Bell Atlantic

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EX PARTE OR LATE FILED

September 27, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW - Room 222
Washington, D.C. 20554

Re: Ex Parte
CC Docket No. 96-149, 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

Dear Mr. Caton:

On September 18, 1996 Joe Mulieri, Mary Ellen Payne, Ed Shakin and the undersigned representing Bell Atlantic met with Radhika Karmarkar and Cheryl Leanza of the Federal Communications Commission, Policy and Program Planning Division regarding the above referenced docket. At that meeting, several questions were posed relating to our discussion.

Attached is a copy of the response we provided today to Cheryl Leanza. An original and a copy of this Ex Parte is being filed in the office of the Secretary on September 27, 1996.

Please include it in the public record of this proceeding.

Respectfully submitted,

Gerald Asch
Director - FCC Relations

cc: Ms. R. Karmarkar
Ms. C. Leanza

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Edward Shakin
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September 27, 1996

Cheryl A. Leanza, Esq.
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1919 M. Street, N.W.
Washington, D.C. 20554

CC Docket 96-149

Dear Ms. Leanza:

In our meeting last week you requested a written follow-up concerning a few specific inquiries. Bell Atlantic responds as follows:

Reporting Requirements for Section 272(e)(1) -- While there is no need to impose any reporting requirement, if the Commission should impose such a requirement, it should only be done using aggregate data. As Bell Atlantic explained in its comments, section 272 is a balanced and detailed set of rules that neither needs nor allows for a regulatory overlay by the Commission. In particular, section 272(e)(1) sets a nondiscrimination benchmark for provision of access and exchange service -- that the time to provide such service to unaffiliated third parties be "no longer" than the time it takes a Bell company to provide the same service to itself and its affiliate. The Act does not raise the need for additional reporting requirements. Indeed, where section 272 does contemplate producing information to accommodate enforcement, it does not require new reports, but rather that existing "financial accounts and records" be made available. (§ 272(d)(3)(A)) And even that requirement is geared toward the enforcement of section 272(b) separation requirements, not the section 272(e)(1) non-discrimination requirement. (§ 272(d)(1)) That is because the Act recognizes that AT&T, MCI and other access customers of the Bell companies are more than adequate watchdogs over nondiscrimination requirements. No burdensome reporting requirement is needed.

If the Commission should nevertheless decide to impose a reporting requirement to enforce section 272(e)(1), it must avoid competitors' suggestions to require an item by item accounting of every transaction. Not only would such a report be incredibly burdensome, it could require the reporting carrier to reveal competitively sensitive customer-specific information that would reveal both provision of service by the local company and purchase of service by the long distance affiliate. This could harm competition in both local and long distance services. In contrast, even existing ONA nondiscrimination installation reports, which are themselves

unnecessary, require only aggregate data for average service interval and for due dates missed.[1] Under this reporting system, there have been no complaints of local exchange carriers favoring affiliated enhanced service providers, and there is no basis to expect anything different with regard to provision of service to affiliated long distance providers.

The Scope of Section 272(e)(4) -- By express language, section 272(e)(4) is a grant of authority by which a Bell company "may provide any interLATA or intraLATA facility or service to its interLATA affiliate . . ." The provision makes no sense unless it is read to allow Bell companies to provide in-region interLATA facilities and services to their affiliates and other carriers during the period that a separate long distance affiliate is required.

Such an interpretation is not only consistent with the language of the provision, it makes good policy sense. The Act contemplates new competition for local services (§ 251) ***and*** new competition for long distance services (§ 271). While section 272 sets up temporary separation requirements, the Act does not contemplate requiring a new competitor to choose between building a wholly independent network that would only be necessary for the three year separation period, or alternatively being dependent on the resale of incumbents' long distance services. Instead, Congress recognized that the section 272 affiliate may give its customers the benefit from network economies of scope by purchasing network facilities and services from the affiliated Bell companies. The Act offers the safeguard that any service, including interLATA service, must be offered to unaffiliated carriers on the "same terms and conditions" as offered to the affiliate.

The balance struck by the Act in section 272(e)(4) contrasts with the treatment of local interconnection services in section 251. There, Congress set forth specific rules and guidelines as to how those services must be offered to enable competition. Clearly, if Congress had meant for the new long distance competitors to be dependent on the incumbents' networks, they would have included similar safeguards for their protection. That they did not is a recognition that the Act allows the new entrants the right to purchase intraLATA and interLATA service and facilities from the affiliated Bell company, thereby offering consumers the best chance for lower prices through more efficient networks.

Successors and Assigns Under Section 3(4) -- The Act limits the definition of a Bell Operating Company to the operating telephone companies listed in Section 3(4) and any "successor or assign" that provides wireline exchange service. Similar language is used in Section 251(h) to define incumbent local exchange carriers ("LECs").

A "successor or assign" is an entity that inures to all or substantially all of the assets and liabilities of another. As the D.C. Circuit explained, a successor "takes the place that another has left, and sustains the like part or character."[2] In other words, the Bell operating company must

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1 ***See Filing and Review of Open Network Architecture Plans***, 5 FCC Rcd 3084 (1990).

2 ***Safer v. Perper***, 569 F.2d 87, 95 (D.C. Cir. 1977)) (citing ***Wawak Co. v. Kaiser***, 90 F.2d 694, 697 (7th Cir. 1937).

cease to perform its role as a LEC, and the successor must take its place. In contrast, an affiliate of a Bell company that does not take over the role as local service provider is specifically exempted from the reach of the statute. (§ 3(4)(C))

Under this standard, when a Bell company or incumbent LEC changes its legal identity, the newly named corporation is a successor or assign. So, for example, when C&P of Maryland became Bell Atlantic-Maryland, Inc., had a new company been created, it would have been a successor of the old and still subject to the restrictions placed on a Bell operating company even though it would not have been one of the companies named in Section 3(4)(A). This standard does not, however, restrict the ability of affiliates to perform marketing, support or other functions if they do not take the place (e.g., succeed to all or substantially all of the assets and liabilities) of the old entity. For example, as Bell Atlantic has previously explained, a marketing affiliate that merely offers an additional sales channel for the local exchange company's services is not a successor or assign of the LEC. In such a case, the local exchange company is still the "provider" of "wireline telephone exchange service." The affiliate simply acts as a reseller or as an agent of the LEC. The same is true of a service affiliate of a Bell company which provides legal and other administrative services to the Bell company and to other affiliates. The service affiliate is not a provider of wireline telephone exchange services and therefore can not fall under the definition of a Bell Operating Company.

Continuing Equal Access Obligations Under Section 251(g) -- Existing equal access and nondiscrimination rules are temporarily preserved under Section 251(g). This principally refers to Appendix B of the MFJ -- "Phased-in BOC Provision of Equal Exchange Access." That provision covers technical requirements for interconnection of competing long distance carriers, and it carries forward even after a Bell company is authorized to provide its own long distance service in-region. Commission rules that supplement the MFJ equal access rules would also survive under section 251(g).[3] The general savings clause of section 251(g) cannot, however, be read as an override to the specific requirements of section 272.[4] Specifically, under section 272(g)(2), once Bell companies are granted authority to provide in-region service, they also have the right to sell and market the long distance service of their separated affiliate. As we discussed in our meeting, included in that authority is the ability to actively promote the affiliate's long distance product on both out-bound and in-bound calls. This allows Bell companies to compete with other full service providers and is no different that what they may do today to market and sell customer premises equipment. As the Act makes clear, this is not discrimination and nothing in the generic savings clause of section 251(g) can be read to impair that right.

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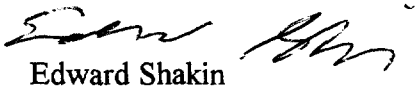
[3] *See, e.g.*, 47 C.F.R. § 64.704(b)(1).

[4] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

Please call me if you have any questions or would like to discuss these issues further.

Sincerely,



Edward Shakin

cc: William F. Caton, Secretary