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

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

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Federal Communications Commission
Office of Secretary

REPLY COMMENTS OF AT&T CORP. ON SECTION 272(e)(4)

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April 24, 1997

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

REPLY COMMENTS OF AT&T CORP. ON SECTION 272(e)(4)

Pursuant to the Commission's Public Notice of April 3, 1997, AT&T Corp. ("AT&T") respectfully submits these Reply Comments on the Commission's interpretation of section 272(e)(4) of the Communications Act of 1934, as amended.[1]

The overwhelming majority of commenters,[2] as well as one RBOC,[3] agree that the Commission was correct in concluding that section 272(e)(4) is not a grant of authority that would override the other requirements of sections 271 or 272(a) and permit a BOC to customize, engineer, build, maintain, and operate a long-distance network for its Section 272 affiliate. Five RBOCs argue otherwise.[4] Because the Five RBOCs largely repeat the arguments that Bell

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[1] A list of the commenters in this remand proceeding, and the abbreviations used herein to refer to each, is attached to these Reply Comments as Appendix A.

[2] See Comptel; Frontier; MCI; Ohio PUC; Sprint; Teleport; TRA; WorldCom.

[3] See First Report and Order, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149 ("First Report and Order"), ¶ 260 (Ameritech).

[4] See Five RBOCs. U S WEST also filed Comments in this proceeding. In contrast to the Five RBOCs, US WEST (p. 2) agrees with the Commission that "[s]ection 272(e)(4) applies to the facilities and services that the Act otherwise allows a BOC to provide directly." However, U S WEST attempts to resuscitate the argument -- which Pacific Telesis previously made and then (continued...)

Atlantic and Pacific Telesis previously made before the Court of Appeals,[5] AT&T had the opportunity to address those claims, and did so, in its initial Comments in this remand proceeding. AT&T will therefore limit this Reply to three points.

First, the Five RBOCs' comments make plain that their interpretation of section 272(e)(4) would nullify the rule of section 272(a)(1) that a BOC "may not provide any service described in paragraph (2)" except through a separate affiliate.[6] The Five RBOCs' sole basis for contending that their interpretation of section 272(e)(4) would not contradict section 272(a)(1) is their idiosyncratic definition of the term "origination." Under the RBOCs' analysis, Congress used that term in section 272(a)(1) to distinguish wholesale service from retail service because, they assert, a carrier "originates" service when it provides service at retail but not when it provides service at wholesale.[7]

That claim is insubstantial. To begin with, the Five RBOCs cite absolutely no statutory, regulatory, dictionary, or industry authority for their customized definition of

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[4] (...continued)
abandoned -- that wholesale services may be offered directly by the BOC because they somehow are not "telecommunications services."

The Commission properly rejected that contention in the First Report and Order. As the Commission held (¶¶ 263-65), Section 251(c)(4) and the Act's legislative history make clear that "telecommunications services" include wholesale services. There is no reason to reopen that determination (and it was not the purpose of this remand to do so). See Bell Atlantic v. FCC, No. 97-1067, Motion of Federal Communications Commission for Remand to Consider Issues, pp. 2-4 (D.C. Cir. filed Feb. 25, 1997).

[5] See Bell Atlantic v. FCC, No. 97-1067, Motion of Bell Atlantic and Pacific Telesis for Summary Reversal or for Expedition (D.C. Cir. filed Feb. 11, 1997); id., Reply of Bell Atlantic and Pacific Telesis.

[6] See 47 U.S.C. § 272(a)(1) (emphasis added).

[7] See Five RBOCs, p. 5.

"origination," which bears no discernible relationship to any recognized understanding of the term. Nor would there have been any reason for Congress to rely on such a tortured use of language had it wished to make this distinction. Congress elsewhere in the 1996 Act, quite naturally, used the terms "wholesale" and "retail" to distinguish between the two concepts, see 47 U.S.C. § 251(c)(4), and if it had wished to make the same distinction in section 272(a)(1) it would not have done so in such a different and utterly opaque manner.

Further, as AT&T pointed out in its initial Comments (p. 4), if the Five RBOCs were correct that "originating" service is limited to retail service, that would merely establish that they could never provide long-distance service on a wholesale basis. Section 271(a)(1) prohibits the provision by a BOC of any interLATA services except as provided in the remainder of section 271, and the process established by section 271(b)(1) for obtaining Commission approval will permit the BOC only to provide in-region "originating" service. The Five RBOCs suggest in a footnote (p. 5 n.3) that perhaps the term "originate" means different things in these two different parts of the same Act. But this would contravene the "'normal rule of statutory construction'" that "'identical words used in different parts of the same act are intended to have the same meaning.'"[8] In addition, the only apparent basis for the Five RBOCs' assertion that this particular term shifts its meaning from subsection to subsection is that such a shift is necessary if they are to achieve their litigation objectives. Certainly, the Five RBOCs offer no other explanation.

Second, the Five RBOCs do not deny that their proposed reading of section 272(e)(4) would leave the interLATA affiliate an empty shell. As AT&T and MCI pointed out

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[8] See Gustafson v. Alloyd Co., Inc., 115 S. Ct. 1061, 1067 (1995) (quoting Department of Revenue of Oregon v. ACF Industries, Inc., 510 U.S. 332, 342 (1994)).

in the Court of Appeals, section 272(g)(2) already permits the BOC to market the long-distance services of its affiliate. If, as the Five RBOCs claim, section 272(e)(4) also enabled the BOC to build, install, maintain and operate the affiliate's long-distance network, then there would be nothing left for the affiliate to do.[9] Indeed, the affiliate would require neither employees nor offices -- just a certificate of incorporation. Any interpretation of section 272(e)(4) that would so thoroughly gut the structural separation requirement of section 272 has to be wrong. But neither in their Reply at the Court of Appeals, nor in their Comments here, did the RBOCs even attempt to answer this point -- and no answer exists.

This failure reflects the broader deficiency in the Five RBOCs' position, which is that their concept of an "integrated supplier" of local and long-distance services (see Five RBOCs, p. 10; Taylor Aff., ¶ 4) is wholly disengaged from -- indeed, at war with -- both the Act and the First Report and Order. This is starkly illustrated by the fact that the Five RBOCs' expert, Professor Taylor, repeatedly defends the RBOCs' position by touting the benefits of "nonstructural" separation requirements.[10] While his economic analysis is otherwise meritless, for present purposes it should be sufficient to note that the 1996 Act and the First Report and Order expressly reject such an approach and require "structural" separation instead.[11]

If the Commission were to adopt the RBOCs' argument, it would therefore have to undo far more of the First Report and Order (and the Act) than merely the seven paragraphs on section 272(e)(4). The First Report and Order held that section 272's "structural separation

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[9] See Bell Atlantic v. FCC, No. 97-1067, AT&T's Response to Motion for Summary Reversal or Expedition, p. 14 (D.C. Cir. filed Feb. 25, 1997); id., MCI's Opposition to Motion for Summary Reversal or Expedition (D.C. Cir. filed Feb. 25, 1997).

[10] See Taylor Aff., ¶¶ 5, 10, 11; see also Five RBOCs, p. 12.

[11] See 47 U.S.C. § 272(b); First Report and Order, ¶¶ 13, 15, 16, 146, 157.

requirements" prohibit a BOC and its affiliate from jointly owning transmission and switching facilities, or from providing one another with operating, installation, or maintenance services.[12] It further held that these prohibitions are necessary in order to effectuate section 272's objective of inhibiting improper cost allocation and discrimination.[13] Specifically, the Commission properly found that the joint ownership of facilities, or the provision of operating, installation, and maintenance services with respect to those facilities by the BOC to its affiliate or vice-versa, "would permit such substantial integration of the BOCs' local operations with their interLATA activities" as to "create substantial opportunities for improper cost allocation" and "inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors."[14] The Five RBOCs' proposal here to integrate those functions within the BOC is in substance indistinguishable from the other arrangements the Commission correctly found would be unlawful and anticompetitive.

The Five RBOCs make no attempt even to engage the Commission's analysis on this point. They simply assert that there is no risk of anticompetitive activity from their integration of exchange, exchange access, and interexchange services and facilities because "no BOC currently supplies interLATA service in-region and 'no BOC possesses market power in the supply of those services.'"[15] As the Commission has explained, however, the BOCs can leverage their monopoly power in the local and access markets into the long-distance market through illicit acts of discrimination and cross-subsidization, and thus can exercise market power

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[12] See id., ¶¶ 15, 159, 163.

[13] See id.

[14] See id.

[15] See Five RBOCs, p. 11 (quoting Taylor Aff., ¶ 8).

in the long-distance market as well.[16] These are the very real concerns which underlie the Section 272 safeguards, and which the RBOCs ignore.

Finally, the affidavits by Mr. Cullen of Bell Atlantic and Mr. Quigley of Pacific Telesis that accompany the Five RBOCs' Comments include some assertions which, while not germane to this proceeding, should not go unanswered. They claim that, unless a BOC can construct and operate long-distance facilities, its affiliate will be forced to purchase long distance services for resale from other carriers at excessive wholesale prices. This is nonsense. Unlike the monopoly local exchange markets, the long-distance market is fiercely competitive, and, as the Commission has found, wholesale services are sold at competitive prices.[17] That is why Pacific Telesis recently informed the Department of Justice that it "has obtained attractive wholesale prices from Sprint, which will permit [its interLATA affiliate] to offer service at extremely competitive levels."[18] While the BOCs would indeed be able to secure a cost advantage over unaffiliated long-distance competitors if the arrangement they propose were permitted, that would only be because they would then be benefitting from the unlawful cross-subsidies and acts of discrimination that the Act seeks to prohibit. Indeed, because each of the nation's existing long distance networks was built without these illicit subsidies from captive ratepayers, it was particularly appropriate for Congress to attempt to mandate that BOCs do the same.

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[16] See First Report and Order, ¶¶ 7-13.

[17] See Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd. 5880, 5887-5893 (1991).

[18] See Response of the Pacific Telesis Group to Questions Regarding RBOC Section 271 Applications, pp. 14-15 (December 13, 1996) (Appendix B).

Respectfully submitted,

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April 24, 1997

APPENDIX A

LIST OF COMMENTERS

AT&T Corp. ("AT&T")

Bell Companies ("Five RBOCS")

Competitive Telecommunications Association ("Comptel")

Frontier Corporation ("Frontier")

MCI Telecommunications Corporation ("MCI")

Omnipoint Communications Inc. ("Omnipoint")

Public Utilities Commission of Ohio ("Ohio PUC")

Sprint Corporation ("Sprint")

Telecommunications Resellers Association ("TRA")

Teleport Communications Group Inc. ("Teleport")

U S WEST, Inc. ("U S WEST")

WorldCom, Inc. ("WorldCom")

APPENDIX B

Before the
UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C.

In the Matter of	)
	)
Inquiry Regarding Impact of	)
RBOC Entry into the	)
InterLATA Market	)

RESPONSE OF THE PACIFIC TELESIS GROUP TO QUESTIONS REGARDING RBOC SECTION 271 APPLICATIONS

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provide long distance service through a fully separate subsidiary, must comply with a multitude of FCC regulations designed to prevent discrimination and cross-subsidization, and is increasingly subject to competitive pressure in the local exchange market. There is no risk of anticompetitive conduct.

3. **How do you anticipate that the Bell Companies will provide their long distance services (e.g., using their existing network, building additional network facilities, reselling other carriers' services, acquiring existing long distance carriers)? To what extent is this expectation relevant to an assessment of the risks and potential benefits of entry?**

PB COM will resell Sprint's interLATA services throughout California and Nevada as well as Sprint's intraLATA services in areas served by GTE California ("GTEC"). PB COM also currently plans to resell the local and intraLATA toll services of Pacific Bell in Pacific Bell's franchise area and the local services of GTE in GTE's territory. PB COM will resell the local and intraLATA toll services of Nevada Bell in Nevada Bell's franchise area and the local services of Sprint Central in Sprint's territory. In addition, PB COM may purchase wholesale interLATA services from Pacific Bell and Nevada Bell on a nondiscriminatory basis with appropriate cost allocation (as permitted by 47 U.S.C. § 272(e)(4)) or install its own switches and purchase transport services from Pacific Bell, Nevada Bell, or other third parties.

Pacific's mode of entry (resale vs. facilities-based) will have no appreciable impact on the risk and benefits of entry. With respect to benefits, Pacific has obtained attractive wholesale prices from Sprint, which will permit PB COM to offer service at extremely

competitive levels.[23] Consumers will benefit both from these prices and from Pacific's ability to offer integrated service packages. PB COM also will be able to use the wholesale services as the foundation for innovative offerings involving value-added services and non-standard billing structures, to the extent supported by the market. With respect to risks, entry as a reseller obviously minimizes any ability to engage in anticompetitive conduct or cross-subsidization. In that case, PB COM would own few facilities and therefore would have few common costs with Pacific Bell and Nevada Bell and no ability to be the beneficiary of discrimination. In any event, as discussed in the response to the next question, Pacific has no appreciable ability to engage in anticompetitive conduct in either the long distance or the local market, whether PB COM provides long distance through resale or over its own facilities.

4. **What are the risks that the Bell Companies' market power in local markets could be used to hamper competition in the provision of any telecommunications service, including both local and long distance services? Will the Bell Companies' ability or incentive to hamper competition be affected by their entry into long distance? Will the entry of the Bell Companies into long distance affect the incentives of long distance companies to expand into local service?**

There is no real risk that Pacific could "hamper competition" in either the local or the long distance market. Its ability and incentive to do so are constrained by (1) state

[23]Wholesale discounts in the long distance market must be distinguished from wholesale discounts in the local market. In the long distance market, steep discounts are available because standard retail prices are essentially unregulated and are far above cost. In the local market, retail prices often are set at or below cost, leaving little room for discounting. In addition, Pacific has demonstrated to the FCC and state regulators that its avoided costs of retail are modest, and that requiring wholesale discounts greater than avoided costs would violate Sections 251(c)(4) and 252(d)(3) and deter facilities-based competition.

CERTIFICATE OF SERVICE

I, Daniel Meron, hereby certify that, on this 24th day of April, 1997, I served the foregoing Reply Comments of AT&T Corp. on Section 272(e)(4) by mailing two copies, first-class postage prepaid, to each of the persons on the attached list.

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