC commenters have proffered three

basic arguments in support of their position. First, they assert that under the criteria generally applied by the Commission in distinguishing between dominant and non-dominant carriers, RBOC/LEC provision of out-of-region long distance services must be afforded non-dominant treatment irrespective of the vehicle through which such services are provided. After all, the RBOC/LEC commenters opine, they have no discernible share of a market populated with hundreds of providers, including such formidable competitors as AT&T Corp. ("AT&T"), MCI Telecommunications Corporation ("MCI"), Sprint Communications Company, L.P. ("Sprint") and WorldCom, Inc. ("WorldCom").⁴ Second, the RBOC/LEC commenters contend that there simply is no need to classify RBOC/LEC provision of out-of-region long distance services as dominant, blithely asserting that given existing regulatory and market constraints, they have neither the incentive nor the ability to utilize their local exchange/exchange access operations to disadvantage rival providers of interstate, interexchange telecommunications services.⁵ And third, the RBOC/LEC commenters claim that conditioning non-dominant treatment of RBOC/LEC provision of out-of-region long distance services on the use of structurally-separate out-of-region long distance affiliates is inconsistent with the '96 Act, imposing on them a regulatory requirement the drafters of the '96 Act specifically declined to impose.⁶

⁴ See, e.g., Ameritech Comments at 3-7; Bell Atlantic Communications, Inc., et al ("Bell Atlantic") Comments at 2-3; The NYNEX Telephone Companies ("NYNEX") Comments at 10-13.

⁵ See, e.g., Ameritech Comments at 7-10; Bell Atlantic Comments at 3-6; BellSouth Corporation ("BellSouth") Comments at 24; NYNEX Comments at 13; U S West, Inc. ("U S West") Comments at 10-11; United States Telephone Association ("USTA") Comments at 10-12; GTE Service Corporation, et al Comments at 6-12; Southern New England Telephone Company ("SNET") Comments at 3-16.

⁶ See, e.g., Ameritech Comments at 10-11; Bell Atlantic Comments at 3; BellSouth Comments at 24-25; NYNEX Comments at 9-10; U S West Comments at 10-11.

While the preponderance of non-RBOC/LEC commenters joined TRA in supporting the Notice's proposal to use more precise market definitions in assessing market power in the interstate, interexchange telecommunications market, RBOC/LEC commenters generally urged the Commission to continue to view the market exclusively as national in scope.⁷ Critically, the vast majority of non-LEC/RBOC commenters recognized the need to refine current market definitions to account for RBOC provision of interstate, interexchange telecommunications services within their respective local service areas ("in-region long distance service").

II.

ARGUMENT

A. The RBOC/LEC Commenters Have Failed To Demonstrate That Non-dominant Treatment Of Integrated RBOC/LEC Provision Of Out-Of-Region Long Distance Services Is In The Public Interest

As TRA emphasized in its initial-phase comments, the '96 Act directs the Commission to forbear from applying regulations and/or statutory provisions only if it first determines that enforcement of the requirements embodied therein is no longer necessary either to ensure the just, reasonable and nondiscriminatory provision of service or to otherwise protect consumers, and affirmatively concludes that such forbearance would further the public interest.⁸ Moreover, as acknowledged by the Notice (at ¶ 17), the '96 Act requires the Commission in exercising its newly-granted forbearance authority to determine "whether forbearance will

⁷ See, e.g., Bell Atlantic Comments at 5-7; BellSouth Comments at 9-22; NYNEX Comments at 4-8; U S West Comments at 2-6; USTA Comments at 13.

⁸ 47 U.S.C. § 160(a).

promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."⁹ And as further acknowledged by the Notice (at ¶ 4), the '96 Act recognizes that competition would be furthered by reducing or eliminating only those regulations "which may no longer be in the public interest."

1. The RBOC/LEC Commenters Misapply The Commission's Dominant/Non-dominant Dichotomy

As noted above, the RBOC/LEC commenters contend that applying the Commission's criteria for dominance, they simply cannot be found to be dominant carriers in their provision of out-of-region long distance services. Without any discernable share of the interstate, interexchange telecommunications services market and faced with not only a handful of large, well-entrenched competitors, but literally hundreds of small facilities-based and resale carriers, how, they ask, can they possibly be deemed to be dominant carriers?

To paraphrase a well-known campaign slogan, the answer, as TRA and others have pointed out in their comments,¹⁰ is "it's the 'bottleneck', stupid". As the Commission has recognized, "the LECs continue to exercise a substantial degree of market power in virtually every part of the country, and continue to control bottleneck facilities."¹¹ Nor is this concern eliminated simply because the '96 Act has rendered the local market "contestable" by eliminating all legal, and providing for the ultimate elimination of certain practical, barriers to local

⁹ 47 U.S.C. § 160(b).

¹⁰ *See, e.g.*, MCI Comments at 11-25; WorldCom Comments at 7-10; AT&T Comments at 24-27.

¹¹ Price Cap Performance Review for Local Exchange Carriers (First Report and Order), 10 FCC Red. 8961 (1995) at 9122, ¶ 368; *id.* at 9143, ¶ 418 ("[t]he record in this proceeding does not support a finding that competition for LEC services is sufficiently widespread to constrain the pricing practices of LECs for new services."); Notice at ¶ 9.

exchange/exchange access competition.¹² As the Commission has further recognized, "the transformation from monopoly to fully competitive markets will not take place overnight."¹³

In its First Report and Order in its Competitive Carrier proceeding, the Commission acknowledged the critical importance of the RBOCs'/LECs' near-monopoly position in the local exchange/exchange access market in assessing dominance, or lack thereof, in the interstate, interexchange telecommunications market when it remarked that "[a]n important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities;"¹⁴ indeed, the Commission declared that it would "treat control of bottleneck facilities as prima facie evidence of market power."¹⁵ Moreover, when the Commission determined to regulate as dominant the "[i]nterstate services provided directly by exchange telephone companies (not through affiliates)," it did so without reference to market share in the interstate, interexchange telecommunications market."¹⁶

The central analysis has been, and should remain, the extent to which an RBOC/LEC can leverage its near-monopoly control of local exchange "bottlenecks" to disadvantage competitors in the interstate, interexchange telecommunications services market. And as TRA demonstrated in its initial-phase comments, until such time as actual -- not merely theoretical -- local exchange/exchange access competition emerges, this "bottleneck" control will

¹² 47 U.S.C. §§ 251, 253, 271(c)(2).

¹³ Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, FCC 96-58, ¶ 130 (released February 15, 1996).

¹⁴ 85 F.C.C.2d 1 at ¶ 62.

¹⁵ Id. at ¶ 58.

¹⁶ 95 F.C.C.2d 554 at 575-79.

continue to provide LECs with the ability to act anticompetitively. Whether the anticompetitive conduct takes the form of discriminatory access or other strategic price or service manipulation or misallocation of costs and/or assets between competitive and monopoly activities or other forms of cross-subsidization, the result will be the same -- competition in the interstate, interexchange telecommunications services market will be adversely effected and it will be the smaller carriers that comprise the rank and file of TRA's membership that will be most directly impacted and most seriously harmed. All of which leads to the RBOC/LEC commenters' second point.

**2. RBOC/LEC Control Of Local Exchange/Exchange Access
"Bottlenecks" Can Be Leveraged To Disadvantage Rival Providers
Of Interstate, Interexchange Telecommunications Services**

The RBOC/LEC commenters argue vigorously that conditioning non-dominant treatment of their provision of out-of-region long distance services on the use of a structurally-separate entity is unnecessary. As noted earlier, the RBOC/LEC commenters essentially contend that given price cap regulation, they no longer have any incentive, and given regulatory constraints, they no longer have the ability, to misallocate costs or assets, or otherwise engage in cross-subsidization, between their local exchange/exchange access operations and their new interstate, interexchange telecommunications activities. Moreover, these commenters assert, they have no ability to strategically manipulate rates or services or otherwise to discriminate against interexchange competitors either because they are prevented from doing so by market forces or in the case of the RBOCs, are limited in their provision of interstate, interexchange telecommunications services to out-of-region and incidental long distance services. Once again,

the RBOC/LEC commenters are incorrect; their assessment of the need for structural safeguards reflects theory, not reality.¹⁷

First, so long as the price cap RBOCs/LECs are subject to any kind of "sharing requirement," they obviously have the same incentives they have always had to misallocate costs from, or otherwise engage in cross-subsidization between, price cap-regulated to non-price cap-regulated activities. Shifting costs from local exchange/exchange access operations to long distance activities could reduce, or even eliminate, the need to share excessive earnings with ratepayers. Even in the absence of such a sharing requirement, however, powerful incentives to shift costs exist. Inflated earnings associated with monopoly activities invite enhanced regulatory scrutiny and oversight which could dampen future profits. By way of example, excessive earnings could prompt proposals to increase the price cap productivity offset or "X Factor," such as those which have been presented in the Commission's pending CC Docket No. 94-1 review of LEC price cap performance. Cross-subsidizing to avoid a higher price cap productivity offset is certainly a profit-maximizing strategy.

¹⁷ It is noteworthy that the RBOCs have been making similar claims regarding their lack of incentives and ability to impede competition in the interstate, interexchange telecommunications market by leveraging their local exchange/exchange access "bottlenecks." *See, e.g., United States v. Western Electric Co.*, 673 F. Supp 525, 567 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C.Cir. 1990), *cert denied sub nom. MCI Communications v. United States*, 498 U.S. 911 (1991) ("Almost before the ink was dry on the decree, the Regional Companies began to seek removal of its restrictions . . . First, it is argued that the local monopoly bottlenecks have been either wiped out or substantially eroded . . . Third, suggestions have been made that, unlike at the time of the entry of the decree, federal regulation can now prevent anticompetitive abuses."). The RBOCs have nonetheless found the motivation and discovered the means by which to act anticompetitively. *See, e.g., United States v. Western Electric Co.*, 767 F.Supp. 308 (1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct"); *see also People of the State of California v. FCC*, No. 92-70083 (9th Cir. 1994) ("After conducting an investigation into the provision of Memorycall, the Georgia PSC concluded that BellSouth had the opportunity and incentive to behave anticompetitively given its monopoly over the local exchange and had in fact discriminated against competitor enhanced service providers by giving them inferior access to the local network.").

Compelling evidence of price cap regulation's failure to eliminate all incentives to engage in, and of the inability of regulatory safeguards to prevent, cross-subsidization is the RBOCs' and other LECs' continued reliance upon and use of such tactics. As TRA noted in its comments, regulatory audits of RBOC/LEC affiliate transactions continue to uncover misallocations of costs and assets between monopoly and other operations. And the potential for future abuses certainly would be exacerbated if the RBOCs and other LECs were permitted to utilize common switching, transmission, database and other facilities in providing local exchange, exchange access, intraLATA toll and interstate, interexchange telecommunications services. As described by TRA and other non-RBOC/LEC commenters, the vehicles for cost/asset misallocation and other forms of cross-subsidization remain numerous.¹⁸

Neither does limiting RBOC/LEC integrated provision of interstate, interexchange telecommunications services to out-of-region long distance services serve to eliminate opportunities for the RBOCs and other LECs to disadvantage rival providers of such services through strategic manipulation of access rates and services within their respective local exchange/exchange access service areas. As TRA and other non-RBOC/LEC commenters explained in their comments, the interstate, interexchange telecommunications services market is national in scope and hence the RBOCs and other LECs can use their control of "bottleneck" facilities within their respective local exchange/exchange access service areas to disadvantage rival long distance service providers with whom they are competing in the rest of the country.¹⁹ Certainly, an RBOC or other LEC could damage a competing long distance service provider's

¹⁸ See, e.g., MCI Comments at 17-18, 22-25.

¹⁹ See, e.g., MCI Comments at 15-17

reputation in the national market with national customers by impairing the carrier's service quality within the RBOC's/LEC's service area. An RBOC/LEC could further use its position in the local services market to prefer or punish national customers to encourage them to take out-of-region long distance services from it through, for example, preferential pricing, provisioning or service options. Moreover, an RBOC or other LEC could discriminate in favor of its out-of-region long distance services affiliate in the provision of terminating access or database services or in access to information. And these efforts could be rendered far more effective by coordinated activities by multiple RBOCs/LECs, a likely eventuality in light of the multiple merger and joint operating discussions currently being conducted by various RBOCs.

And market forces are certainly not adequate to prevent the RBOCs and other LECs from engaging in anticompetitive conduct. As noted above and in TRA's initial-phase comments, while the '96 Act may have rendered the local exchange/exchange access market "contestable," "contestable" markets should not be confused with "contested" markets. While competitive potential may ultimately evolve into actual competition significant enough to discipline market power, the lag in time before competition actually emerges may be, and likely will be, substantial. It belabors the obvious to suggest that the local exchange/exchange access services market cannot be deemed competitive merely because competition is no longer legally prohibited.

The RBOCs and other LECs will continue to be able to leverage their near-monopoly control of local exchange/exchange access "bottlenecks" to disadvantage rival providers of interstate, interexchange telecommunications services until such time as meaningful local exchange/exchange access competition emerges. For the time being, such competitors generally have little, and often no, choice but to take exchange access services from incumbent LECs

within their respective service areas, which translates into opportunities for anticompetitive abuse by the RBOCs and other LECs.

3. Conditioning Non-dominant Regulatory Treatment Of RBOC/ LEC Provision Of Out-Of-Region Long Distance Services On The Use Of Structurally-Separate Affiliates Is Not Inconsistent With The Telecommunications Act of 1996

The RBOC commenters, as noted earlier, allege that limiting non-dominant regulatory status only to RBOC out-of-region long distance services that are provided through a structurally-separate affiliate is inconsistent with the '96 Act. The RBOC commenters argue that such a limitation effectively imposes on their out-of-region long distance services the separate subsidiary requirement the drafters of the '96 Act intended to impose only on their provision of in-region long distance services. Moreover, the RBOC commenters contend that retention of the Common Carrier separation requirements would undermine the competitive thrust of the new legislation. The RBOCs are wrong again.

The '96 Act did not deprive the Commission of its authority, or absolve it of its responsibility, to regulate interstate telecommunications. Indeed, Section 261 of the '96 Act expressly states that "[n]othing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part."²⁰ And conditioning non-dominant regulatory treatment on the provision of out-of-region long distance services by a structurally-separate affiliate is not inconsistent with the requirements of the '96 Act. While the '96 Act arguably

²⁰ 47 U.S.C. § 261.

limits structural safeguards to in-region long distance services, it is far too great a reach to equate the grant or denial of non-dominant regulatory status with the imposition of structural separation requirements. The RBOCs would be afforded a choice between two alternatives, one of which would allow them to provide out-of-region long distance services on an unseparated basis. Only if the RBOCs elected to avail themselves of the relaxed regulation attendant to non-dominant regulatory status would they have to provide out-of-region long distance services on a structurally-separate basis.

The claims of RBOC commenters that they would be unable to compete effectively in the interstate, interexchange telecommunications market if they are not afforded non-dominant status cannot be lent any credence. AT&T managed to compete quite well as a dominant carrier for many years, maintaining during that period a market share far larger than all of its competitors combined. Certainly, the RBOCs with the competitive advantages they bring to the market could be expected to compete no less effectively even if treated as dominant in their provision of out-of-region long distance services. After all, even if the RBOCs are entering the market without appreciable market share, they certainly are not typical "start-up" providers of interstate, interexchange telecommunications services.

Moreover, as the RBOCs acknowledge, the '96 Act was intended to preserve, promote and facilitate the growth of competition in telecommunications product and service markets.²¹ To this end, the Congress sought to open monopoly markets to competitive entrants, and to enhance competition in markets already subject to competition, by eliminating entry barriers and reducing unnecessary or outmoded regulation. The '96 Act does not, however,

²¹ H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).

constitute a license to extend or leverage existing market power. Obviously, the Congress did not intend to afford the RBOCs an opportunity to undermine competition in the interstate, interexchange telecommunications market during the lag in time between the removal of legal and practical barriers to local exchange/exchange access competition and the emergence of such competition. Nor did the Congress intend to abolish all regulation; indeed, in key respects, the '96 Act is aggressively regulatory in the short term, with regulatory relief anticipated thereafter.

Finally, RBOC claims of undue burden are without merit. Under Section 272 of the '96 Act, the RBOCs will be required to provide in-region long distance services through a structurally-separate affiliate.²² Hence, whatever burdens may be imposed on the RBOCs due to the limiting of non-dominant treatment to non-integrated RBOC/LEC provision of out-of-region long distance services will be burdens that the RBOCs will bear when they enter the in-region long distance service market irrespective of how their provision of out-of-region long distance services is regulated. Moreover, as TRA emphasized in its initial-phase comments, any assessment of burdens imposed on the RBOCs/LECs must involve a balancing of public and private costs and benefits, and here the burdens imposed on the RBOCs/LECs are far outweighed by the public interest in preserving existing, and promoting new, competition in the provision of telecommunications products and services.

B. The Commission Should Adopt Its More Sharply Focused Product And Market Definitions

As noted above, the RBOC/LEC commenters generally urge the Commission to retain the product and market definitions it has historically used to assess market power in the

²² 47 U.S.C. § 272.

interstate, interexchange telecommunications markets, urging the Commission to continue to treat the market solely as national in scope. RBOC/LEC arguments in this respect are painfully transparent; the RBOC/LEC commenters seek to minimize or preclude consideration by the Commission of one of the most critical factors in its assessment of RBOC/LEC market power in the provision of interstate, interexchange telecommunications services -- the ability of individual RBOCs/LECs to leverage their control of "bottleneck" local exchange/exchange access facilities to prefer their own long distance affiliates and/or to disadvantage competitors. The Commission should summarily reject these self-serving arguments.

Certainly, TRA does not disagree with the view expressed in the Notice (at ¶ 51) that "in most cases," the Commission should "continue to treat interstate, interexchange services as a single national market when examining whether a carrier or group of carriers acting together has market power." However, the Notice was clearly correct in its assessment (at ¶ 40) that "more sharply focused market definitions" would aid the Commission both in conducting market power analyses generally and specifically in "evaluating whether the BOCs possess market power with respect to the provision of interLATA services in areas where they provide local access service." RBOCs and other LECs control "bottleneck" local exchange/exchange access in discrete regions, states and/or markets. The ability to use these facilities to prefer their own long distance affiliates and/or to disadvantage competitors in-region as well as nationally represents precisely the type of "special circumstances" that demand a more focused market power analysis. Hence, the Commission should, as the Notice suggests (at ¶ 53), retain the flexibility "to examine a particular point-to-point market (or group of markets) for the presence of market power if there is credible evidence suggesting that there is or could be a lack of competition in that market (or group of markets)."

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with its initial-phase comments.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By: 
Charles C. Hunter
Laura C. Mow
HUNTER & MOW, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

May 3, 1996

Its Attorneys