

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition of LCI International Telecom Corp.)
for Expedited Declaratory Rulings)
)

CC Docket No. 98-5

**INTERMEDIA COMMUNICATIONS INC.
REPLY COMMENTS OPPOSING LCI PETITION TO MODIFY
THE SECTION 271 REVIEW PROCESS**

Intermedia Communications Inc. ("Intermedia") hereby submits its Reply Comments opposing LCI's petition to expand the review process under section 271 of the Communications Act¹ by establishing a form of structural separation. Intermedia strongly supports rigorous Commission enforcement of the Act, in particular the 14-point checklist governing Bell operating company ("BOC") entry into in-region interLATA markets. However, the plain language of the Act, rather than expansive new interpretations, should guide the Commission in its effort to bring competition to local markets. Straightforward Commission enforcement will lead to competition as anticipated by the Act. In contrast, any overly broad interpretation of the Commission's powers under the Act will lead to court battles, which will increase the already high level of regulatory uncertainty that exists today. Thus, Intermedia writes to: (1) support the Commission's existing section 271 review process and (2) demonstrate that the LCI proposal is inconsistent with the Act, and should thus be rejected.

¹ Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* ("Act").

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I. INTERMEDIA SUPPORT THE COMMISSION'S EXISTING 271 PROCESS

The Commission's 271 process is working. Over the past year, the Commission has considered four different applications under section 271 of the Act, and each time the Commission has further defined the type of showing that a BOC must make to obtain interLATA relief. In fact, the recent decision of the Court of Appeals for the District of Columbia Circuit, which upheld the Commission's first order under section 271,ⁱ further clarified the section 271 process. Rather than change the rules midstream, as LCI suggests, the Commission should stay the Congressionally-mandated course and continue to enforce the 14-point checklist "as is." Any effort to change substantially the existing regulatory structure – especially through means that appear inconsistent with the Act – will result in more litigation, will yield further uncertainty, and will further slow competition – especially facilities-based competition.

A. The LCI proposal promises litigation, which will hurt facilities-based CLECs

The BOCs unanimously oppose the LCI proposal, and the Commission should expect the BOCs to litigate any Commission action that endorses the LCI approach or any similar divestiture model. With the BOCs' established record of litigation on 271 matters,ⁱⁱ little doubt should exist that the BOCs will mount legal challenges against creative expansions of the section 271 process, such as the LCI divestiture plan.

The interexchange carriers ("IXCs") might not mind protracted litigation, if it has the effect of delaying BOC entry into in-region long distance markets. The Commission is

cognizant of differing incentives that apply to IXCs and facilities-based CLECs. While facilities-based CLECs seek full implementation of the 14-point checklist, some IXCs may be willing to forego such implementation and accept protracted litigation if it keeps BOCs out of their markets. Thus viewed, litigation may actually benefit IXCs by keeping out BOC competition.

By contrast, the uncertainty and delay caused by litigation hurts facilities-based CLECs, such as Intermedia, that require the unbundled network elements, operations support systems, interconnection, and mutual compensation that are mandated by the 14-point checklist. Facilities-based CLECs view local exchange service as a broad new business opportunity, and not just a defensive customer retention mechanism. To the extent that litigation is pending and the rules of compliance are uncertain, full implementation of the 14-point checklist may be delayed. Only when the regulatory dust settles and the rules become clear can the industry expect full BOC compliance with the checklist, and the Commission's existing section 271 process is the best alternative available. As such, competition will be best served by the Commission's continued strict enforcement of the competitive checklist contained in section 271 of the Act, rather than radical changes to the existing regulatory framework.

At bottom, facilities-based CLECs view section 271 as a carrot for encouraging BOCs to open their networks, but IXCs view section 271 as a stick for keeping the BOCs out of long distance. Litigation-fueling rule changes may benefit IXCs seeking to delay BOC interexchange competition, but these same rule changes create uncertainty, which makes it very difficult for facilities-based CLECs to expand their presence in local markets.

B. The LCI proposal may discourage facilities-based-competition

LCI's proposal may hamper facilities-based competition and encourage only resale competition.ⁱⁱⁱ Under the LCI divestiture plan, NetCo would retain a monopoly on network services, which would discourage competitors from bringing facilities-based competition to local markets.²

As noted by ICG, "[a]s long as NetCo exists as a relatively independent entity, it would be motivated to do whatever it could to discourage the entry of facilities based carriers ... and to encourage the use of [NetCo's] own facilities."³ NetCo would be incented to keep carriers on NetCo's facilities rather than have carriers build their own facilities. Such an outcome could thus promote resale competition, but at the cost of undermining facilities-based competition.

With NetCo in the business of providing network services to its customers, NetCo would benefit from providing better service to its resale customers than to its facilities-based customers.⁴ To the extent that carriers provide their own facilities, they take business away from NetCo. NetCo would thus make itself better off by encouraging CLECs to resell NetCo's end-to-end service rather than have a CLEC purchase network element combinations that work in concert with the CLEC's own facilities. Such a result may benefit IXCs by making it easier to

² New Jersey Ratepayer Advocate at 2.

³ ICG at 5.

⁴ *Id.*

protect long distance market share, but it would hurt competitors seeking to build competitive local networks, such as Intermedia and other facilities-based CLECs.

II. THE LANGUAGE AND STRUCTURE OF THE ACT INDICATE THAT CONGRESS FORESAW AN INTEGRATED BOC PROVIDING RETAIL AND WHOLESALE SERVICE, AND, THUS, ANY RETAIL-WHOLESALE DIVESTITURE PROPOSAL IS INCONSISTENT WITH THE ACT

LCI's structural separation proposal imposes duties on the BOCs that go beyond what Congress intended. As Intermedia discusses below, the plain language of the Act suggests that Congress contemplated integrated BOCs providing both wholesale and retail service. Moreover, the divestiture plan seems to rewrite Congress' 14-point competitive checklist, which the Commission may not "limit or extend."^{iv}

A. The plain language of the Act indicate that Congress understood that an integrated BOC would provide both retail and wholesale service

As the BOCs recognize,^v the resale provisions contained in sections 251 and 252 suggest that Congress expected a single BOC entity to provide retail and wholesale service, much in the way long distance companies presently resell their services. As written, the resale requirements of the Act – both for services offered and for pricing – lose essentially all meaning under LCI's proposal, which indicates that the proposal is contrary to the Act.

Section 251(c)(4) requires BOCs and others to resell:

at wholesale rates any telecommunications service that the [BOC] provides at retail to subscribers who are not telecommunications providers.⁵

In other words, any telecommunications service a BOC makes available to end-user customers, a BOC must also make available to competing carriers at a wholesale discount. Under LCI's plan, however, the wholesale group (*i.e.*, NetCo) would have no end-user customers. As a carrier's carrier, NetCo would lack "subscribers who are not telecommunications providers," as contemplated by section 251(c)(4). Without retail services to resell, the BOCs' 251(c)(4) obligation becomes meaningless.

Similarly, section 252(d)(3), requires state commissions to:

determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested ... excluding costs that will be avoided by the local exchange carrier.⁶

Put another way, state commissions should price wholesale rates at the BOC's retail rate less any cost that the BOC does not incur, such as billing, collections, or marketing. But as noted, NetCo would offer no retail service, and thus lack any retail rate upon which to base wholesale prices. As such, Congress' wholesale pricing provision loses any substantive meaning under the LCI plan.

As Ameritech notes, "when Congress drafted the Act, it accepted the fact that BOCs would offer retail and wholesale services from an integrated operation."⁷ Adding weight to

⁵ 47 U.S.C. § 251(c)(4).

⁶ *Id.* at § 252(d)(3).

⁷ Ameritech at 8.

Ameritech's reading of the Act, Congress has shown that it will speak when it wants to require structural separation. For example, section 272 requires BOCs to create separate affiliates for a number of activities, including manufacturing,⁸ in-region interLATA service,⁹ and interLATA information services.¹⁰ Section 274 requires BOCs to create separate affiliates for publishing activities.¹¹ Had Congress wanted BOCs to provide local exchange service through separate wholesale and retail facilities, Congress would have made its desire clear in sections 251, 252, and 271. Thus, LCI's proposal, while creative, goes well beyond the regulatory structure established by the Act.

B. Implementing the LCI divestiture plan would require rewriting Congress' 14-point checklist, which would violate the Act

Congress has expressly prohibited the Commission from limiting or extending the terms of the 14-point competitive checklist.^{vi} LCI's proposal requires that the BOCs divide their wholesale and retail operations into two structurally separate entities and eventually distribute customers to competitors through a balloting process.¹² These requirements simply are not found in the 14-point checklist or anywhere else in the Act. While LCI claims that the Commission "has plenary authority to adopt structural approaches to regulatory problems" by virtue of its

⁸ 47 U.S.C. § 272(a)(2)(A).

⁹ *Id.* at § 272(a)(2)(B).

¹⁰ *Id.* at § 272(a)(2)(C).

¹¹ *Id.* at § 274(b).

¹² LCI petition at 16-22.

general “154(i)” and “201(b)” powers,¹³ it seems unlikely that the Congress intended the Commission to use its general authority to eviscerate express provisions of the Act.

Courts have become increasingly suspicious of expansive use of provisions granting the Commission general authority. For example, the Eighth Circuit in *Iowa Bd.* specifically rejected the Commission’s attempt to use sections 154(i) and 201(b) to support policy determinations. The court stated that section 154(i) gives the Commission only “ancillary” authority, not substantive authority.¹⁴ The court also explained that section 201(b) is limited to interstate and international rate cases.¹⁵

The Eighth Circuit is not alone in its suspicion of attempts to support policy positions with provisions of the Act that do not “fit” the issue at hand. For example, the Court of Appeals for the Ninth Circuit rejected the Commission’s effort to preempt state-imposed structural separation requirements using Title I of the Act (which includes section 154(i)), as “Title I is not an independent source of regulatory authority, rather is confers on the FCC only [ancillary authority].”¹⁶

Under the tenets of statutory construction, the Commission must read specific provisions of the Act to govern general provisions. Congress specifically instructed the Commission to use

¹³ LCI petition at 39-40 and n. 53.

¹⁴ *Iowa Util. Bd. v. FCC, as amended on rehearing Oct. 14, 1997*, 120 F.3d 753, 798 (8th Cir. 1997), *cert. granted*, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141).

¹⁵ *Id.*

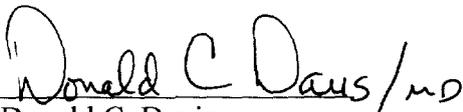
¹⁶ *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990).

the 14-point checklist "as is" when evaluating section 271 applications. Any effort to modify the checklist would violate the express language of the Act, and so must be rejected.

III. CONCLUSION

While LCI's plan is creative, it goes well beyond what Congress intended, as evidenced by the language of the statute. The Commission should expect the BOCs to litigate aggressively any Commission action that seems to go beyond the Act, including the LCI proposal. Rather than risk embroiling the industry in further regulatory upheaval, Intermedia instead submits that the Commission should maintain the course it has taken to date, and require the BOCs to satisfy all provisions of section 271 "as is" before receiving approval to enter in-region interLATA markets.

Respectfully submitted,

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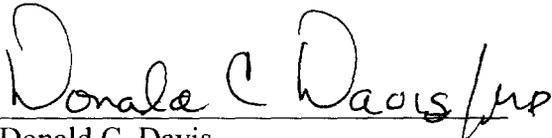
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CERTIFICATE OF SERVICE

I hereby certify that I have, this 22 day of April, 1998, served this day a copy of the foregoing REPLY COMMENTS OF INTERMEDIA COMMUNICATIONS INC. by hand delivery to the following:

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