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

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

PETITION FOR RECONSIDERATION OF
MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

Summary ii

Introduction 1

A. The Order Fails to Implement the Separation and Nondiscrimination Required by Section 272 3

B. The Order Fails to Impose Reporting Requirements Necessary to Enforce the Nondiscrimination Requirements of Section 272 10

Conclusion 13

SUMMARY

MCI Telecommunications Corporation (MCI) requests that the Commission reconsider and modify its First Report and Order and Further Notice of Proposed Rulemaking (Order) in this proceeding so as to strengthen its separation and nondiscrimination reporting requirements. If Section 272 is not implemented properly, the degree of separation between a Bell Operating Company (BOC) and its separate interLATA affiliate and the nondiscrimination requirements imposed on the BOCs will not be sufficient to protect against cross-subsidization and anticompetitive conduct if and when the BOCs enter the in-region interLATA market.

The Order permits joint ownership by a BOC and its affiliate of property used for purposes other than switching and transmission, joint research and development and shared administrative services. It also allows the affiliate to construct, own and operate its own local exchange facilities.

These aspects of the Order allow such a close intertwining of the operations of the BOC and its affiliate that in some areas of activity, they will be fully integrated and will not be operating independently. Moreover, the integrated operations allowed by the Order will require the same cost allocations that the separation requirements were intended to avoid. For example, if the separate affiliate is permitted to provide both local and in-region interLATA services, those functions will not be separate, and both the BOC and its affiliate will be in the local

exchange business, precluding the separation and independent operations required by Section 272(b). Shared administrative services also violate the separation requirements, especially the separate employee requirement of Section 272(b)(3), and will necessitate cost allocations.

The Order also permits the BOCs to transfer their official services networks (OSNs) to their affiliates. The OSNs were left with the BOCs at divestiture on the understanding that they would be used only for local services. If excess capacity has been built into the OSNs for interLATA purposes, and they are ultimately used for both local and interLATA services, the BOCs have been engaging in massive cross-subsidization. Moreover, since the OSNs have been tailored to the BOCs' own needs, they will provide a unique, discriminatory benefit to the BOCs and their affiliates that no other entity could extract from the OSNs. Making them available to other entities on a supposedly nondiscriminatory basis thus cannot cure the inherent discrimination and cross-subsidization that will occur if they are transferred to the separate affiliates.

The Order also fails to impose performance and quality of service reporting requirements to detect and prevent violations of Sections 272(c)(1), 272(e)(2) and 272(e)(4). Degradation of the quality of service provided by BOCs to rivals, which would violate those provisions, is a significant anticompetitive threat and cannot be prevented without the kinds of reporting measures proposed by MCI and AT&T.

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Introduction

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby requests that the Commission reconsider and modify its First Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding (Order) in the manner discussed below.[1] The Order sets forth structural separation and other non-accounting safeguards to be applied to previously barred Bell Operating Company (BOC) activities once the BOCs are authorized to engage in such activities under the criteria set forth in the Telecommunications Act of 1996 (1996 Act).[2] Such safeguards are intended to implement the separation and nondiscrimination provisions in the new Sections 271 and 272 of the Communications Act of 1934, added by the 1996 Act, the purpose of which is to ensure that BOC entry into new lines of business does not produce the same anticompetitive consequences as the former Bell System.

Unfortunately, the Order fails to accomplish that goal. The

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[1] FCC 96-489 (released December 24, 1996).

[2] Pub. L. No. 104-104, 110 Stat. 56.

regulatory scheme promulgated in the Order does not reflect the separation between a BOC and its interLATA affiliate required by Section 272(b) of the Act, nor does it properly implement the nondiscrimination requirements imposed on BOCs by Section 272(c)(1). The inadequate separation and nondiscrimination regime set forth in the Order thus cannot possibly accomplish the intent of those provisions, which is

> to protect subscribers to BOC monopoly services, such as local telephony, against the potential risk of having to pay costs incurred by the BOCs to enter competitive markets, such as interLATA services ..., and to protect competition in those markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter.[3]

The Order appears, at first, to recognize the dangers posed by inadequate separation and nondiscrimination regulations:

> In enacting section 272, Congress recognized that the local exchange market will not be fully competitive immediately upon its opening. Congress, therefore, imposed in section 272 a series of separate affiliate requirements applicable to the BOCs' provision of certain new services and their engagement in certain new activities. These requirements are designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition.[4]

Thus, the degree of separation and the effectiveness of the nondiscrimination required by Section 272 is intended to provide protection to ratepayers and consumers sufficient to make up for the lack of fully developed local service competition. The Order, however, fails to carry out that intent.

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[3] Order at ¶ 6.

[4] Id. at ¶ 9.

A. The Order Fails to Implement the Separation and Nondiscrimination Required by Section 272

The most striking shortcoming in the Order is its implementation of Section 272(b)(1), which requires that a BOC's separate affiliate "operate independently" from the BOC. Although the Commission goes through the motions of ordering such independent operation, such as prohibiting a BOC and its separate affiliate from joint ownership of transmission and switching facilities and from performing operating and other functions associated with the other's facilities, those limited, technical restrictions are rendered moot by other provisions in the Order.

Thus, the Order permits joint ownership of property used for purposes other than switching and transmission, such as marketing or administrative services. Also, the separate affiliate is permitted to construct, own and operate its own local exchange facilities and may purchase unbundled network elements from the BOC for that purpose, with the BOC performing all operating, installation and maintenance functions associated with those facilities.[5]

MCI and other parties emphasized the risks that would be created by the provision of local services by a BOC's separate affiliate. Very simply, the BOC's local exchange and in-region interLATA operations will no longer be separate if the interLATA affiliate is also allowed to own and operate local service

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[5] Id. at ¶¶ 158-70.

facilities. If both the BOC and its separate affiliate are in the local exchange business, it will be impossible for them to operate independently or for the Commission to ascertain whether they are operating independently. In effect, both the BOC and its interLATA affiliate would be sharing the use of and acting through the affiliate's local service operations, requiring precisely the coordination and integrated activities that are the antithesis of independent operation.

Also, a separate affiliate's provision of local service will not be subject to all of the nondiscrimination and interconnection requirements imposed on incumbent LECs by the 1996 Act, particularly Section 251. Thus, the separate affiliate's local services could become a massive loophole through those requirements, as more and more local, intraLATA and in-region interLATA services are provided on an integrated, largely deregulated basis by the separate affiliate. Meanwhile, unaffiliated entities and the public would be forced to rely on the BOC's incumbent local service operations, which could be allowed to become obsolete and fall into disrepair.

Moreover, the Order permits the BOCs to transfer their Official Services Networks (OSNs) to their affiliates as long as all entities have an equal opportunity to acquire such facilities from the BOCs.[6] The OSNs were constructed, and left with the BOCs upon divestiture, however, on the understanding that, although they are interLATA networks, they would be used only for

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[6] See id. at ¶¶ 218, 266.

local exchange and intraLATA services.[7] If a BOC's OSN were to be transferred to its separate affiliate, the question would then arise as to what the BOC would use for its internal interLATA needs. The affiliate might have to make capacity in the OSN available to the BOC. It would only be possible to use the OSN for both local and interLATA services in such a manner, however, if there were excess capacity in the OSN. If excess capacity has been built into the OSNs in preparation for interLATA use, the BOCs have been engaging in massive cross-subsidization.[8] Moreover, since the OSNs were tailored for the BOCs' needs, they will provide a unique, discriminatory advantage to the BOCs and their affiliates that no other entity could extract from the OSNs. Since no other interexchange carrier (IXC) is likely to be interested in acquiring an OSN, making the OSNs available for acquisition on a nondiscriminatory basis will not cure the inherent discrimination and cross-subsidies that will occur if they end up with the BOCs' separate affiliates.

The Order also allows a BOC to engage in joint research and development, unrelated to manufacturing, with its affiliate and to develop new services and features for its affiliate, as long as such research and development services are also offered to others on a nondiscriminatory basis.[9] The Commission's Computer

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[7] See Western Electric Co. v. United States, 569 F. Supp. 1057, 1098-99 (D.D.C. 1983).

[8] See MCI Comments at 25 (filed Aug. 15, 1996).

[9] See Order at ¶ 169.

II[10] separation rules, however, which provide guidance on the meaning of "structural separation" and the concept of independent operation in the telecommunications context,[11] prohibited such joint activities.[12] The Order also permits a BOC and its separate affiliate to share administrative services. Moreover, the parent Regional Holding Company or another affiliate may perform services for both the BOC and its interLATA affiliate.[13]

As interpreted in the Order, Section 272(b) thus appears to be collapsed into a mere prohibition on joint ownership of certain facilities, rather than anything approaching a requirement of independent operation and meaningful separation. The Order allows close coordination in many facets of the BOC's and separate affiliate's operations. The joint provision by the separate affiliate of local and in-region interLATA services allowed by the Order especially undermines Section 272(b).

The Order emphasizes repeatedly, as a justification for its approach, that all facilities and services obtained from the BOC must be provided on a nondiscriminatory basis and thus made

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[10] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980)(Computer II Order), mod. on reconsideration, 84 FCC 2d 50 (1981), mod. on further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

[11] See Computer II Order at 477-78 (discussing policy of "maximum separation").

[12] See id. at 479.

[13] Order at ¶¶ 178, 182.

available to others,[14] but that does not fulfill the requirements of Section 272(b). At one point, the Order even states that "[w]e decline to impose additional structural separation requirements given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272."[15] The problem with that policy decision is that Congress has already made a contrary policy choice. Congress imposed nondiscrimination safeguards, the audit requirement and other safeguards in Section 272 in addition to the separation requirements of Section 272(b). If Congress had intended that BOC provision of in-region interLATA and other competitive services need only satisfy nondiscrimination and other non-structural requirements, it would not have imposed the separation requirements of Section 272(b), particularly the independent operation requirement of Section 272(b)(1). Having done so, it is now incumbent on the Commission to implement those requirements fully.

The close interweaving of the operations of the BOC and its affiliate allowed by the Order is also at odds with the stated rationale for the minimal legal separation that the Order does impose. The reasons given for the prohibition of joint ownership of certain facilities are, in addition to the prevention of discrimination, "to prevent a BOC from integrating its local exchange and exchange access operations with its section 272

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[14] See, e.g., id. at ¶ 160.

[15] Id. at ¶ 167.

affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently"[16] and to "avoid[] the need to allocate the costs of such ... facilities between BOC activities and the competitive activities...."[17]

The integration that the Order does allow, however, and the cost allocation that will be required, undercut those rationales. Providing unbundled elements, OSN facilities and administrative services to a separate affiliate and permitting the affiliate to provide local services will intertwine the planning and operations of the BOC and its affiliate to such an extent that, in a number of areas of operation, it will be virtually impossible to know where one entity's activities end and the other's begin. Moreover, the same cost allocations will be required as would have been required if joint ownership of facilities had been allowed. The only difference is that instead of allocating the costs of jointly owned facilities, it will be necessary to allocate costs between the facilities, elements and services the BOC provides to its affiliate and those it provides to all others, an equally intricate and error-prone task. The Order thus accomplishes nothing in the way of avoiding cost allocations and integration of operations.

Permitting a BOC to provide administrative services to its affiliate also undermines the separate employee requirement of Section 272(b)(3). If the BOC may perform services for the

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[16] Id. at ¶ 158.

[17] Id. at ¶ 159.

affiliate, as the Order allows, the affiliate will not need employees for those functions. The affiliate thus becomes a legal fiction controlled by the BOC in those areas of activity, in violation of both the independent operation requirement of Section 272(b)(1) and the separate employee requirement of Section 272(b)(3).

Perhaps the most telling point on this issue is the Commission's response to AT&T's argument that Section 272 was intended to achieve "'fully separate operations'" between a BOC and its affiliate.[18] Rather than stating that the Commission's interpretation in fact accomplishes that end, the Order instead states that AT&T is citing an irrelevant legislative document for that assertion.[19] In other words, according to the Order, the sharing of administrative services is appropriate under Section 272(b), since that provision is not intended to bring about "fully separate operations." It is difficult to understand, however, how a separate affiliate requirement, under which the affiliate is supposed to "operate independently" from the BOC, should not be expected to bring about fully separate operations.

In short, the intertwining of the activities of a BOC and its separate affiliate allowed by the Order will prevent the accomplishment of the stated goal of this proceeding, which was to implement Section 272 such that the BOCs cannot use their continuing local exchange monopoly power to discriminate against

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[18] Id. at ¶ 178 n. 432.

[19] Id.

interexchange competitors and cross-subsidize their interLATA and other competitive services with local and access revenues.[20]

B. The Order Fails to Impose Reporting Requirements Necessary to Enforce the Nondiscrimination Requirements of Section 272

The failure to impose reporting requirements to detect and prevent violations of Sections 272(c)(1), 272(e)(2) and 272(e)(4) should also be corrected. The nondiscrimination requirements of Section 272(c) and (e) clearly prohibit the BOCs from discriminating in the quality of the local and access services they provide. Degradation of the quality of services provided to rivals is as effective an anticompetitive strategy as the use of any other discriminatory tactics. Moreover, information about the quality of access services that the BOCs are providing to their affiliates will be unavailable if a reporting requirement is not imposed.

The Order finds that such requirements are unnecessary because of the structural and transactional requirements of Section 272 -- including the requirement to operate independently[21] -- the biennial audit requirement, the need to demonstrate satisfaction of the conditions for in-region authority,[22] the threat of the complaint remedy, other disclosure requirements and the possibility of incorporating performance and

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[20] See id. at ¶¶ 6, 9.

[21] Id. at ¶ 322.

[22] Id. at ¶ 323.

quality standards in local interconnection agreements.[23]

None of these reasons provides adequate justification for rejecting quality of service reporting requirements, however. In fact, they reinforce the need for such requirements. The complaint remedy, for example, is toothless unless a complainant can set forth a prima facie case. In the case of discriminatory service provisioning, a complainant may suspect it is not getting the service it should, but without quantifiable performance and quality of service measures, it will not be able to demonstrate that it is receiving lesser service from a BOC than the BOC's own affiliate enjoys. It is also internally inconsistent for the Commission to reject reporting requirements to implement Section 272(c)(1) on the basis of the separation requirements and the audit requirement, since the Order also "decline[s] to impose additional structural separation requirements given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272."[24] Various provisions in Section 272 cannot be presumed to substitute for one another, since Congress deemed each of them necessary in concert with all of the others.

The need to demonstrate compliance with the conditions for in-region authority, the possibility of incorporating performance and quality standards in interconnection agreements and the other disclosure requirements in the Act also provide no justification

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[23] Id. at ¶¶ 324-26.

[24] Id. at ¶ 167.

for the absence of service quality reporting requirements. The other disclosure requirements cannot take the place of performance and service quality reporting requirements, since the other disclosure requirements, such as the requirement that transactions between the BOC and its affiliate be written and available to the public, are either irrelevant to or implicitly depend on nondiscriminatory service provision. Moreover, if there are no uniform performance and service quality reporting requirements, it will not be feasible to check on a Section 271 applicant's assertions that it is, in fact, providing service on a nondiscriminatory basis. Indeed, the importance of a thorough review of Section 271 applications for in-region authority is another reason for stringent service quality reporting requirements.

Finally, the interconnection agreements being negotiated or arbitrated under Sections 251 and 252 have little bearing on the nondiscrimination provisions of Section 272(c). The latter address the equality of treatment of a BOC's interLATA affiliate and all others, while the interconnection agreements address the equal treatment of the BOC and its local service competitors. To the extent that IXCs need different features and services from local service providers, nondiscrimination in the latter context cannot provide useful protection for IXCs. Moreover, the BOCs are resisting requests to include performance and service quality standards, let alone reporting requirements, in interconnection agreements, and state commissions are not requiring them to do

so. For example, the North Carolina Utilities Commission recently declined to adopt any performance or service quality standards in its Recommended Arbitration Order in response to MCI's petition for arbitration of its interconnection with BellSouth Telecommunications, Inc., stating that

> The Commission believes that it is neither appropriate nor practical for it to become involved, at least at this stage, in the minutiae of performance standards. These are quintessentially matters for negotiation between the parties concerned, who possess superior knowledge about the processes involved. It would be premature for the Commission to impose either a "one size fits all" approach, or an apprach which would lead to different sets of performance standards applicable to each ILEC with respect to each [competitive provider].[25]

This is typical of MCI's experience on this issue. This Commission thus cannot dismiss the need for performance and service quality reporting requirements on the ground that somehow, someone else will take care of it.

Conclusion

Accordingly, in order to fulfill the Commission's stated goals in this proceeding and to implement Section 272 in a manner consistent with its language and intent, the Order should be modified to impose more stringent separation requirements. Not only should the BOC and its affiliate not jointly own any transmission or switching facilities, but they also should not

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[25] Recommended Arbitration Order at 11-12, Petition of MCI Telecommunications Corporation for Arbitration of Interconnection with BellSouth Telecommunications, Inc., Docket No. P-141, Sub 29 (N.Car. Util. Comm. Dec. 23, 1996).

jointly own or use any facilities or other property. The OSNs also should not be transferred to or made available to the interLATA affiliates under any conditions. Moreover, a separate interLATA affiliate should not be permitted to construct, own or operate local service facilities or take unbundled network elements from its affiliated BOC for the provision of such services. Finally, the Order should also be modified to prohibit any sharing of administrative services between a BOC and its affiliate as well as joint research and development.

The Order should also be modified to impose reporting requirements to facilitate the enforcement of Section 272(c)(1) and Section 272(e). The Section 272 report format proposed by the Commission in the Further Notice[26] should incorporate the service quality measures suggested in MCI's and AT&T's ex parte letters on the issue.[27] The BOCs should be required to report, at a minimum, the failure frequency of local and exchange access circuits, local and exchange access service repeat troubles as a percentage of trouble reports, and the percentage of exchange access circuit failures within 30 days of installation.

Such modifications are essential if Section 272 is to be properly implemented. Moreover, without these improvements, satisfaction of the Section 271 requirement that in-region

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[26] Id. at ¶ 371.

[27] See Letter from Frank W. Krogh, MCI, to William F. Caton, Secretary, FCC, dated Nov. 1, 1996; letter from Charles E. Griffin, AT&T, to William F. Caton, Secretary, FCC, October 3, 1996, at 3-5.

services will be provided in accordance with Section 272 will be meaningless. Reconsideration of the Order as requested herein is thus a necessary prerequisite to any consideration of an application under Section 271 to provide in-region service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that a true copy of the foregoing "PETITION FOR RECONSIDERATION" was served this 20th day of February, 1997, by hand-delivery or first-class mail, postage prepaid, upon each of the following persons:

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