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Federal Communications Commission
Office of Secretary

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

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In the Matter of	)	
	)	
MCI TELECOMMUNICATIONS CORPORATION	)	CC Docket No. 96-149
	)	
Petition for Declaratory Ruling	)	
Regarding the Joint Marketing	)	
Restriction in Section 271(e)(1) of the	)	
Communications Act of 1934, as amended	)	
by the Telecommunications Act of 1996	)	

COMMENTS OF AT&T CORP.

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Summary

In this proceeding, MCI seeks a declaration that certain of its marketing materials, some of which are the subject of a proceeding brought by Pacific Bell before the California Public Utilities Commission (the "California Action"), do not violate the joint marketing restriction of Section 271(e)(1) of the Communications Act of 1934, as amended. These materials largely fall into two categories: (1) those that reference MCI's status as a long distance carrier, but that are aimed solely at marketing local service, and (2) those that discuss MCI's ability to provide joint "customer care". AT&T materials falling within each of these categories are also at issue in the California Action, and are attached.

The Commission should grant MCI's petition, and make clear that the types of marketing represented by MCI's marketing materials do not violate the joint marketing restriction. As these comments show, none of the materials discussed herein violates that restriction, and a contrary ruling would hamper local market entry and raise serious First Amendment concerns.

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MCI TELECOMMUNICATIONS CORPORATION	)	CC Docket No. 96-149
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Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	

COMMENTS OF AT&T CORP.

Pursuant to the Commission's May 9, 1997 Public Notice, AT&T Corp. ("AT&T") hereby submits these comments regarding the petition of MCI Telecommunications Corporation ("MCI") for a declaratory ruling concerning the joint marketing restriction in Section 271(e)(1) of the Communications Act of 1934, as amended.

I. INTRODUCTION

In its petition, MCI seeks a declaration that certain of its marketing materials, some of which are the subject of a complaint brought before the California Public Utilities Commission (the "California PUC") by Pacific Bell ("Pacific"), do not violate the joint marketing restriction contained in Section 271(e)(1) of the Telecommunications Act of 1996 (the "Act"). The Commission should grant MCI's petition, and make clear that the types of marketing represented by MCI's marketing materials, as

well as the other materials discussed below, do *not* violate the joint marketing restriction.

A. The California Action

MCI's petition was prompted in large part by the complaint filed by Pacific Bell with the California PUC in March 1997.[1] In that complaint, Pacific alleged that certain of MCI's and AT&T's marketing materials violate the joint marketing restriction contained in the Act. Because the Administrative Law Judge did not believe that Pacific had adequately pleaded a basis for state Commission jurisdiction under state law, it directed Pacific to amend its complaint. Pacific did so on April 25, 1997. Subsequently, MCI filed the instant petition for a declaratory ruling. Because Pacific's amended complaint contained no new allegations that warranted resolution by the California PUC, as opposed to this Commission, both AT&T and MCI filed motions on May 22, 1997 to dismiss the California proceeding or to stay it pending the outcome of the instant petition. These motions are currently pending.[2] A copy of AT&T's motion to dismiss is attached hereto as Exhibit A.

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1 Pacific Bell v. AT&T Communications of California, Inc. & MCI Telecommunications Corp., Case No. 97-03-016 (Cal. PUC).

2 As with Pacific's initial complaint, the amended complaint was accompanied by a motion for a temporary restraining order and preliminary and permanent injunction. These motions are pending.

Pacific annexed to its complaint before the California PUC certain AT&T and MCI materials relating to their service offerings. The AT&T materials, copies of which are annexed hereto as Exhibit B, consisted of (1) a reproduction of a TV ad, (2) a customer survey form, and (3) a question and answer sheet on AT&T local service, and (4) a transcript of a radio news interview of an AT&T spokeswoman. As demonstrated below, none of the AT&T materials or the MCI materials annexed to its petition constitutes impermissible joint marketing.

B. The Need For Commission Action

The pendancy of the California action and the likelihood that Bell Operating Companies ("BOCs") will engage in forum shopping by filing similar complaints against the larger interexchange carriers ("IXCs") in other states raises the possibility that the FCC's NonAccounting Safeguards Order will be the subject of duplicative litigation and will be interpreted inconsistently by different state commissions. Such an outcome would make it difficult and costly for covered IXCs to conduct marketing campaigns because any centralized marketing efforts will be thwarted by the need to tailor marketing materials to account for varying state interpretations of the NonAccounting Safeguards Order. It would also be flatly inconsistent with the Commission's expectation that it would be the arbiter of future joint marketing disputes:

> "We recognize that the principles we have adopted to implement the requirements of

> Section 271(e) may not address all of the possible marketing strategies that a covered interexchange carrier might initiate to sell BOC resold local services and interLATA services to the public. *We emphasize, however, that in enforcing this statutory section, we intend to examine the specific facts closely* to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing by conveying the appearance of "one-stop shopping" BOC resold local services and interLATA services to potential customers."

Order at ¶ 282 (emphasis added).

Thus, in order to prevent the likelihood of multiple, duplicative litigation that would have a chilling effect on interexchange carrier marketing of local service offerings, the Commission should issue a broad ruling with respect to MCI's petition that considers the types of marketing materials that any of the IXCs subject to the joint marketing restrictions bring to the Commission's attention in the course of this proceeding. For the reasons discussed below, the Commission should make clear that the types of materials discussed herein do *not* violate the joint marketing restriction. A contrary ruling would thwart the intent of the Act to foster competition in local markets by severely hampering IXCs' efforts to enter such markets, and would raise serious First Amendment issues.

C. Section 271(e) of the Act and The Commission's NonAccounting Safeguards Order

Section 271(e)(1) restricts the larger IXCs -- AT&T, MCI, and Sprint -- from jointly marketing their long distance

services with local exchange services purchased from a BOC at a wholesale discount for resale until February 8, 1999 or until the BOC is authorized to provide in-region interLATA services, whichever is earlier. In its First Report and Order and Further Notice of Proposed Rulemaking, CC Docket 96-149, FCC 96-489 (December 24, 1996) (the "NonAccounting Safeguards Order"), the Commission found that the joint marketing restriction prohibits the largest IXCs from bundling interLATA service and BOC resold local service by offering BOC resold local exchange service and interLATA service as a package under an integrated pricing schedule. Thus, the Commission held that covered IXCs cannot (a) provide a discount if a customer purchases both interLATA and BOC resold services, (b) condition the purchase of one type of service on the purchase of the other, or (c) offer both interLATA services and BOC resold local services as a single combined product. *Id.* at ¶ 277. In addition, covered IXCs may not market interLATA services and BOC resold local services to consumers through a single transaction, which was defined to include the use of the same sales agent to market both products to the same customer during a single communication. *Id.* at ¶ 278.

At the same time, the Commission made explicit that certain other activities are permissible. Among other things, the Commission determined that covered IXCs could advertise the availability of interLATA service and BOC resold local services in a single advertisement, so long as the ad does not mislead the

public by stating or implying that the IXC may offer bundled packages or that it can provide one-stop shopping of both services through a single transaction. *Id.* at ¶ 280. In addition, because the joint marketing restriction applies only to activities that take place prior to the customer's decision to subscribe, the FCC determined that IXCs could provide joint "customer care," including issuing a single bill and providing a single point of contact for maintenance and repairs. *Id.* at ¶ 281. For the same reason, covered IXCs are permitted to market any new services to a subscriber once the customer decides to subscribe to both interLATA and resold BOC local services. *Id.*

II. THE CONTESTED MATERIALS DO NOT CONSTITUTE JOINT MARKETING

In general, the MCI and AT&T marketing materials that form the basis of Pacific's state complaint fall into two basic categories: (1) materials that reference AT&T's or MCI's status as a long distance carrier, but that are aimed at solely marketing local service; and (2) materials that reference each IXC's ability to provide the customer with a single bill or a single point of contact for customer service needs.[3] Each of

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[3] Pacific also included as a basis of its complaint a sentence on the fax cover sheet annexed to the AT&T local service customer survey that states: "Your signature on line 6 [of the survey] will functionally act as a waiver of [the joint marketing restriction.]" However, this language was the result of a simple error by the person who drafted the fax cover sheet. As the attached survey makes clear, the customer's signature on line 6 acts as a waiver of the customer proprietary network information ("CPNI") rules, not the joint marketing rules, which may not be waived by the customer. *See* Exhibit B, item 2, page 2. Even if the

(footnote continued on next page)

these categories of materials constitutes lawful marketing activities.

A. Materials Aimed Solely at Marketing Local Service

One of the marketing items annexed to Pacific's complaint was an MCI mailing that states, in part, that "[a]s an MCI long distance customer, you know we're committed to providing the highest levels of quality and service, 24 hours a day, 7 days a week." MCI Petition, Exhibit A. Similarly, Pacific complained about an AT&T advertisement that states in pertinent part:

> "now the company that guarantees your calls across the country . . . guarantees them across the street. Now you have a choice you never had before. AT&T local service for California . . ."

See Exhibit B hereto, item 1, page 1.

Neither of these examples constitutes impermissible joint marketing. Each is aimed at attracting local service customers, not long distance customers. In MCI's case, MCI represents (MCI Petition, p. 7) that marketing materials were sent to MCI's existing long distance customers, and were designed to interest those customers in MCI's local service offering. From the face of the document, that appears to be the case, and

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customer could waive the joint marketing rules, such a waiver would not have been necessary in connection with distribution of the annexed survey. All the survey requests is information regarding the customer's interest in purchasing AT&T's local service when available. AT&T was not jointly marketing long distance and resold local service as a result of that survey.

MCI appears simply to have touted what it views to be its strengths as a long distance carrier. In the AT&T ad, AT&T simply made a truthful statement about its status as a long distance carrier in connection with its ad for local service - like MCI, it was not advertising its interLATA services. Thus, neither effort can be construed as the joint marketing of interLATA and resold local services.

Moreover, even if the AT&T or MCI pieces could be construed as ads for both interLATA and local services, they would be permissible. The Commission explicitly stated that "a covered interexchange carrier may advertise the availability of interLATA service and BOC resold local services in a single advertisement," as long as it does not mislead the public by stating or implying that it may offer bundled packages of long distance and resold local service or that it can provide one-stop shopping through a single transaction.[4] Neither of these marketing pieces carry any such implications.

A contrary interpretation, moreover, would not advance the purpose of the joint marketing restriction and would raise serious First Amendment concerns. The joint marketing restriction was designed to prevent the larger IXCs from combining resold BOC services with existing long distance services in a manner that would give the IXCs what was deemed an

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4 NonAccounting Safeguards Order at ¶ 280.

unfair advantage in the marketplace before the BOCs were free to enter the long distance market.[5] It was not designed to prevent IXCs from providing accurate information about their long distance services, or to strip them of their brand identity. Indeed, as the Commission recognizes, so long as IXC statements are truthful, they are accorded constitutional protection. *See* 44 Liquormart v. Rhode Island, 116 S. Ct. 1495, 1505 (1996) (First Amendment provides constitutional protection of accurate and non-misleading commercial messages); NonAccounting Safeguards Order at ¶ 279. Thus, AT&T's or MCI's statements about their status or attributes as long distance carriers in connection with marketing efforts aimed at promoting local service cannot be deemed improper.[6]

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5 In this regard, the legislative history of the Act is instructive. In the Senate Committee Report accompanying the Pressler bill, which contained joint marketing restrictions on the BOCs as well as the IXCs (as does the Act), the Committee stated:

> "The Committee believes that the ability to bundle telecommunications, information, and cable services into a single package to create 'one-stop shopping' will be a significant competitive marketing tool."

Report of the Committee on Commerce, Science and Transportation on S. 652, S. Rpt. 104-23 at 23 (March 30, 1995). Thus, the legislative history confirms the rationale underlying the Commission's conclusion to restrict only those marketing efforts that create a bundle or one-stop shopping through a single transaction, or the appearance thereof.

6 Indeed, Section 272(g) prohibits the BOCs currently from marketing in-region interLATA services. Yet, BOCs do advertise that they will be offering such services in the future. For example, Bell Atlantic has run an advertisement proclaiming, in connection with statements about local and toll calling plans, that it will soon be offering long distance. It is difficult to square claims that AT&T's and MCI's

(footnote continued on next page)

For the same reasons, the statements made by AT&T in the radio interview are patently lawful. There, an AT&T spokeswoman stated that whether customers "want local, long distance, wireless, internet access or home entertainment, of which AT&T offers all, they can deal with one company for any combination of those services or all of them that they want." Exhibit B, item 3, page 1. This statement, like the AT&T piece discussed above, is no more than a truthful statement of the various services that AT&T offers. Moreover, it was not even made in connection with a marketing campaign; rather, it was made in the course of a radio interview with a reporter. Surely, there is no interpretation of the joint marketing restriction or the First Amendment that could dictate suppression of truthful statements made to reporters such as this one challenged by Pacific.[7]

B. Materials That Inform Customers that IXCs can Provide Them With a Single Bill or a Single Customer Service Number

The other types of materials about which Pacific complained were those that related to the IXCs' ability to offer customers a single bill for long distance and local services and

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advertisements are unlawful if they include information about their status as long distance carriers with BOC ads like the Bell Atlantic ad.

7 The central statement from the radio interview that apparently formed the basis for Pacific's allegation - that AT&T "will promote its

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a single customer service number for both services. For example, one of MCI's mailings stated that the customer could "enjoy one call to one company for customer service" and "one easy-to-read monthly statement for both your local and long distance calls." MCI Petition, Exhibit A. Another mailing advertised the same capabilities.[8] Similarly, one of the AT&T marketing items -- an AT&T question and answer sheet -- informed customers that "[i]f you're an AT&T Local and Long Distance customer, you'll receive a single convenient bill each month, itemizing . . . local, local toll and long distance calls," and provided a single customer service number that customers could call. Exhibit B, item 4, pages 1 & 2.

Each of these statements is clearly permissible under the NonAccounting Safeguards Order. The Commission expressly stated in its Order that the joint marketing restriction in Section 271(e) applies only to activities that take place prior

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services as a type of one-stop shopping" - was made by the reporter, not the AT&T spokesperson.

8 Specifically, this MCI mailing included similar statements about joint customer care. *See* MCI Petition, Exhibit B ("One company . . . One bill . . . One call." "When you choose MCI as your local service carrier, you'll enjoy the convenience of receiving one consolidated, easy-to-understand monthly bill. And if you ever have a question, an MCI Local Communications Specialist is ready to help you 24 hours a day, 7 days a week"). Another MCI mailing, which was not annexed to Pacific's complaint but with respect to which MCI seeks a declaratory ruling, contains essentially the same joint customer care information. MCI Petition, Exhibit C.

to the customer's decision to subscribe. For that reason, the Commission determined that the

> "carrier should be permitted to provide joint 'customer care' (i.e. a single bill for both BOC resold local service and interLATA services, and a single point-of-contact for maintenance and repairs)."

NonAccounting Safeguards Order at ¶ 281. The Commission expressly noted the sound public policy reasons that provided the foundation for its decision. *First*, the Commission recognized that imposing additional prohibitions on post-marketing activities would add additional burdens not required by the Act. *Second*, the Commission reasoned that requiring customers to send separate payments to the same corporate entity would be confusing and burdensome to consumers. *Id.*

Because the IXCs are permitted to provide joint customer care and a single bill to customers of both local and long distance services, they must also be permitted to advertise their ability to provide such services. Otherwise, they would be precluded from discussing their ability to provide services that they are lawfully entitled to provide. As is the case with restrictions on discussing a carrier's status as a long distance carrier, such a restriction would raise serious First Amendment concerns. Liquormart, 116 S. Ct. at 1505 (dissemination of accurate and non-misleading commercial messages are accorded First Amendment protection). Thus, the Commission should find that these marketing materials are lawful.

III. CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling on MCI's petition that makes clear that the types of marketing represented by the materials discussed above do not violate the joint marketing restriction contained in Section 271(e) of the Act.

Respectfully submitted,

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June 9, 1997

Exhibit A

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Pacific Bell (U 1001 C), Complainant, v. AT&T Communications of California, Inc. (U 5002 C) and MCI Telecommunications Corporation (U 5011 C), Defendants.	Case No. C. 97-03-016

NOTICE OF MOTION AND MOTION OF AT&T COMMUNICATIONS OF CALIFORNIA, INC. (U 5002 C) TO DISMISS OR STAY THIS PROCEEDING AND MEMORANDUM IN SUPPORT THEREOF

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May 22, 1997

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I. MOTION TO DISMISS OR STAY

Pursuant to Commission Rules 45 and 56, AT&T Communications of California, Inc. ("AT&T") moves that the Commission dismiss the complaint filed by Pacific Bell ("Pacific") without prejudice pending a determination by the Federal Communications Commission ("FCC") of essentially similar issues in the proceeding initiated by MCI Telecommunications Corp. ("MCI") noticed in Attachment A hereto.

In the alternative, should the Commission for any reason chose not to dismiss, AT&T requests that this matter be stayed pending such action by the FCC.

II. SUMMARY OF FACTS AND LAW SUPPORTING THE MOTION

Consideration at this time of Pacific's complaint and its accompanying motion for a temporary restraining order and preliminary injunction would be a waste of this Commission's time and resources. The central issue raised by the complaint is whether certain advertisements and other communications by AT&T regarding its ability to provide local exchange service violate Section 271(e)(1) of the Telecommunications Act of 1996 ("TA96" or "Act") governing "joint marketing" of resold local and long distance service, which has been interpreted by the FCC in its Non-Accounting Safeguard Order, CC Docket 96-149, FCC 96-489 (12/24/96) (the "Non-Accounting Safeguard Order"). Absent a violation of the FCC Non-Accounting Safeguard Order and its implementing regulation, no state law claim is stated.

Substantial Commission authority calls for a deferral of action on the Pacific complaint pending an interpretation by the FCC of its controlling order and regulation in the proceeding initiated by MCI. That proceeding addresses the same joint marketing issues put to this Commission by Pacific. The FCC has the primary obligation to interpret its own orders and regulations. The FCC also has the ability to order interim relief, if necessary, during the pendency of the proceeding before it. Accordingly, Pacific's complaint here should be dismissed without prejudice so that Pacific may refile at the FCC or intervene in the already pending MCI proceeding.

On their face, the documents and statements attributed to AT&T by Pacific do not violate 271(e)(1), as interpreted in the Non-Accounting Safeguards Order. Indeed, AT&T's statements are explicitly authorized by that FCC order. The FCC Order provides, *inter alia*, that an interexchange carrier covered by Section 271(e)(1), like AT&T, may advertise the availability of its own interLATA services and the resold local services of a Bell Operating Company ("BOC"), in a single advertisement, provided it does not state or imply that it may offer "bundled" packages of those services or one-stop shopping through a single transaction. *Id.* at ¶ 280. A covered interexchange carrier is also permitted to provide joint customer care such as a single bill and a single point of contact for maintenance and repairs. *Id.* at ¶ 281. The marketing materials complained of by Pacific are permissible activities under the FCC's Order.

Since the FCC has authority to order interim relief if necessary in its proceeding, there is no reason for this Commission to take action and it should simply dismiss or stay this complaint. Indeed, it would be inappropriate for the Commission to issue injunctive relief pending resolution of MCI's petition at the FCC. If the Commission determines not to dismiss or stay the action, AT&T will file a brief addressing the merits of Pacific's motion for a preliminary injunction pursuant to whatever schedule is established by the Administrative Law Judge.

III. BACKGROUND

The Telecommunications Act of 1996

TA96 lies at the heart of Pacific's complaint. All state law claims are derivative: they are based on the theory that the conduct complained of is unlawful under the federal law and, as a result, it violates California law as well.

TA96 requires that Pacific and other incumbent local exchange companies (incumbent "LECs") provide certain services that enable competitors to compete in local telephone service markets. Among other things, incumbent LECs must sell for resale their local exchange services to competitors at a wholesale discount and must also offer unbundled

"network elements" at cost-based rates so that competitors can purchase those elements to provide local exchange service to their customers. Once meaningful competition in local exchange markets is established and a number of other statutory prerequisites are met, BOCs (such as Pacific) will then be authorized by the FCC to provide interLATA long distance service in their respective regions.

Section 271(e)(1), which forms the basis for Pacific's complaint, prohibits the larger interexchange carriers ("IXCs"), including AT&T, from jointly marketing their long distance service with local exchange services purchased from incumbent LECs at a wholesale discount for resale until February 8, 1999, or until a BOC is authorized to provide interLATA services in an in-region state, whichever is earlier.[1] The joint marketing restriction contained in Section 271(e)(1) does not prohibit IXCs from selling both their traditional long distance service and local service purchased from a BOC at a wholesale discount so that a customer can get both services from the same company; rather, it only the restricts how the IXCs can "jointly" market those services.

These restrictions were interpreted by the FCC in its Non-Accounting Safeguards Order dated December 24, 1996. With respect to the activities of the largest IXCs, the FCC found that, while the restriction is in place, such carriers may not offer BOC resold local exchange service and their own interLATA service as a package under an integrated pricing schedule. Thus, covered IXCs cannot (a) provide a discount if a customer purchases both interLATA and BOC resold services, (b) condition the purchase of one type of service on the purchase of the other, or (c) offer both interLATA services and BOC resold local services as a

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[1] The Act also restricts the marketing activities of the BOCs. Section 272(g)(1), for example, prohibits a BOC affiliate that sells long distance service from marketing or selling the telephone exchange service of the BOC unless the BOC complies with a nondiscrimination rule, and Section 272(g)(2) provides that a BOC may not market or sell interLATA services provided by its affiliate within any of its in-region states until the company is authorized to provide interLATA services in such state.

single combined product. Non-Accounting Safeguards Order, ¶ 277. In addition, covered IXCs may not market interLATA services and BOC resold local services to consumers through a single transaction, which was defined to include the use of the same sales agent to market both products to the same customer during a single communication. *Id.* at ¶ 278.

The FCC also made clear, however, that certain activities were permissible. First, the FCC made clear that IXCs were not required to establish separate sales forces to sell interLATA and local services. *Id.* Thus, it determined that a single agent is permitted to market interLATA services in the context of one communication, and to market resold local services to the same potential customer in the context of a separate communication. *Id.* Second, explicitly recognizing that imposing an overly broad advertising restriction would have First Amendment implications, the FCC determined that covered IXCs could advertise the availability of interLATA service and BOC resold local services in a single advertisement as long as the ad does not mislead the public by stating or implying that the IXC may offer bundled packages or that it can provide one-stop shopping of both services through a single transaction. *Id.* at ¶ 280. In addition, the FCC made clear that IXCs are free to advertise a combined offering of local and long distance services as long as the IXCs provide local service through means other than reselling BOC local exchange services. *Id.* at ¶ 279.

Finally, because the FCC concluded that the joint marketing restriction applies only to activities that take place prior to the customer's decision to subscribe, the FCC determined that IXCs could provide joint customer care, including issuing a single bill and providing a single point of contact for maintenance and repairs. *Id.* at ¶ 281. For the same reason, covered IXCs are permitted to market any new services to a subscriber once the customer decides to subscribe to both interLATA and resold BOC local services from a covered long distance carrier. *Id.*

The claim that the advertising and other communications attached to the amended complaint violate these rules is the heart of Pacific's claim.

IV. ARGUMENT

Both procedurally and substantively, Pacific's complaint and motion are misguided. Pacific essentially asks this Commission to interpret FCC orders, a task better left to the FCC in the first instance. The FCC is available to Pacific as a forum. AT&T's motion to dismiss, or in the alternative for a stay, should be granted.

A. The FCC Has The Primary Obligation To Interpret Its Joint Marketing Order.

This complaint represents Pacific's second attempt to allege a basis for Commission jurisdiction over this matter. It goes to great lengths to argue that the Commission *may* assert jurisdiction over this federal controversy. Assuming *arguendo* that jurisdiction exists, that is not the only issue.

A narrower, and therefore simpler, question is whether the Commission *should* assert jurisdiction. On that the answer is clear: this is a predominately federal matter, requiring interpretation of the relevant order issued by the FCC based on a federal law. A petition is now pending at the FCC, initiated by MCI, raising the same joint marketing issues put to this Commission by Pacific. *See* Public Notice of May 9, 1997, attached hereto as Exhibit A. Pursuant to the schedule adopted by the FCC, interested parties are required to file comments in that proceeding by June 9, 1997, and reply comments by June 24, 1997. In its comments in the FCC proceeding, AT&T will request the FCC to resolve all of the issues that Pacific's complaint against AT&T here raises. Thus, considerations of comity and efficiency strongly suggest that this Commission should exercise its discretion to dismiss this proceeding pending relevant rulings by the FCC.

Indeed, in the Non-Accounting Safeguards Order the FCC expressly stated its expectation that it would be the arbiter of future disputes relating to its Order, finding:

> We recognize that the principles we have adopted to implement the requirements of section 271(e) may not address all of the possible marketing strategies that a covered interexchange carrier might initiate to sell BOC resold local services and interLATA services

> to the public. We emphasize, however, that in enforcing this statutory section, *we intend to examine the specific facts closely* to ensure that covered interexchange carriers are not contravening the letter and spirit of the congressional prohibition on joint marketing . . . "
>
> Order at ¶ 282.

It makes sense that the FCC adjudicate these joint marketing disputes. Not only will fragmented litigation before numerous state commissions be inefficient, it will likely lead to inconsistent rulings. Such inconsistent rulings will make it extremely difficult and costly for covered IXCs to conduct marketing campaigns – any centralized marketing efforts will be thwarted by the need to tailor advertising and other marketing materials to account for varying state interpretations of the FCC Order. Indeed, AT&T is aware of no other complaint that has been brought before a state Commission alleging a violation of the joint marketing restriction. The only other pending complaint of which AT&T is aware is a joint marketing complaint against MCI, which was filed by Ameritech at the FCC. Accordingly, the Commission should exercise its discretion to dismiss this proceeding.

There is ample Commission precedent for the course AT&T advocates. Most recently, in a case also involving TA96, this Commission last fall in its Universal Service opinion, Decision No. 96-10-066, in *Rulemaking on the Commission's Own Motion into Universal Service and to Comply with the Mandates of Assembly Bill 3643*, 1996 Cal. PUC LEXIS 1046, *120-126 (1996), deferred adopting regulations governing rates for telecommunications services for rural health care providers under TA96, in part because the FCC had not yet addressed the issue. As the Commission noted, "We believe that the issue of reasonably comparable rates for rural health care providers should be deferred until the Joint Board and the FCC have had an opportunity to address this issue." *Id.* at *126.

The Commission similarly refrained from requiring telecommunications providers to implement Time of Day ("TOD") access rates while the FCC was considering a TOD pricing plan for interstate access in *In the Matter of the Application of The Pacific Telephone and*