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

REPLY TO OPPOSITIONS TO AT&T CORP. PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby replies to the oppositions to its petition for reconsideration of the First Report and Order[1] ("Order") in this proceeding.

AT&T sought reconsideration of a single issue: the Commission's interpretation of § 272(b)(1)'s requirement that a Bell Operating Company ("BOC") affiliate established pursuant to § 272 "shall operate independently from the [BOC]." The Order specifies just four requirements to implement § 272(b)(1), ruling that the section prohibits: (i) joint ownership by a BOC and its § 272 affiliate of facilities used to provide local exchange and exchange access; (ii)

[1] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996 ("Order"). A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to this reply. All citations to parties' pleadings are to oppositions to petitions for reconsideration, unless otherwise indicated.

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joint ownership of the land and buildings where those facilities are located; (iii) performance by the § 272 affiliate of operating, installation, and maintenance functions associated with BOC facilities; and (iv) performance by the BOC or its other affiliates of operating, installation, and maintenance functions associated with facilities that the § 272 affiliate owns or obtains from a third party.

With the exception of the BOCs, the commenters that address the question agree unanimously that the Commission's reading of § 272(b)(1)'s "operate independently" requirement cannot be squared with the plain language or intent of that section.[2] The safeguards Congress imposed in § 272 are a critical component of the 1996 Act's plan to open the nation's local telephone exchange monopolies to competition. To that end, § 272 establishes strict and extensive separation requirements intended to deter discrimination, cost misallocation, price squeezes and other BOC abuses of any market power they may retain when they enter previously prohibited markets. In order to protect both consumers and competition, the Commission must enact the full array of protections Congress intended. As AT&T and MCI showed in their petitions, the limited set of restrictions the Order imposes cannot reasonably be found to ensure the independent operation of BOCs and their § 272 affiliates.

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2 See AT&T Petition, pp. 1-10; MCI Petition, pp. 3-10; Cox, p. 1; TRA, pp. 9-12. The BOC commenters support the Commission's interpretation, or seek to vitiate even the minimal limitations the Order imposes. See Ameritech, pp. 2-12; Bell Atlantic / NYNEX, pp. 2-5; BellSouth, pp. 5-8; SBC, pp. 2-6; U S West, pp. 1-13.

I. The Order Is Contrary To The Plain Language of § 272(b)(1)

Section 272(b)(1) imposes a straightforward and unequivocal mandate: a BOC and its § 272 affiliate "shall operate independently." Congress simply did not direct the Commission to mandate operational independence only to the extent that doing so would not limit BOCs' ability to achieve economies of scale and scope; nor did it authorize the Commission to balance the administrative burdens of separation against the efficiencies that a BOC might gain by integrating its local and long distance operations. Indeed, the entire purpose of § 272 is to prevent such integration for a period of at least three years.

The Order correctly holds that § 272(b)(1) imposes substantive requirements that go beyond the other structural and transactional restrictions of § 272. Although a few BOCs attempt to argue that § 272(b)(1) is fully implemented by the other requirements of § 272,[3] these contentions plainly are without merit. These commenters purport to rely on the maxim expressio unius est exclusio alterius, or on some variant of that principle. However, as AT&T showed in its opposition to BellSouth's petition for reconsideration, expressio unius provides only that the inclusion of multiple items in a list of statutory requirements creates a presumption that items not included were intentionally omitted -- that precept has never constituted grounds to ignore a particular requirement altogether.[4] It is beyond cavil that § 272(b)(1) has substantive meaning; the issue before the Commission is how, not whether, to interpret "operate independently."

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[3] See Ameritech, p. 11; Bell Atlantic / NYNEX, pp. 4-5.

[4] See AT&T, p. 3.

No party to this proceeding can seriously contend that the minimal set of requirements the Commission imposed is consistent with the ordinary meaning of the words "operate independently." Two BOCs seek to argue that the phrase has no plain meaning,[5] but that claim is specious. While "operate independently" is not self-executing, and the Commission enjoys some discretion to shape the specific requirements necessary to implement § 272(b)(1),[6] it certainly is possible to determine whether the minimal requirements the Order imposes are consistent with the ordinary meaning of that section's operative language.

As the Commission's order now stands, its § 272 regulations can be interpreted to require that a separate affiliate be nothing more than a shell corporation that i) has its own directors and officers; ii) owns its own switching and transmission facilities (to the extent it does more than simply resell other carriers' services); and iii) employs a skeleton crew of employees to maintain and install those switching and transmission facilities.[7] A BOC and its § 272 affiliate arguably could perform every other function on an integrated basis.

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5 See Ameritech, p. 4; U S West, pp. 3-4.

6 See AT&T Petition, p. 4.

7 As AT&T observed in its petition, it is not clear whether the Commission would in fact permit a BOC to operate its § 272 affiliate in such a fashion. See AT&T Petition, p. 2 n.5. At one point in the Order, the Commission explicitly provides that, to the extent a function is an "integral part" of an activity subject to § 272, it "must be conducted through the section 272 affiliate." Order, ¶ 169. Nevertheless, as the Order now stands, there is a substantial risk that the BOCs will assert a contrary reading of § 272. Although CLECs could seek redress through complaint proceedings, even expedited resolution of such disputes will not be sufficient to prevent severe -- and possibly irreversible -- competitive injury.

The mere shell described above could not reasonably be deemed to "operate independently" of its BOC sibling. Nor is this a mere theoretical concern. Recent press reports indicate that Ameritech has begun "shifting the most important functions of its two-year-old long distance unit" back to its local exchange company.[8] Although Ameritech now contends that the Commission's interpretation of § 272 is consistent with the language and intent of that provision, it originally designed its affiliate with more significant separation of functions -- presumably based, at least in part, on its predictions of how the Commission could reasonably be expected to interpret § 272. In addition, the state commissions that have granted certificates of public convenience and necessity to Ameritech's § 272 affiliate have acted on the basis of the more separated corporate structure it originally proposed. Indeed, before the Commission issued the instant order, it seemed implausible that § 272 could potentially be read to require so little separation of BOCs and their affiliates, and it does not appear that any BOC initially structured its operations so as to permit the extensive integration that the Order arguably permits.

Three BOC commenters assert that the Order's interpretation of § 272(b)(1) represents a reasonable balance of "operational independence" with their desire to obtain efficiencies by integrating their local and interexchange operations.[9] Yet the BOCs can point to nothing in § 272(b)(1) or elsewhere in § 272 that authorizes the Commission to "balance" operational independence against any other value. Section 272(b)(1) is terse and unequivocal, requiring simply that BOCs and their affiliates "shall operate independently." Congress thus

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8 See, e.g., Jim Kirk, Ameritech Centralizes, Chicago Sun-Times, April 8, 1997, at 41 (attached as Exhibit 1).

9 See Ameritech, p. 6; Bell Atlantic / NYNEX, pp. 2, 5; BellSouth, p. 6.

already has balanced the benefits of integration, the risk of BOC cross-subsidy and other abuses, and the public's interest in competition. Indeed, § 272 provides no metric against which the Commission could balance integration versus separation. Even if such a balancing were authorized (as it plainly is not), the Order never reveals what standard the Commission employs to determine how great a risk of anticompetitive behavior should be tolerated in order to permit the BOCs to integrate their local and long distance operations. In fact, the Order never finds that its requirements will ensure independent operation, but merely states that it has achieved an unspecified "balance" not contemplated by § 272.

Some BOCs also assert that § 272(g)'s grant of permission for joint marketing somehow supports the Order's reading of § 272(b)(1).[10] If anything, that subsection cuts strongly against their position. The most natural reading of § 272(g) is that Congress understood that in the absence of an express grant of authority to conduct marketing and sales activities jointly, the other restrictions of § 272 -- such as the requirement that BOCs and their affiliates operate independently -- would prohibit such conduct.[11] Any other interpretation renders § 272(g) surplusage, as there would be no need for Congress expressly to permit a power already implied elsewhere in § 272. Indeed, Congress' inclusion of express permission for joint marketing is a

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10 See Ameritech, pp. 11-2; Bell Atlantic / NYNEX, p. 3.

11 Thus, SBC's observation that § 272 does not expressly prohibit "shared services" proves nothing. SBC, pp. 9-10. The section plainly does not explicitly permit shared services either; and both § 272(b)(1) and the limited grant of permission for joint marketing in § 272(g) militate strongly against SBC's reading (as do the underlying aims of § 272 and the Commission's previous interpretations of "operate independently.").

strong indication that joint activities which are not explicitly authorized are forbidden by § 272(b)(1).

II. The Commission's Interpretation Of "Operate Independently" Fails To Take Into Account The Requirements Of § 274(b)

The BOC commenters also oppose AT&T's contention that the Order failed adequately to take into account Congress' use of the phrase "operated independently" in § 274(b) of the 1996 Act, which the Commission concluded is significantly more restrictive than § 272(b)(1). First, Ameritech argues that § 274(b) includes provisions that would render parts of § 272 surplusage.[12] AT&T recognized this concern in its petition, but as it stated there, the Commission must offer some reasoned basis for choosing one interpretive strategy over another.[13] As AT&T showed in its petition for reconsideration of the § 274 order, the Commission's rules now provide no fewer than four distinct definitions of the phrase "operate independently."[14] Ameritech offers no reason why this confusing state of affairs should be preferred to an interpretation that reads § 274(b) and § 272(b)(1) consistently, but creates some overlap among statutory provisions.[15]

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12 See Ameritech, pp. 7-8.

13 See AT&T Petition, p. 8, n.20.

14 See AT&T Petition For Reconsideration, filed March 24, 1997, at 4 in First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997.

15 U S West averts to the maxim that a statute's omission of specific elements in one section which are included in another is evidence of a different congressional intent in each of the two provisions. U S West, p. 5, n.16. This argument is simply a variation of the expressio unius claims discussed above, and it is equally inapposite. Congress used precisely the same formulation in § 272(b)(1) as in § 274(b). The Commission has held

(footnote continued on next page)

Second, SBC observes that § 274 regulates BOCs' provision of electronic publishing, which it claims is a "very different industr[y]" from those addressed in § 272.[16] This is a distinction without a difference, as SBC offers no explanation why the alleged (and unspecified) disparities between these businesses support its claim. In any event, the Commission did not assert that such distinctions were the basis for its differing interpretations of "operate independently."[17]

III. The Commission Failed Adequately To Consider Or Distinguish Its Prior Interpretations Of The "Operate Independently" Requirement

Finally, the BOCs offer wholly unpersuasive opposition to AT&T's contention that the Order fails adequately to account for the Commission's interpretation of the phrase "operate independently" in its Computer II and cellular separation rules. Bell Atlantic and NYNEX argue that because Congress enacted specific requirements in § 272, the Commission's prior

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(footnote continued from previous page)

that the subparts of § 274(b) define the term "operate independently," whereas § 272(b)(1) is not followed by any definitional provisions. Congress thus cannot be said to have omitted certain specific terms in § 272(b)(1) from its list of requirements in § 274(b); rather, it declined to delineate any specific requirements in the former section. Given the lack of a specific definition in § 272(b)(1), the most logical means to interpret that provision is to look to the definitions of "operate independently" provided elsewhere in the 1996 Act and in the Commission's own regulations.

16 SBC, p. 4.

17 See, e.g., SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.").

interpretations of "operate independently" are inapplicable.[18] However, the fact that § 272 imposes certain specific measures in addition to § 272(b)(1)'s mandate of operational independence is simply irrelevant. When Congress enacted § 272(b)(1), it employed a phrase that has long been used in the Commission's rules, and it must be presumed to have understood that "operate independently" was a regulatory term of art.[19] The Commission therefore cannot assume that Congress intended it to modify or abandon its longstanding interpretation of that phrase unless it can provide a well-reasoned basis for that conclusion.

Finally, U S West and Ameritech assert that both telecommunications markets and their regulation have changed significantly since the Commission enacted its prior interpretations of "operate independently."[20] However, the Commission did not offer these rationales as a basis for its decision.[21] Moreover, because "operate independently" is a regulatory term of art, the Commission does not begin the work of interpretation with a blank slate. The Commission's prior interpretations of that phrase express its well-considered opinion, and it cannot modify those

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18 Bell Atlantic / NYNEX, pp. 4-5. These comments also offer the unexplained (and plainly wrong) assertion that the Commission's prior rules did not adopt specific requirements to implement the "operate independently" requirement.

19 Cf., e.g., Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979) (Congress is presumed to know interpretation courts have given to terms used in prior statutes).

20 See Ameritech, p. 9; U S West, pp. 11-14.

21 See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549 (1978) ("[W]hen there is a contemporaneous explanation of the agency decision, the validity of that action must stand or fall on the propriety of that finding, ...").

views without offering a clear explanation of its reasons for concluding that Congress intended it to do so.[22]

CONCLUSION

For the foregoing reasons, and the reasons stated in AT&T's Petition For Reconsideration, the Commission should reconsider and clarify its First Report and Order in CC Docket No. 96-149, as set forth in AT&T's petition.

Respectfully submitted,

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April 14, 1997

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22 See AT&T Petition, pp. 9-10.

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EXHIBIT 1

1ST STORY of Level 1 printed in FULL format.

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Chicago Sun-Times

April 8, 1997, TUESDAY, Late Sports Final Edition

SECTION: FIN; Pg. 41

LENGTH: 504 words

HEADLINE: Ameritech centralizes

BYLINE: BY JIM KIRK

BODY:

Ameritech Corp. is shifting the most important functions of its two-year-old long-distance unit under the wing of its largest consumer and business divisions.

Steve Nowick, president of the long-distance unit, left the company March 21 as a result of the move.

The consolidation of long-distance marketing efforts with all other consumer marketing is the latest in a number of changes at the Chicago-based Bell operating company that have come as full-scale phone competition nears.

Nowick had built Ameritech's long-distance operation from scratch under federal rules that required the separate business unit. When that rule was rescinded late last year, Ameritech decided to pull the important marketing elements under its two biggest business units to gain efficiencies and a single marketing strategy.

More than 100 employees work for the long-distance division in northwest suburban Rosemont.

Asked if there would be any layoffs, a spokesman said he "wouldn't speculate on that. We've gone out and hired and continue to hire the best talent."

The company said that Nowick will remain as a consultant.

The centralizing of functions is a reversal of Ameritech's strategy started in 1993, which set up a variety of separate business units to market to specific customers. The consolidation takes advantage of recent Federal Communications Commission rules that have lessened the burdens of the Baby Bell operations as they get ready to enter the market.

But as full-service phone competition gets closer, company insiders said that the push is also under way to corral resources under its two main units, business and consumer.

"The problem was that you had a separate marketing department in each unit

that was split for consumer and business. They can gain some efficiencies from (doing) this," one Ameritech source said.

The company has said it will consolidate most of its separate advertising functions in an effort to whittle down the number of ad agencies that work on the company's $ 100 million worth of advertising.

Nowick's departure is the latest in a number of changes at several business units. Mitch Wienick, president of the consumer services unit, left to become CEO at CDI Corp., in Philadelphia. Replacing Wienick is the hard-charging John Rooney, who had been head of Ameritech's cellular division.

Insiders said that Rooney being named to head consumer services is seen as a sign that the company wants to shore up its service record on residential phone service, which has come under fire in Illinois and other states within its five-state region.

"We're obviously looking for Jack to bring to the consumer unit the same magic that he brought the cellular unit," said Mike Brand, a spokesman for the company. "We'll miss Mitch. . . . He was an outstanding marketer."

Brand says that the recent top-level shuffling of executives is not a sign of unrest at the top. He said that Ameritech executives have become "targets" for other companies trying to play catch-up.

LANGUAGE: English

LOAD-DATE: April 8, 1997

List of Commenters
(CC Docket No. 96-149)

Ameritech
Association for Local Telecommunications Services ("ALTS")
AT&T Corp.
Bell Atlantic and NYNEX Telephone Companies ("Bell Atlantic/NYNEX")
BellSouth Corporation
Cox Communications, Inc. ("Cox")
MCI Telecommunications Corporation ("MCI")
SBC Communications, Inc. ("SBC")
Teleport Communications Group, Inc. ("TCG")
Telecommunications Resellers Association ("TRA")
Time Warner Cable ("Time Warner")
US West, Inc.

CERTIFICATE OF SERVICE

I, Margaret Smith, do hereby certify that on this 14th day of April, 1997, a copy of the foregoing "Reply To Oppositions To AT&T Corp.'s Petition For Reconsideration" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

Margaret Smith

Margaret Smith

April 14, 1997

APR-14-97 MON 14:06 AT&T LAW DIVISION FAX NO. 9062210405

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