STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
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August 14, 1996

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VIA FEDERAL EXPRESS

Office of the Secretary
Federal Communications Commission
1919 M St., N.W. Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-149

Gentlemen:

Please find enclosed for filing an original plus eleven.copies of the COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed postage pre-paid envelope.

Yours truly,

Patrick S. Berdge
Attorney for California

PSB:cdl

Enclosures

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ORIGINAL

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

In the Matter of	)	FCC 96-308
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	CC Docket No. 96-149
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING

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August 14, 1996

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I. INTRODUCTION

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") hereby respectfully submit these comments to the Federal Communications Commission ("FCC" or "Commission") on the notice of proposed rulemaking ("NPRM") regarding rules to implement, and, where necessary, to clarify the non-accounting separate affiliate and nondiscrimination safeguards prescribed by Congress in section 272. These safeguards are intended to protect subscribers to the Bell Operating Companies' ("BOC's") monopoly services (such as local telephony) against the potential risk of having to pay costs incurred by BOCs to enter competitive services (such as interLATA services and equipment manufacturing). They also serve to protect new competitors from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in the new markets the BOCs now seek to enter. This NPRM is issued pursuant to the Telecommunications Act of 1996 ("the Act").

II. SUMMARY

California questions the NPRM's broad interpretation of the FCC's jurisdiction over traditional State concerns such as intrastate interLATA telecommunications services. The NPRM's conclusions regarding the FCC's ability to govern intrastate regulation of telecommunications services lack adequate legal foundation. In lieu of direct involvement in the regulatory affairs and police powers of the States, the CPUC urges the FCC in this rulemaking to

recognize the jurisdiction of the States in determining the scope of regulation of intrastate interLATA services under the Act and to issue guidelines and expositions of the purpose and proper considerations of that State regulation under the Act. These would be especially helpful in charting the States' course of action under the Act consistent with the rules promulgated by the FCC.

III. DISCUSSION

A. Scope Of California's Jurisdiction

The FCC's proposal that its rules apply to both interstate and intrastate services[1] are of the utmost concern to California. This tentative conclusion would effectively nullify Section 2 (b) of the Communications Act of 1934 ("the 1934 Act").[2] The CPUC opposes this suggestion on the grounds that it would preempt states in intrastate telecommunications matters in violation of both the 1934 Act and the Act of 1996 and the Congressional intent underlying them.[3] Congress envisioned joint federal/state coordination in opening up the telecommunications network to competition.

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[1] NPRM ¶ 21.

[2] Section 152(b) of the 1934 Communications Act.

[3] Neither §§ 251 or 252 of the 1996 Act gives the FCC authority over intrastate functions. The FCC has ". . . note[d] that sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions." (Local Competition NPRM, CC Docket # 96-98 ¶ 40.)

1. The FCC's Jurisdiction Over Intrastate InterLATA Services and Information Services

The NPRM solicits comments on whether sections 271 and 272 of the Act, and the FCC's authority pursuant to those sections, apply only to interstate interLATA services and information services, or to intrastate interLATA services and information services as well. The NPRM tentatively concludes that the Commission's rules implementing sections 271 and 272 apply to both interstate and intrastate services.[4] California strongly disputes this conclusion.

a) The Modified Final Judgment

The NPRM's premise is that: (1) many states have more than one LATA within their jurisdiction, and (2) the Modified Final Judgment ("MFJ") governed the provision of both interstate and intrastate BOC services.[5] As successor to the MFJ, the FCC would interpose its authority in lieu of the MFJ's with respect to intrastate jurisdiction generally. However, the MFJ was designed to prevent predatory behavior by the BOCs, albeit both in the interstate and intrastate arenas. It is unreasonable to assert the MFJ's judicially imposed intrastate protections against monopoly power as a general basis for removing the State's traditional powers from the area of intrastate interLATA jurisdiction simply because the MFJ did so for another, more limited purpose, i.e., protection

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[4] NPRM ¶ 21.

[5] *Ibid.*

against national predatory monopoly power. The NPRM interprets the exercise of that limited power, which did not disturb the States' jurisdiction generally in the intrastate arena, as grounds for excluding the States. "The interLATA/intraLATA distinction appears to some extent to have supplanted the traditional interstate/intrastate distinction for purposes of these sections."[6] This bootstrapping goes too far and oversteps the traditionally recognized jurisdiction of the States in regulating commerce within their borders.

b) The FCC's consultation with the States for BOC entry on a state-by-state basis

Likewise, the NPRM goes too far when it suggests that because Congress required the FCC "to consult with the relevant State Commission before making any determination with respect to an application in order to verify the BOC's compliance with the requirements for providing in-region interLATA services. . .", Congress intended "to have put in place rules to govern both interstate and intrastate services. . .".[7] It is more likely that Congress intended that the States maintain their present jurisdiction and that the State Commissions and the FCC simply coordinate in assuring compliance with the Act by the BOCs who must apply for interLATA entry on a state-by-state basis.[8] Such coordination would

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[6] NPRM ¶ 22.

[7] NPRM ¶ 24.

[8] *Ibid.*

provide the same safeguards and "orderly entry" into the interLATA market sought by the FCC in this NPRM.[9]

c) Section 2(b) of the 1934 Act versus sections 271 and 272 of the 1996 Act

Similarly, the NPRM goes too far in ignoring the jurisdiction afforded the States in section 2(b) of the Act of 1934. As the NPRM notes:

> Section 2(b) provides that, except as provided in certain enumerated sections not including sections 271 and 272, "nothing in [the Communications Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier . . . ."[10]

Nevertheless, the NPRM declares without further support or reasoning that,

> Congress intended for sections 271 and 272 to take precedence over any contrary implications based on section 2(b). . . [and] that in enacting the 1996 Act, there are [other] instances where Congress indisputably gave the Commission intrastate jurisdiction without amending section 2(b).[11]

Certainly such an unsupported legal conclusion cannot be an adequate basis for the removal of the States' clear and active jurisdiction over their intraLATA and

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[9] NPRM ¶ 25.

[10] NPRM ¶ 26.

[11] *Ibid.*

intrastate telecommunications markets. The appellate courts would demand a greater showing by the FCC than that provided in this NPRM.

d) State regulation which thwarts or impedes the FCC's

The NPRM seeks comments on:

> (1) the extent to which it may not be possible to separate the interstate and intrastate portions of the regulations we propose here to implement sections 271 and 272, and (2) the extent to which state regulation inconsistent with our regulations may thwart or impede the Commission's exercise of lawful authority over interstate interLATA services. [12]

The CPUC does not dispute that certain preemptive powers are provided the FCC under the Act. However, to preempt state law, the FCC will have the burden of establishing that state law does indeed thwart or impede the exercise of the Commission's rightful interstate jurisdiction. To the extent that the FCC can demonstrate that a state's laws or regulations do not provide adequate safeguards of the type provided by the MFJ and outlined within the NPRM,[13] they may be preempted. But it is unlikely that the States would fail to adopt their own similar rules in this regard.

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[12] NPRM ¶ 28.

[13] "(1) [A] BOC affiliate's ability to use, co-use, or co-own facilities with the BOC; (2) a BOC affiliate's ability to share personnel with the BOC; and (3) a BOC's ability to discriminate in favor of its affiliate." NPRM ¶ 28.

e) California III *preemption*

The NPRM notes that:

> . . . the Commission adopted rules to govern the BOCs' provision of enhanced services rules prior to the enactment of the 1996 Act . . . [and] preempted certain inconsistent state structural separation requirements dealing with the intrastate portion of jurisdictionally mixed enhanced services. The U.S. Court of Appeals for the Ninth Circuit upheld this exercise of our preemption authority, agreeing that the state separation requirements would essentially negate the Commission's goal of allowing BOC provision of interstate enhanced services on a non-separated basis. Along the same lines, it is conceivable that a state may try to impose separate affiliate or nondiscrimination requirements on the intrastate portion of jurisdictionally mixed services that are inconsistent with the requirements in section 272. We believe that California III may provide support for Commission preemption of such inconsistent state regulations, to the extent that the regulations would thwart or impede the Commission's exercise of its authority over interstate interLATA services or interstate interLATA information services pursuant to sections 271 and 272. [14]

Again, the CPUC does not dispute that the FCC may preempt state law where it can affirmatively establish that such state law would actually thwart or impede the rightful exercise of FCC authority under sections 271 and 272 of the Act.

The NPRM also asks whether it might preempt state law that is "less stringent than the Commission's regulation of interstate services" on the ground

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[14] NPRM ¶ 29.

that the state law "could thwart or impede the Commission's exercise of its authority over interstate, interLATA, information services." [15] Theoretically it is possible so long as the FCC meets its affirmative duty to establish that such less stringent state regulation would actually thwart or impede the FCC's rightful exercise of authority. Whether it is realistic to think that the FCC could establish that burden based on the degree of stringency of state law, is another question entirely. In addition, given the size of the interstate market relative to that of the intrastate market, it is difficult to believe that the FCC could meet its burden of proof.

B. InterLATA Versus IntraLATA Information Services

The NPRM invites parties to comment on how the Commission should distinguish between an interLATA information service and an intraLATA information service. The NPRM further asks parties to comment upon the types of services that should be classified as interLATA or intraLATA information services.[16]

California proposes using a straightforward definition of the term "interLATA", namely, any transmission that crosses LATA boundaries as established by the MFJ, or as modified by a waiver of such LATA boundaries. Moreover, California agrees with the NPRM's suggestion that an information

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[15] *Ibid.*

[16] NPRM ¶ 44.

service should be considered an interLATA service only when the service *actually* involves an interLATA telecommunications transmission component.[17] Specifically, California opposes expanding the term "interLATA service" to *any* information service that *potentially* involves an interLATA telecommunications transmission component." [18]

IV. CONCLUSION

For the reasons stated, California urges FCC not to issue strict national rules regarding structural requirements, means of regulating, or enforcement of the BOCs' provision of intrastate interLATA telecommunications services that would constrain the States from implementing their own rules in the intrastate arena similar to those proposed in this NPRM. Instead, California proposes that the FCC establish guidelines for the States in these areas with sufficient

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[17] *Ibid.*

[18] *Ibid.*

explanation as to allow the States the ability to coordinate with the FCC's rules and comply with the Act.

Dated: August 14, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charlene D. Lundy, hereby certify that on this 14th day of August, 1996, a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE NOTICE OF PROPOSED RULEMAKING in FCC 96-308, CC Docket No. 96-149, was mailed first class, postage prepaid to all known parties of record.

Charlene D. Lundy