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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the Non-)	CC Docket No. 96-149
Accounting Safeguards of Sections)	
271 and 272 of the Communications)	
Act of 1934 as amended)	
)	
and)	
)	
Regulatory Treatment of LEC)	
Provision of Interexchange)	
Services Originating in the LEC's)	
Local Exchange Area)	

**OPPOSITION TO PETITION FOR RECONSIDERATION
UNITED STATES TELEPHONE ASSOCIATION**

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**OPPOSITION TO PETITION FOR RECONSIDERATION
UNITED STATES TELEPHONE ASSOCIATION**

Pursuant to Section 1.429 of the Commission's rules, the United States Telephone Association ("USTA") respectfully files these comments opposing the Petition for Reconsideration jointly filed by RCN Telecom Services, Inc. and Hyperion Telecommunications, Inc. ("Joint Petitioners") on August 4, 1997 in the above-captioned proceeding. USTA is the major trade association of the local exchange carrier ("LEC") industry, with over 1,000 members.

INTRODUCTION

The Joint Petitioners miss the point entirely when they argue that Bell Operating Company ("BOC") affiliates will be able to exercise market power and thereby harm the interexchange market. Rather than illustrating the market power they allege BOC affiliates would possess, they

focus exclusively on the purely competitive challenge posed to their individual companies by BOC affiliates and how the present composition of the interexchange market might be altered by their entry. The question at hand is not how BOC affiliate entry might affect the interexchange market's composition, but whether BOC affiliates will be able to exercise market power purposefully to affect the market's composition. The Joint Petitioners avoid even asking, much less answering, this question.

I. The Joint Petitioners Fail To Show That BOC Affiliates Possess Market Power And How Such Alleged Market Power Would Be Exercised.

The Commission recognizes two ways for a service provider to exercise market power. "First, a carrier may be able to raise prices by restricting its own output (which usually requires a large market share); second a carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services."¹ The Joint Petitioners do not dispute the Commission's conclusion that BOC affiliates lack the ability to exercise market power in the first instance, and they fail to address the second instance. Instead, the Joint Petitioners ask the impossible: to prove a negative. Rather than specifically illustrating for the Commission how BOC affiliates do, in fact, possess market power, they instead ask the Commission to require in-region BOC interLATA affiliates that have not even begun to offer service to prove that they do

¹ Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order and Third Report and Order, CC Docket Nos. 96-149, 96-61, FCC 97-142 (released April 18, 1997) (Classification of LEC Long Distance Service Report and Order) at ¶ 83.

not possess market power. The Joint Petitioners make no specific showings anywhere supporting why they believe the Commission erred when it found that BOC affiliates will be unable to raise prices by restricting their output² and that Commission safeguards will prevent BOC affiliates from raising their rivals' costs or restricting their output. The Department of Justice believes that BOC interLATA affiliates should be classified as dominant only if they have the ability to raise prices by restricting their own output.³ BOC interLATA affiliates do not possess this ability. The Commission has confirmed this lack of market power. The Joint Petitioners do not dispute the Commission's finding. Accordingly, the Commission must reject the unsupported claims made by the Joint Petitioners.

II. Dominant Regulation Is An Inappropriate Vehicle For Addressing The Joint Petitioners' Allegations.

The Joint Petitioners do not demonstrate to the Commission how treating BOC affiliates as dominant in the interexchange market would prevent them from exercising their alleged market power. As the Commission has already recognized, dominant regulation is "designed to prevent a carrier from raising its prices by restricting its output rather than to prevent a carrier from raising its prices by raising its rivals' costs."⁴ The Commission notes that even AT&T concedes that dominant regulation does not address the anticompetitive concerns surrounding raising a rival's

² Given that BOC affiliates will enter the market providing *no* output, the conclusion that BOC affiliates will be unable to raise prices by restricting their output is inescapable.

³ Reply Comments of Department of Justice in CC Docket No. 96-149 at p. 16 (filed August 30, 1996).

⁴ Classification of LEC Long Distance Service Report and Order at ¶ 85.

costs.⁵ Indeed, dominant regulation has a recognized dampening effect on competition in the interexchange market,⁶ so it is incongruous that the Joint Petitioners would advocate the imposition of a competition-impeding “solution” if their stated goal is to enhance competition. Moreover, imposing dominant regulation on BOC affiliates would fly in the face of the Commission’s goal to eliminate tariffing in the interexchange market.⁷

III. The Joint Petitioners’ Criticism That The Commission’s Findings Rely Too Much On Theory Is Self-Contradictory.

The Joint Petitioners criticize the Commission’s decision to treat BOC affiliates as non-dominant as relying too heavily on theory. Specifically, they state that “[r]ather than making a comprehensive national assessment based on theories of how BOC interLATA affiliates will affect the interexchange market, the Commission should examine carefully the impact that each BOC interLATA affiliate will have in its own in-region market, on the basis of specific evidence relevant to that affiliate’s ability to exercise market power.”⁸ In and of itself, this request is logically

⁵ Id., at ¶ 86.

⁶ Id., at ¶ 88.

⁷ See, generally, Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, Second Report and Order, CC Docket No. 96-61, FCC 96-424 (released October 31, 1996) (“Tariff Forbearance Order”), stayed pending judicial review, MCI Telecom. Corp. v. FCC, No. 96-1459 (D.C. Circuit, February 13, 1997), and Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, Order on Reconsideration, CC Docket No. 96-61, FCC 97-293 (released August 20, 1997), also stayed.

⁸ Joint Petition for Reconsideration and Clarification of RCN Telecom Services, Inc., and Hyperion Telecommunications, Inc., at p. 3 (filed August 4, 1997) (“Joint Petition for Reconsideration”)

inconsistent. On the one hand, the Joint Petitioners tell the Commission not to rely on theory, yet in the next breath they tell the Commission to rely on some ambiguous, purely speculative competitive harm which they allege will necessarily occur upon BOC affiliate entry.

The Commission's analysis of BOC affiliate market power is anything but speculative. The Joint Petitioners have not bothered to contest the indisputable *fact* that BOC interLATA affiliates will begin offering service with an initial market share of zero. The Joint Petitioners also make a *non sequitur* argument. It does not follow that a smaller interexchange carrier ("IXC") can withstand competitive pressure from AT&T, yet would be unable to withstand competitive pressure from a BOC interLATA affiliate possessing less interexchange market share than itself. Moreover, it seems disingenuous to suggest that a competitive local exchange carrier ("CLEC") will suffer business losses in its local exchange because it cannot afford to also offer interexchange service. As USTA has stated earlier in this proceeding,⁹ forty percent of its members who are known to be offering interexchange service are average schedule companies that do so on a resale basis. If these small average schedule incumbent local exchange carriers ("ILECs") that serve high cost, rural areas can afford to provide interexchange service, it seems difficult to believe that CLECs serving low cost, high revenue businesses cannot also provide interexchange service on a competitive basis.

The "specific evidence" referenced by the Joint Petitioners has already been properly recognized and acknowledged by the Commission. BOC interLATA affiliates will begin offering service with no customers, no traffic, no revenues, and no presubscribed lines. The Commission has elected to deal with the facts in this matter, and the facts clearly demonstrate that BOC

⁹ Petition for Reconsideration of USTA at p. 6, footnote 13 (filed August 4, 1997).

interLATA affiliates will be unable to exercise market power. The Commission should reaffirm this finding and reject the argument of the Joint Petitioners.

IV. The Joint Petitioners's Allegations Lack A Foundation Of The Real Life Economic Incentives That Would Be Necessary To Motivate Any Carrier To Attempt The Long, Costly, And Non-Guaranteed Process Of Driving Smaller Carriers Out Of The Market.

The Joint Petitioners chide the Commission for not classifying BOC interLATA affiliates as dominant. They claim that BOC affiliates will exercise anticompetitive market power (again, without having demonstrated that BOC affiliates even possess market power) to drive second tier IXCs out of the interexchange market, presumably in order to gain some competitive advantage. Specifically, they state that “[s]tunningly, while the Commission concludes on the basis of this speculative analysis that all BOC interLATA affiliates should not be classified as dominant, the Commission simultaneously admits that the exercise of market power by BOC interLATA affiliates could likely lead to small competitors being priced out of the market.”¹⁰

Assuming *arguendo* that this is true, one is left to question what competitive advantage would be gained. AT&T, MCI, Sprint, and WorldCom would all still be present and competing against the BOC affiliate. The affiliate certainly will not be able to raise prices by restricting its output in the face of these competitors.¹¹ The marginal benefit of any gain in market share would be more than outweighed by the costs involved in attempting to drive the smaller IXCs out of the market successively. The Joint Petitioners' theory simply does not comport with marketplace

¹⁰ Joint Petition for Reconsideration at p. 3.

¹¹ *See supra* note 2.

reality.

V. The Joint Petitioners' Allegations About BOC Affiliate Entry Necessarily Entailing Market Consolidation Are Purely Speculative And Improbable.

The Joint Petitioners speculatively argue that BOC interLATA affiliate entry would harm competition in the interexchange market because they assume that the market would consolidate. Yet, market consolidation can just as easily occur among the IXCs even without BOC affiliate entry, yet the Joint Petitioners are conspicuously silent on that point. The combination of several second tier IXCs would have a far greater market share than any BOC affiliate, yet even this conglomeration would pale in size and revenue to the largest *non-dominant* interexchange carrier, AT&T. The Commission properly recognized in its Classification of LEC Long Distance Service Report and Order that it makes no sense whatsoever to regulate BOC interLATA affiliates as dominant interexchange service providers while the largest interexchange service provider of all, AT&T, is classified as non-dominant.

Another problem with the Joint Petitioners' speculation is the speculation itself. The Joint Petitioners assume that the interexchange market would necessarily consolidate. A more probable alternative is that BOC interLATA affiliate entry as non-dominant service providers will accelerate and further diversify the level of competition in the interexchange market. As prices are driven down by this greater competition, those interexchange carriers that depend on resale will benefit from the decrease in cost of this input and be able to lower their own prices correspondingly.

Since 1984, the market share concentrated within the three largest interexchange carriers -- AT&T, MCI, and Sprint -- has steadily decreased regardless of whether market share is measured

by revenues, presubscribed lines, or minutes.¹² This has been due primarily to the emergence of the resale market. If this emergence has occurred during a period when prices are dictated largely by three IXCs moving in lock-step, it seems reasonable to speculate that this market will flourish even more with the competitive energy that BOC interLATA entry is widely expected to generate. The Commission should recognize that the Joint Petitioners' assertions about the inevitability of consolidation in the interexchange market that would result from BOC affiliate entry are vastly overstated and much less probable than the alternative: greater competition with lower prices.

VI. The Costs Of Imposing *A Priori* Safeguards In The Form Of Dominant Regulation Vastly Outweigh What Few Benefits Might Result, Making The Commission's Reliance On An Expedited *Ex Post* Complaint Process An Appropriate Approach.

The Commission was correct when it stated that the expedited complaint process in Section 271(d)(6)¹³ "will allow [the Commission] to adjudicate complaints against the BOCs and the BOC interLATA affiliates in a timely manner."¹⁴ The Joint Petitioners claim that they possess neither the luxury of time nor the financial resources to file complaints with the Commission. It is difficult to believe that ninety days is too long an amount of time in which to resolve expedited complaints. It is equally difficult to believe that these service providers also lack the financial resources to prosecute a complaint.

Sections 271 and 272 of the Telecommunications Act of 1996 erect numerous safeguards to

¹² See, generally, Common Carrier Bureau, Industry Analysis Division Report Long Distance Market Shares, released July 1997.

¹³ 47 U.S.C. § 271(d)(6).

¹⁴ Classification of LEC Long Distance Service Report and Order at ¶118.

deter any anticompetitive behavior by BOCs or BOC affiliates. The Commission has further augmented these safeguards with its various orders in this proceeding. These safeguards are sufficient to deter anticompetitive behavior. The expedited complaint process is the appropriate vehicle for addressing specific instances of alleged anticompetitive behavior. It provides for a speedy review of the facts at hand, thereby avoiding unnecessary and costly regulatory burdens that would otherwise accrue solely to the BOCs and BOC affiliates. It also avoids delaying the consumer benefits of increased interLATA competition. The Commission should reject the Joint Petitioners' request to impose even more *a priori* safeguards.

CONCLUSION

The purpose of the Telecommunications Act of 1996 was to stimulate competition and move the telecommunications industry toward a market regulated by itself rather than by government. The Commission itself stated early on that the Act was intended to be pro-competition, rather than pro-competitor.¹⁵ However, the Joint Petitioners baldly ask the Commission to prohibit BOC affiliate entry unless the Commission determines that not a single IXC will go out of business as a result. Healthy competitive markets have both market entry and market exit, a fact overlooked by the Joint Petitioners. A market that has only market entry and never allows for market exit is not competitive. This is not the intent of the Telecommunications Act of 1996.

¹⁵ See, e.g., Speech by Reed Hundt, Chairman, Federal Communications Commission, Newsweek Telecommunications Forum, Washington DC, February 21, 1996 (as prepared for delivery). "Competition inevitably means that there will be winners and losers."

The Joint Petitioners' request is an obvious attempt to forestall and hobble greater competition in the interexchange market through BOC interLATA affiliate entry. They do not support their allegations, preferring instead to rely on a speculative assumption that some consolidation might possibly occur in the interexchange market, ostensibly through BOCs exercising market power. They do not dispute the fact that BOC affiliates will be unable to raise prices by restricting their own output, nor do they demonstrate how the Commission's safeguards will fail to prevent BOCs from raising the costs of their rivals. They do not offer any support that dominant regulation is the appropriate vehicle for addressing their allegations. Indeed, their proposed pro-competitive solution would dampen competition. For these and the above-stated reasons, the Commission should reject the Joint Petitioners' petition for reconsideration.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

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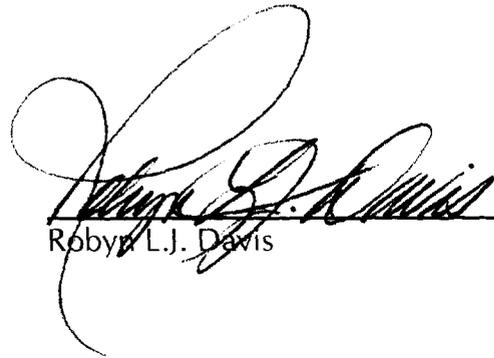
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September 8, 1997

CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on September 9, 1997 the Opposition to Petition for Reconsideration of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.



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