

DOCKET FILE COPY ORIGINAL ORIGINAL

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

RECEIVED

APR 17 1997

Federal Communications Commission
Office of Secretary

CC Docket No. 96-149

In The Matter of)

IMPLEMENTATION OF THE NON-)
ACCOUNTING SAFEGUARDS OF)
SECTIONS 271 AND 272 OF THE)
COMMUNICATIONS ACT OF 1934,)
AS AMENDED)

**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel, hereby submits the following comments on the four issues identified in Public Notice, DA 97-666, released April 3, 1997 (Notice), pertaining to the interpretation and implementation of Section 272(e)(4) of the Communications Act of 1934,² as amended by the

¹ A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services. TRA's resale carrier members are also among the many new market entrants that are, or will soon be, offering local exchange and/or exchange access services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

² 47 U.S.C. § 272(e)(4).

No. of Copies rec'd
List ABCDE

022

Telecommunications Act of 1996.³ The identified issues will be addressed by the Commission in fulfilling its commitment to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit")⁴ to review the interpretation of Section 272(e)(4) announced in the First Report and Order, FCC 96-489, released December 24, 1996, in the captioned docket.⁵

In implementing Section 272(e)(4),⁶ the FCC concluded that the provision "is not a grant of authority for BOCs to provide 'interLATA or intraLATA facilities or services' in contravention of the scheme governing BOC provision of in-region interLATA services in section 271 or the requirement that these services must be provided through a separate affiliate in section 272(a)."⁷ As explained by the Commission, "Section 272(e)(4) is intended to ensure the nondiscriminatory provision of services that the BOCs are authorized to offer directly, and not

³ Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

⁴ Bell Atlantic v. FCC, Case No. 97-1067 (Motion of Federal Communications Commission for Remand to Consider Issues) (D.C.Cir. filed Feb. 25, 1997). TRA, having submitted comments in the Commission's rulemaking proceeding below, intervened in support of the Commission in the aforesaid appeal and opposed the "Motion for Summary Reversal or for Expedited Action" filed by the Bell Atlantic Telephone Companies and Bell Atlantic Communications, Inc. (collectively, "Bell Atlantic") and the Pacific Telesis Group ("PacTel") which led to the remand requested by the Commission.

⁵ In the First Report and Order, the FCC implemented the non-accounting separate affiliate and nondiscrimination safeguards embodied in Sections 271 and 272 of the Communications Act.

⁶ Section 272(e)(4) provides as follows:

A Bell operating company and an affiliate that is subject to the requirements of section 251(c)

(4) may provide any interLATA or interLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

⁷ First Report and Order, FCC 96-489 at ¶ 261 (footnote omitted).

through an affiliate, such as those services exempted from section 271 prior to the sunset of the separate affiliate requirement."⁸ Thus, the Commission concluded, "[I]ike the other subsections of section 272, section 272(e)(4) prescribes the manner in which a BOC must offer services and facilities it is authorized to provide."⁹

Based on its reading of Section 272(e)(4), the FCC held that while the BOCs could use "the capacity on [their] Official Services network[s] to provide interLATA services to other carriers or to end-users," such usage must be "in accordance with the requirements of the 1996 Act and [the Commission's] rules."¹⁰ Thus, a BOC "must provide in-region, interLATA services through a section 272 affiliate as required by section 272(a)." If a BOC desires to utilize its Official Services network to provide in-region, interLATA services, the Commission further explained, it would have to "transfer ownership of its Official Services network to its section 272 affiliate," and in so doing "ensure that the transfer takes place in a nondiscriminatory manner . . . and . . . comport[s] with [the Commission's] affiliate transaction rules."¹¹

Bell Atlantic and PacTel have argued to the D.C. Circuit that the Commission erred in not permitting Bell Operating Companies ("BOCs") to provide interLATA network services and facilities to their interexchange facilities, arguing that the 1996 Act permits them to do so as long as they make those same network services and facilities available to all other carriers on a nondiscriminatory basis and allocate costs properly. In so contending, Bell Atlantic and PacTel raised a number of issues not previously presented in full to, and hence not fully

⁸ *Id.* (footnote omitted).

⁹ *Id.* (footnote omitted).

¹⁰ *Id.* at ¶ 266.

¹¹ *Id.* (footnote omitted).

addressed by, the Commission. For example, Bell Atlantic and PacTel contended that if a BOC provided interLATA network services and facilities to an interexchange affiliate, the BOC would not be "originating" telecommunications service.¹² Moreover, these entities argued that permitting a BOC to provide interLATA network services and facilities to an interexchange affiliate, would not undermine the effectiveness of the Section 272 separations and nondiscrimination safeguards, as implemented by the Commission.¹³ These and other matters are among those on which the Notice seeks comment.

ISSUE 1: Does a BOC "originate" interLATA telecommunications services when it provides interLATA network services and facilities on a wholesale basis?

As the Commission has recognized, "resellers, like other users, are . . . large customers."¹⁴ In other words, any attempt to limit the scope of the term "originate" to retail customers must fail because non-facilities-based resale carriers are also customers of facilities-based providers. Indeed, non-facilities-based resale carriers often more closely resemble retail customers than large corporate users of telecommunications services. For example, a non-facilities-based resale carrier may well have smaller traffic volumes and take service in more geographically-concentrated areas than a large corporate user. Large corporate user may also use telecommunications networks for more diverse and sophisticated applications than would small non-facilities-based resale carriers. Moreover, large corporate users may provide service to large

¹² Bell Atlantic v. FCC, Case No. 97-1067 (Bell Atlantic and PacTel Reply in Support of Motion for Summary Reversal and Response to Motion for Remand at 5) (D.C.Cir. filed Feb. 28, 1997) .

¹³ Id. at 7.

¹⁴ Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993),, 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995).

numbers of retail outlets, branch offices or remote facilities, looking in so doing very much like non-facilities-based resale carriers. Thus, limiting the term "originate" to retail, as opposed to wholesale, customers would create arbitrary and meaningless distinctions.

Certainly, the Congress was aware of the concepts of "retail" and "wholesale" as they apply to the provision of telecommunications service. Indeed, the Congress made use of these very terms in establishing the resale obligations of incumbent LECs in Section 251(c)(4).¹⁵ If the Congress had intended to limit the Section 272(a)(2)(B) structural separation requirement to the retail provision of service and allow BOCs to provide "in-region," interLATA services directly on a wholesale basis, it undoubtedly would have articulated this distinction using the terminology it employed elsewhere in the 1996 Act.

Further with reference to the resale requirement embodied in Section 251(c)(4), it is noteworthy that this requirement imposes on each incumbent LEC the obligation to offer for resale all telecommunications services the incumbent LEC provides at retail, thereby imposing on the incumbent LEC the common carrier obligation to provide wholesale services to any entity requesting such services. This obligation to provide service to all comers confirms that provision of service on a wholesale basis constitutes common carriage. Offered on a common carrier basis, wholesale services fall squarely within the definition of "interLATA telecommunications services" to which the Section 272(a)(2)(B) separate affiliate requirement applies, because they are "offer[ed] . . . for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."¹⁶

¹⁵ 47 U.S.C. § 251(c)(4).

¹⁶ 47 U.S.C. § 153(51).

The Congress' use of the term "originating" in Section 271(b)(1) further confirms that the limitations imposed by the 1996 Act on BOC provision of "in-region," interLATA services apply with equal force to wholesale and retail services. The term "interLATA services" encompasses all "telecommunications between a point located in a local access and transport area and a point located outside such area."¹⁷ This broad definition is limited only by the requirement that there be a "transmission . . . of information . . . without change in the form or content of the information as sent and received."¹⁸ Obviously, a definition of this breadth does not allow for a distinction between the wholesale and the retail provision of service. Hence, Congress' use of the term "originating" in Section 271(b)(1) makes clear that telecommunications are "originated" on both a wholesale and a retail basis.

ISSUE 2: What is the legal significance of the fact that Section 272(e)(4) applies to both intraLATA and interLATA services and facilities?

The Congress' reference to both intraLATA and interLATA services in Section 272(e)(4) simply confirms the accuracy of the Commission's interpretation of that provision in the First Report and Order. As noted above, the Commission concluded in the First Report and Order that Section 272(e)(4) "is not a grant of authority for BOCs to provide 'interLATA or intraLATA facilities or services' in contravention of the scheme governing BOC provision of in-region interLATA services in section 271 or the requirement that these services must be provided through a separate affiliate in section 272(a)."¹⁹ Indeed, as the Commission correctly noted,

¹⁷ 47 U.S.C. § 153(42).

¹⁸ 47 U.S.C. § 153(48).

¹⁹ First Report and Order, FCC 96-489 at ¶ 261 (footnote omitted).

Section 272(e)(4) simply "prescribes the manner in which a BOC must offer services and facilities it is authorized to provide."²⁰

The BOCs have long been able to directly provide intraLATA facilities and services. No Congressional action, therefore, was necessary to permit BOC entry into the intraLATA market or to authorize BOCs to provide intraLATA facilities and services to their affiliates. As such, viewing Section 272(e)(4) as an independent grant of authority renders the references therein to intraLATA facilities and services entirely superfluous. And well settled tenets of statutory construction dictate that statutory provisions should not be read to render words or phrases extraneous or meaningless.²¹

The Commission's reading of Section 272(e)(4) would not produce such a result. Section 272(e)(4) would, as described by the Commission, "ensure the nondiscriminatory provision of services that the BOCs are authorized to offer directly, and not through an affiliate, such as those services exempted from section 271 prior to the sunset of the separate affiliate requirement."²² As such, Section 272(e)(4) not only has meaning, but fits into the overall statutory scheme by avoiding conflict with Section 271(b) or Section 272(a)(2)(B). And, again, according to well settled tenets of statutory construction, individual provisions of a statute

²⁰ Id. (footnote omitted).

²¹ See e.g., Gustafson v. Alloy Co., Inc., 115 S. Ct. 1061, 1069 (1995); Zeigler Coal Co. v. Kleepe, 536 F.2d 398 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973, *cert. denied* 411 U.S. 917 (1974)).

²² First Report and Order, FCC 96-489 at ¶ 261 (footnote omitted).

should be interpreted "to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purposes."²³

ISSUE 3: Are the principal concerns that underlie the separate affiliate requirement of Section 272 less serious in the context of the wholesale provisioning of 'in-region,' interLATA services to affiliates than in the context of the direct retail provisioning of such services?

The simple answer is an emphatic "no;" indeed, safeguards against discrimination and misallocation of costs are all the more critical in wholesale service arrangements. Resale carriers know all too well from their experience in the interexchange and wireless industries that even the slightest preference or discrimination can be highly consequential in a fast-paced competitive environment. A non-facilities-based resale carrier is completely dependent upon its network service provider in virtually all aspects of its operations, looking to that entity for the performance of functions ranging from the provision of telecommunications services and facilities to myriad operational support services such as order provisioning, trouble resolution and billing. Seemingly minor differences in treatment in the right circumstances -- *e.g.*, when a major account is involved -- can be deadly, particularly when competition involves the quality of not only the telecommunications, but all associated and ancillary, services. When there are multiple service alternatives, it can take as little as one bungled repair or one late bill to lose an important account.

Given the comprehensive interaction between a non-facilities-based resale carrier and its network service provider, the opportunities for preference or discrimination abound. Moreover, the likelihood of detection is minimal, rendering the likelihood of effective regulatory

²³ Weinberger v. Hynson, Westcott and Dunning, Inc., 412 U.S. 609, 631 (1973) (*citing Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)).

oversight virtually nil. And this situation is made worse by the importance that seemingly minor differences in treatment can assume in determining the relative competitive success of BOC long distance affiliates versus the existing community of resale carriers.

At least Bell Atlantic and PacTel clearly intend, if permitted, to effect a comprehensive interrelationship between their respective local exchange and interexchange operations. For example, in an affidavit submitted to the D.C. Circuit, James Cullen, Vice Chairman of Bell Atlantic, declared that his company intended to "place the construction, ownership and operation of its long distance network in its operating telephone companies," treating its long distance affiliate as a non-facilities-based resale provider.²⁴ As a result, Bell Atlantic would be able to provide its long distance affiliate with the full benefit of not only hundreds of millions of dollars of capital invested in switching and transmission facilities, but an existing "skilled work force that is trained in the construction, operation, installation and maintenance of telephone facilities and equipment, and that is capable of managing local and long distance facilities alike."²⁵

The Commission has recognized, "BOC entry into in-region interLATA services raises issues for competition and consumers, even after a BOC has satisfied the requirements of section 271(d)(3)."²⁶ As explained by the Commission:

a BOC . . . may have an incentive to discriminate in providing . . . services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information

²⁴ Bell Atlantic v. FCC, Case No. 97-1067 (Bell Atlantic and PacTel Motion for Summary Reversal or for Expedition at Appx. 2) (D.C.Cir. filed Feb. 28, 1997) .

²⁵ Id.

²⁶ First Report and Order, FCC 96-489 at ¶ 10.

services markets, . . . to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys . . . [and to] entrench its position in local markets by making . . . [its] rivals' offerings less attractive. . . . Moreover, . . . a BOC [could] charge[] other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate . . . creat[ing] a 'price squeeze.'²⁷

Given the degree of integration envisioned by Bell Atlantic, all of these scenarios apply in a wholesale environment and then some. In comparison to the retail world, instances of preference or discrimination in a wholesale arrangement will occur more often, have greater impact and be more difficult to detect. As the Commission noted in the First Report and Order, "allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC . . . would create substantial opportunities for improper cost allocation . . . [and] invariably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors."²⁸

Exacerbating this concern, the BOCs' respective long distance affiliates would begin in a highly preferred position. Although the BOCs' so-called "official services" networks were purportedly built to handle intracompany communications,²⁹ these facilities apparently have been constructed with considerable excess capacity. Thus, both Mr. Cullen and Philip J. Quigley, Chairman and Chief Executive Officer of PacTel, have represented on behalf of their respective companies to the D.C. Circuit that by using existing official services networks, each can save in

²⁷ Id. at ¶¶ 10 - 12.

²⁸ Id. at ¶ 163.

²⁹ United States v. Western Electric Co., 569 F.Supp. 1057, 1098-99 (D.D.C. 1983).

excess of one hundred million dollars in new capital investment.³⁰ Moreover, other BOCs have elsewhere confirmed that their official services networks can carry substantial volumes of commercial long distance traffic without impairing their ability to satisfy internal communications needs.³¹ These overbuilt networks have not only been financed with monopoly rents, but have undoubtedly been tailored to meet the needs of the BOC long distance operations. Certainly, such networks have not been built to the specifications of any of TRA's resale carrier members.

In the 1996 Act, the Congress sought to foster fair and equitable competition in all telecommunications markets; it did not intend to materially favor one subset of competitors over all others. Accordingly, the Congress imposed separate affiliate and nondiscrimination requirements on the BOCs, attempting in so doing to safeguard against anticompetitive abuses. To this end, the Congress listed among "the activities that must be separated from the entity providing telephone exchange service . . . interLATA telecommunications services, except out-of-region and incidental services (not including information services) and interLATA services that have been authorized by the MFJ court."³² Allowing the BOCs to provide network services and facilities to their long distance affiliates would negate the effectiveness of these carefully crafted safeguards, permitting the BOCs to fully exploit their preferred market position through integration of local and long distance operations.

³⁰ Bell Atlantic v. FCC, Case No. 97-1067 (Bell Atlantic and PacTel Motion for Summary Reversal or for Expedition at Appx. 2 & 3) (D.C.Cir. filed Feb. 28, 1997) .

³¹ *See, e.g.*, AT&T Response to U.S. Department of Justice Questions Regarding Competitive Evaluation of BOC Section 271 Applications for "In-region," InterLATA Authority at 12 - 14, filed December 13, 1996.

³² S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 150 (1996) ("Conference Report").

As noted above, the Congress recognized no wholesale/retail distinction in barring the BOCs from providing "in-region," interLATA telecommunications services until they had satisfied the Section 271(c)(2)(B) "competitive checklist" and were facing facilities-based competition in the local exchange/exchange access market. Likewise, the Modification of Final Judgment permitted no "wholesale" exception to the bar on BOC provision of interLATA telecommunications services. The rationale underlying both mandates is the same; the potential for anticompetitive abuse is no less -- indeed, it is substantially greater -- in a wholesale environment. While the Commission has allowed a BOC long distance affiliate to offer local exchange service, freeing it to deal on a wholesale basis with its affiliated local operating company,³³ TRA submits that this mistake should not be compounded by creating further and greater opportunities for discrimination and misallocation of costs.

ISSUE 4: Does the extent of concern for discrimination and cost misallocation depend on the particular kind of "in-region" wholesale interLATA service a BOC seeks to offer?

In light of the views expressed by TRA above, TRA's position as to this final inquiry should be readily apparent. TRA submits that it matters little what "in-region," interLATA network services or facilities a BOC is providing to its long distance affiliate, the potential for abuse remains constant; only the scope of the harm will change. It is the integration of operations, not the specific nature of the operations integrated that is crucial. Integration allows for discrimination and misallocations of costs. Distinguishing between "bundled end-to-end interLATA service" and "a interLATA service that merely transmits traffic from a point of

³³ First Report and Order, FCC 96-489 at ¶ 312.

presence in one LATA to a point of preference in another LATA" merely alters the form and reach of the anticompetitive abuse.

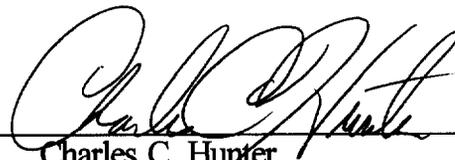
CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to interpret Section 272(e)(4) of the Telecommunications Act in a manner consistent with the above comments.

Respectfully submitted,

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

By:



Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(202) 293-2500

April 17, 1997

Its Attorneys