

Bell Atlantic
1300 I Street NW, Suite 400W
Washington, DC 20005
Phone (202) 336-7888
Fax (202) 336-7922

Susanne Guyer
Executive Director,
Federal Regulatory Affairs

DOCKET FILE COPY ORIGINAL



October 21, 1997

EX PARTE OR LATE FILED

Ex Parte

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RECEIVED
OCT 21 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket Nos. 96-149 and 97-137

Dear Mr. Caton:

Today, Mr. E. Shakin and I, representing Bell Atlantic, met with Ms. C. Mattey, Ms. S. Whitesell, Mr. J. Di Scipio and Ms. L. Choi of the Policy and Program Planning Division of the Common Carrier Bureau.

In the meeting, Bell Atlantic presented its views in support of the BellSouth Petition for Reconsideration of the Ameritech Michigan Section 271 Order as set forth in the attached comments of Bell Atlantic. If the Commission does not withdraw or reconsider its discussion concerning marketing scripts on inbound calls, Bell Atlantic suggested that the Commission clarify its existing rulemaking order on this issue in CC Docket 96-149, and offered its comments in CC Docket 97-137 as support.

In particular, the 96-149 order should be clarified in two respects. First, the Commission should clarify that the requirement that service representatives "provide" a list of carriers only requires that a list be "made available." Second, that the carrier may mention its own long distance service and offer further information about that service contemporaneously with the offer to read a random list.

We request that you enter this letter into the record in the items captioned above.

Sincerely,

Attachment

cc: C. Mattey
J. Di Scipio

S. Whitesell
L. Choi

No. of Copies rec'd 0+3
List ABCDE

CONFIDENTIAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED
OCT 21 1997
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Application of Ameritech Michigan)
Pursuant to Section 271 of the)
Communications Act of 1934, as amended,)
To Provide In-Region InterLATA Services)
In Michigan)

CC Docket No. 97-137

COMMENTS OF BELL ATLANTIC¹
ON PETITIONS FOR RECONSIDERATION

The Commission should grant the petitions that ask it to reconsider its discussion of the script proposed by Ameritech for use on inbound calls. That portion of the Order, while dicta, directly conflicts with the 1996 Act, which expressly permits a Bell operating company and its interLATA affiliate to jointly market their services, is inconsistent with the Commission's own non-accounting safeguards rules, and, by the Commission's own analysis, would raise serious constitutional concerns to boot. Consequently, the Commission simply should withdraw this portion of its Order.

1. Background. In its application, Ameritech included a script for use on inbound calls that proposed to inform callers that they have a choice of long distance callers, and that Ameritech is one of the choices. It also offered to read a list of available carriers at the caller's

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic- Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company.

option. In its order, however, the Commission concluded that the proposed script was flawed, and suggested that Ameritech instead should read a randomized list of all available long distance carriers.² While the discussion of this issue in the Order is non-binding dicta, the uncertainty it has engendered significantly impairs reasoned business planning efforts. As a result, this portion of the Commission's Order simply should be withdrawn.

2. The discussion of the script proposed by Ameritech is inconsistent with the Act. In section 272(g) of the 1996 Act, Congress expressly permitted a Bell operating company and its interLATA affiliate to jointly market and sell their local and long distance services, and made it clear that this joint marketing did not violate a Bell company's non-discrimination obligations under the Act. Prohibiting the use of scripts such as that proposed by Ameritech simply cannot be squared with this section of the Act.

The reason for this is straightforward. In most of the jurisdictions served by Bell Atlantic, there are well over 100 available carriers. For example, there are over 140 in the District of Columbia, and over 170 in New York. Merely reciting a random list of carriers would take a service representative eight minutes or more, and consumers simply cannot be expected to sit still for the inconvenience of having to listen to a list this long. Instead, they will interrupt with a selection (or simply terminate the call), if only to put a stop to the seemingly endless roll call of carriers. This not only would trigger a flood of complaints from frustrated consumers, but also, by effectively preventing a Bell company from jointly marketing its local and long distance services on inbound calls, would run afoul of section 272(g).

² See *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, Mem. Op. and Order (rel. Aug. 19, 1997) ("Ameritech Order").

In fact, the legislative history makes clear that Congress intended to permit a Bell company to “offer the same one-stop shopping alternatives that long distance companies can offer.” See 141 Cong. Rec. E1913-02, E1913 (Oct. 11, 1995)(remarks of Rep. Mike Ward, Kentucky). But a long distance carrier offering local service would not have to subject its customers to a list of more than one hundred competing providers before even mentioning its own service. And Congress simply did not intend for a long distance incumbent to sell all their services to a customer on an inbound call, while denying that same opportunity to a Bell company.³

3. The discussion of the script proposed by Ameritech is inconsistent with the Commission’s own rules. In its Safeguards Order implementing section 272, the Commission expressly held that “a BOC may market its affiliate’s interLATA services to inbound callers, provided that the Bell company also informs such customers of their right to select the interLATA carrier of their choice.”⁴ In addition, the Commission cited favorably an *ex parte* filing by NYNEX as an example of how this inbound joint marketing could be carried out – a procedure where NYNEX explicitly would inform customers “that a number of companies provide long distance service, including NYNEX Long Distance Company.”⁵

³ This conclusion is further buttressed by section 274 of the Act. That provision bars a Bell operating company, as a general matter, from engaging in joint marketing with its separate electronic publishing affiliate, section 274(c)(1), but expressly permits the Bell operating company to provide “inbound telemarketing or referral services,” section 274(c)(2)(A). And if inbound services are permitted even where joint marketing *is* restricted, then they must certainly be permitted where it is *not*.

⁴ *Implementation of the Non-Accounting Safeguards of Section 271 and 272*, 11 FCC Rcd 21905, 22045-22047 (1996) (“Safeguards Order”).

⁵ See *Ex Parte* letter from Susanne Guyer to William F. Caton, CC Docket No. 96-149, (filed Oct. 23, 1996), cited in Safeguards Order, n.764.

The script proposed by Ameritech fully complies both with the express terms of the Safeguards Order itself, and with the specific procedure that was cited favorably in that order.⁶ It first reminds customers that they have a choice of long distance carriers. It then informs customers that Ameritech is one of the choices, but immediately offers to read a list of other available carriers.

The Commission's only explanation for its about face here is that the Safeguards Order also requires a Bell company to "provide" a list of carriers in random order. Ameritech Order, ¶ 376. But the Ameritech script does explicitly offer to read such a list. *Id.*⁷ And as the Commission itself recognizes elsewhere in the same order, to "make available," as Ameritech expressly proposes to do, is consistent with a "commonly understood" meaning of "provide." *Id.*, ¶ 110.

As a result, to the extent the Order here suggests that the list not only must be made available, but must actually be read -- apparently whether the customer wants to hear it or not -- it is simply inconsistent with the rules adopted in the Safeguards Order.

4. The discussion of the script proposed by Ameritech raises serious constitutional concerns. Under the Commission's own analysis, precluding a Bell operating company from

⁶ Specifically the cited portion of the Ameritech script states: "You have a choice of companies, including Ameritech Long Distance, for long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like?" Ameritech Order at ¶ 375.

⁷ The Order complains that the list was only available if the "customer affirmatively requests the names," *id.*, but in reality it is the script which "affirmatively" makes the list available to the customer, and merely leaves it to the customer to choose whether or not he or she wants to hear the list.

providing truthful information to its customers through a script such as that proposed by Ameritech also would create serious constitutional issues.

As the Commission itself has recognized, commercial speech of the type at issue here is afforded First Amendment protection so long as the speech concerns a lawful activity and is not misleading or fraudulent -- not an issue here. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 340 (1986). Such speech can only be restricted where there is a substantial government interest directly advanced by the restrictions and the restrictions are no more extensive than necessary to serve that interest. 478 U.S. at 340 (citing *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 566 (1980)).

The Commission itself recognized the problem when it interpreted the Act's explicit prohibition on the ability of large long distance carriers to joint market their long distance service with resold local services, and construed the prohibition narrowly to minimize the First Amendment concerns. Here, in contrast, the statute specifically permits a Bell operating company to market and sell its affiliate's long distance services, yet the Ameritech Order nowhere explains how preventing a Bell company from using a script such as that proposed by Ameritech satisfies the rigorous constitutional standard.

It does not because it cannot. Any conceivable concern is addressed by reminding callers that they have a choice of long distance carriers, and offering to provide a list of those carriers. In today's world of multi-million dollar long distance marketing campaigns, customers already are aware that they have choices for long distance service. Indeed, customers are least likely to be aware that the Bell company affiliate also offers such service. If a cone of silence is lowered over the Bell company, customers are less likely to understand their long distance options, and will be less able to benefit from the additional competition that Bell company entry into the long

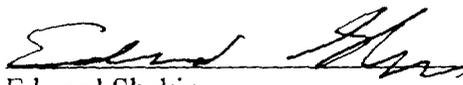
distance market can provide. As a result, it actually harms the very governmental interest the Commission claims it is protecting.

CONCLUSION

For all the foregoing reasons, the portion of the Commission's order discussing the script proposed by Ameritech for use on inbound calls should be withdrawn.

Respectfully submitted,

Of Counsel
Edward D Young, III
Michael E. Glover

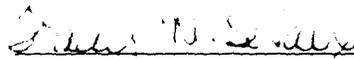

Edward Shakin
Leslie A. Vial
1320 N. Courthouse Road
8th Floor
Arlington, Virginia 22201
703-974-2819

Attorneys for the Bell Atlantic
telephone companies

October 9, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 1997 a copy of the foregoing "Comments of Bell Atlantic on Petitions for Reconsideration" was sent by first class mail, postage prepaid, to the parties on the attached list.



Tracey M. DeVaux

Walter Alford
William Barfield
M. Robert Sutherland
BellSouth Corporation
1155 Peachtree Street, NE
Suite 1700
Atlanta, GA 30309-3610

Lawrence Malone
General Counsel
New York State
Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Robert McKenna
Laurie Bennett
US West, Inc.
Suite 700
1029 19th Street, NW
Washington, DC 20036

Michael Kellogg
Austin Schlick
Jonathan Molot
Kellogg, Huber, Hanson, Todd & Evans
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

Counsel for BellSouth Corporation

William Lake
John Harwood
Jacquelynn Ruff
Michael McKenzie
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037-1420

Counsel for US West, Inc.

ITS, Inc.*
1919 M Street, NW
Room 246
Washington, DC 20554