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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of)
)
Implementation of the Non-Accounting)
Safeguards of Sections 271 and 272 of the)
Communications Act of 1934,)
as amended;)
)
and)
)
Regulatory Treatment of LEC Provision)
of Interexchange Services Originating)
in the LEC's Local Exchange Area)

CC Docket No. 96-149

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Reply Comments of the Yellow Pages Publishers Association

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August 30, 1996

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Executive Summary of the Reply Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA") believes that it would be inappropriate for the Commission to impose separate affiliate requirements beyond those enacted in the Telecommunications Act of 1996. Specifically, YPPA urges the Commission to (1) reassess its tentative conclusion that the term "operate independently" imposes requirements beyond those listed in subsections 272(b)(2)-(5); (2) refrain from imposing additional requirements not expressly included in the Act; and (3) properly interpret the Act's provisions regarding joint marketing of services and sharing of officers, directors, and employees.

In drafting section 272 of the Act, Congress contemplated the Commission's Computer II and Competitive Carrier proceedings. That Congress chose to include certain Computer II requirements over others indicates that section 272 was crafted with deliberate care. The Commission may not properly incorporate additional requirements into the Act from Computer II, Competitive Carrier, or any other source; section 272 was designed to be self-executing. In addition, the Commission has in the past used the term "operate independently" in its own rules without further delineating the term.

It would be inappropriate for the Commission to impose identical or substantially similar requirements on both electronic publishers and information service providers. By including a separate section in the Act for electronic publishing, Congress meant to subject it to distinct rules. Any plans the Commission may have for grafting the requirements of section 274 onto section 272 would be contrary to the intent of the Act.

Some commenters have urged the Commission to impose requirements beyond those in the Act in order to "limit the BOCs' ability to impede competition in the interLATA information services market." The thorough debate over BOC market power resulted in the carefully crafted sections 271 through 276. It would be inappropriate for the Commission to assume that Congress did not adequately address the issue.

Some commenters assert that the BOCs and their section 272 affiliates must be prohibited from jointly marketing their services. By including section 272(g) in the Act, however, Congress made its intentions clear that the BOCs may provide "one stop shopping" subject to the safeguards of sections 272 and 274.

Finally, some have suggested that because the Act prohibits the BOCs and their section 272 affiliates from sharing officers, directors, and employees, they are also prohibited from sharing "in-house functions." Neither the plain wording of section 272(b)(3) nor its legislative history supports this conclusion. In addition, the Commission recognized in the Computer II proceeding that there are various cost/benefit factors associated with different levels of separation and permitted the BOCs and their affiliates to share certain in-house functions. It would be dramatically inconsistent with the intent of Congress to impose rules more restrictive than those of Computer II.

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To: The Commission

Reply Comments of the Yellow Pages Publishers Association

The Yellow Pages Publishers Association ("YPPA"), by its attorneys, hereby submits Reply Comments in response to Comments to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

These Reply Comments focus on four important issues for meeting the pro-competitive goals of the Telecommunications Act of 1996 and for implementing the Act consistent with Congress' intentions: (1) the proper interpretation of the term "operate independently" in section 272(b)(1); (2) the appropriateness of imposing additional requirements not specifically mentioned in the Act; (3) joint marketing of services between a BOC and its § 272 affiliate; and (4) the sharing of officers, directors, and employees.

I. Scope and Definition of "Operate Independently"

In paragraph 57 of the NPRM, the Commission tentatively concludes that it "should interpret the 'operate independently' requirement in section 272(b)(1) as imposing requirements beyond those listed in subsections 272(b)(2)-(5)." Specifically, the Commission asks whether the Computer II and Competitive Carrier separation requirements would serve as useful additional safeguards.

The drafters of section 272 were cognizant of the Commission's Computer II and Competitive Carrier proceedings. Indeed, some of the requirements of Computer II appear in the Act. The fact that Congress chose certain Computer II requirements over others, however, indicates that it crafted section 272 with deliberateness; Congress neither expressly nor implicitly extended a license to the Commission to incorporate any additional requirements into the Act from Computer II, Competitive Carrier, or from any other source.

As USTA pointed out in its Comments to this proceeding, "the comprehensive, detailed nature of Section 272... indicate[s] that Section 272 was intended to be self-executing, with the Commission playing primarily an enforcement role."^{1/} Moreover, the situation here is distinct from that which occasioned the Commission's rules in Computer II and Competitive Carrier: in those proceedings, the Commission was establishing rules where Congress had not specified safeguards and requirements. Here, Congress has spoken with studied precision and has not invited the Commission to do more.

^{1/} Comments of United States Telephone Association, Executive Summary.

In addition, the Commission has used the term "operate independently" in its own rules without further delineating the term. In fact, as YPPA and others reminded the Commission in the Comments to this proceeding, the term "operate independently" in 47 C.F.R. § 64.702(c)(2) serves as a description of the enumerated requirements that follow that rule. Thus, contrary to the Commission's assertion that it must infer additional requirements in order to give effect to § 272(b)(1), Congress' intent in drafting § 272 and the Commission's past practices are in alignment. Both the Commission's and Congress' use of the term "operate independently" to describe the immediately following enumerated requirements are correct; standard principles of statutory construction support this conclusion as well.

Similarly, it would be inappropriate for the Commission to graft the requirements of § 274 onto § 272. After arguing that "any BOC-provided information service that is capable of accessing, or being accessed by, interLATA facilities... should be subject to the requirements of Section 272," the Information Technology Association of American urges that "[b]ecause there is no clear or principled dividing line between electronic publishing and other information services, the Commission should impose substantially the same... requirements on the BOCs' provision of electronic publishing and other information services."^{2/}

This proposition ignores that fact that Congress included a separate section in the Act specifically addressing electronic publishing. Although the two sections are closely related in

^{2/} Comments of ITAA at (i).

both subject matter and physical proximity in the Act, had Congress intended the requirements of § 274 to be ascribed to § 272, it would have included them in both sections. The Information Technology Association asks that the Commission to do something it lacks the authority to do: rewrite the Act. The most reasonable interpretation of the term "operate independently" in both sections 272 and 274 is that the requirements enumerated below the term give it meaning.

II. Imposition of Additional Safeguards

Some commenters to the NPRM suggest that Congress intended to vest the Commission with authority to prescribe safeguards beyond those included in the Act.^{3/} As has been shown in the Comments to the NPRM, however, the requirements set forth in Section 272 are complete unto themselves. The provisions of the Act are broad and cover, among other things, customer proprietary network information, network disclosure, nondiscrimination, and accounting. These provisions supplant the Commission's enhanced services requirements found in the Computer II, Computer III, and Open Network Architecture ("ONA") proceedings. By reflecting back upon these older proceedings, the Commission runs contrary to Congress' intentions. As expressed by SBC Communications

^{3/} See e.g., Comments of Time Warner Cable at 27. Time Warner argues, for example, that § 271(h) ("The Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market") and § 254(k) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition") reflect a "broader set of concerns for BOC misconduct" and that the Commission must therefore impose additional rules. The wording of section 271(h) without more, however, simply directs the Commission to *enforce* the generally pro-competitive goals of the Act. Those goals will be met by implementing and enforcing the provisions of the Act; the subsection cannot be understood to authorize new rules. Section 254(h), addressing universal service concerns, relates to the Commission's authority to develop *accounting* rules -- an issue contemplated under a separate proceeding.

in its Comments, "Congress expected the Commission to look for ways to increase competition within the burgeoning telecommunications market, not simply revisit its history and to apply its old rules to a fundamentally changed industry."^{4/} In addition, when Congress expressly authorized the Commission to prescribe rules for accounting safeguards, it implied that no such authority was granted for the non-accounting safeguards at issue here.

Some information service providers have urged the Commission to impose additional requirements in order to "limit the BOCs' ability to impede competition in the interLATA information services marketplace."^{5/} As has been shown, Congress contemplated the potential for a BOC's use of its monopoly power in local exchange services to leverage into other markets and dealt with the issue in the Act. The long and thorough debate over BOC market power resulted in the carefully crafted §§ 271 through 276. It would be inappropriate -- and incorrect -- for the Commission to assume that Congress did not adequately address the problem.^{6/}

It would be inappropriate to apply the requirements of Computer II, Computer III, and ONA to LEC-created section 272 subsidiaries because the requirements of section 272 were written to more effectively deal with these issues. Congress acted with deliberation

^{4/} Comments of SBC Communications at 12.

^{5/} See Comments of Information Technology Association of America at (i) and Comments of Information Industry Association at 2-3.

^{6/} Essentially, the comments filed by the information service providers have asked the Commission to limit the BOCs' ability to compete with these information service providers. Congress did not intend such a protectionist result.

when it chose to include -- or exclude -- the Commission's safeguard provisions from various prior proceedings.

III. Joint Marketing

Some commenters to the NPRM assert that the BOCs and their § 272 affiliates must be prohibited from jointly marketing their services in order to prevent them from "leverag[ing their] monopoly power into competitive markets and thereby distort[ing] competition."^{2/} Congress expressly decided, however, that BOCs may provide 'one-stop-shopping' through joint marketing even though they must initially use a separate affiliate for engaging in interLATA service.

By including § 272(g) in the Act, Congress made its intentions clear: a BOC affiliate may market the BOC's telephone exchange services as long as the BOC permits other entities to market those services; and, a BOC may market the interLATA services provided by the BOC's affiliate once the BOC has obtained authorization under § 271(d). Indeed, had Congress intended to prohibit a BOC from engaging directly in joint marketing, as suggested by the NPRM, it would not have included a provision expressly allowing the activity.

IV. Sharing of Officers, Directors, and Employees

Under § 272(b)(3), the separate affiliate and the BOC must not share officers, directors, and employees. It is inappropriate to conclude from the plain wording of this subsection that Congress meant to also prohibit the sharing of "in-house functions." As USTA explains in its comments to this proceeding, there is nothing in either the wording of

^{2/} See e.g., Comments of Time Warner Cable at 23.

§ 272(b)(3) or its legislative history to suggest that the BOCs and their affiliates are prohibited from entering into arms-length transactions for the purchase of administrative functions.^{8/} Indeed, in the Computer II proceeding, the Commission recognized that "there are various cost/benefit factors associated with different levels of separation"^{9/} and permitted the BOCs to contract for in-house services on a cost reimbursement basis. It would be equally inappropriate to interpret § 272(b)(3), as the Commission suggests, to apply to relationships between a § 272 separate affiliate and an affiliate other than a BOC. That section only covers the relationship between a BOC and its § 272 affiliate. In addition to the plain words of the section, the legislative history of § 272(b)(3) supports this conclusion: the prohibitions apply between the § 272 affiliate and "any entity that provides telephone exchange service."^{10/} Thus, extending the Act's sharing prohibitions to affiliates other than the § 272 separate affiliate (*e.g.*, service affiliates, holding company, *etc.*) would be contrary to the intent of Congress.

V. Conclusion

Through the Telecommunications Act of 1996, Congress has spoken with deliberate care; the requirements and safeguards therein are necessary and sufficient to achieve the pro-competitive goals of the Act. Thus, it would be inappropriate and contrary to the intent of

^{8/} Comments of United States Telephone Association at 21.

^{9/} *Id.*

^{10/} Report 104-458, Conference Report to the Telecommunications Act of 1996, 104th Congress, Second Session (1996) at 150.

Congress for the Commission to impose additional onerous requirements on the provision of interLATA information service under § 272.

Respectfully submitted,



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August 30, 1996