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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)	
)	
Petition on Declaratory Ruling Or,)	
In the Alternative, For Rulemaking)	
on Defining Certain Incumbent LEC)	CC Docket No. 98-39
Affiliates as Successors, Assigns,)	
or Comparable Carriers Under)	
Section 251(h) of the)	
Communications Act)	

AT&T CORP.'S REPLY COMMENTS

Pursuant to the Commission's Public Notice (DA-98-627), released April 1, 1998, and Order (DA 98-867) extending time to file reply comments, released May 8, 1998, AT&T Corp. ("AT&T") hereby replies to the comments of other parties¹ on the petition of the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association (collectively, "Petitioners") requesting a declaratory ruling or the initiation of a rulemaking proceeding concerning the regulatory status of certain affiliates of incumbent local exchange carriers ("ILECs"). The critical issues highlighted in the comments confirm that the Commission should commence a rulemaking proceeding to determine the minimum requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC.

¹ A list of the commenters and the abbreviations used to refer to each is set forth in Attachment 1.

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INTRODUCTION

AT&T reaffirms that Commission action is warranted. The comments overwhelmingly confirm the need for swift Commission engagement in the form of a rulemaking. Indeed, Frontier, itself an ILEC, confirms that: "Comptel has correctly identified a potentially serious problem – namely, the potential for ILECs to evade their substantive responsibilities under section 251 of the Communications Act through specially structured affiliated CLECs in the same area."²

For the reasons set forth below, in our comments, and in the other comments supporting Petitioners, the Commission should immediately commence, and promptly conclude, a proceeding to specify the minimum nondiscrimination, separation, transaction, and other requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC.

ARGUMENT

As AT&T pointed out before, the Petitioners are correct to conclude that the evolution of ILEC affiliates, as currently envisioned by the ILECs, seriously threaten prospects for the development of local exchange competition.³ Some ILECs⁴ try to obfuscate the central issue of ILEC affiliate status by raising the procedural red herring that the Petitioners' arguments are an

² Frontier comments, p. 2. Frontier's comments partially support and partially oppose the Petitioners. However, Frontier supports the essence of Petitioners' argument. They differ on the scope and other peripheral issues rather than the underlying indicia of a serious problem, and Frontier endorses initiation of a rulemaking. See id., at p. 2. See also, Sprint comments, pp. 2, 3-4, & 5-7 (wherein Sprint similarly endorses a modified commencement of Commission action).

³ See, AT&T comments, p. 3.

⁴ See, Ameritech comments, pp. 2-3; BellSouth comments, pp. 2-7; and GTE comments, pp. 10-16.

untimely request for reconsideration of the Non-Accounting Safeguards Order.⁵ Contrary to the ILECs' claims, however, the Commission did not resolve these issues in that order. Instead, it stated that section 251(c) "... applies only to entities that meet the definition of a incumbent LEC under section 251(h). [where] ... Section 251(h)(1) defines an incumbent LEC as ... [among other things] a successor or assign of [] a [NECA] member."⁶ The Commission did not interpret or offer broad guidance concerning construction of the term 'successor or assign,' or comparable carrier, under 251(h).⁷

The ILECs are, moreover, wholly disingenuous in claiming that the Commission concluded in that order that the *sole and exclusive* way an ILEC affiliate can be deemed an ILEC is if network elements, subject to unbundling under Section 251(c)(3), are transferred from the latter to the former.⁸ This interpretation could not be more wrong or misleading.

⁵ 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 and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (subsequent history omitted) ("Non-Accounting Safeguards Order") adopted December 23, 1996.

⁶ Non-Accounting Safeguards Order at pp. 22055-56, ¶ 312.

⁷ Commenters offer legal interpretations of the terms "successor or assign." See, e.g., BellSouth comments, pp. 16-18 and MCI comments, pp. 13-16. The Commission should, and in a fully developed rulemaking would have proper opportunity to, provide guidance to the industry concerning the construction of these terms, taking account of the unique characteristics of the telecommunications industry, the current state of exchange and exchange access competition, ILEC efforts to avoid opening their markets to competition, and the purposes of the Act.

⁸ See, Ameritech comments, pp. 3-4; Bell Atlantic comments, pp. 2, 4; BellSouth comments, pp. 7-8, 15; and SBC comments, pp. 4-5.

While the Commission clearly found that, if a BOC transfers to an affiliate ownership of any network element, that affiliate will be deemed an “assign” of the BOC, it did not suggest that under no other circumstances could an affiliate be a successor, assign, or comparable carrier to an ILEC. Specifically, the Commission in paragraph 309 of the Non-Accounting Safeguards Order deals with the transfer of local exchange and exchange access capabilities. In pertinent part, the Commission set forth in its discussion:

We note, however, that there are still legitimate concerns that a BOC could potentially evade the section 272 or 251 requirements by, for example, first transferring facilities to another affiliate or the BOC’s parent company, which would then transfer the facilities to the section 272 affiliate. To address this problem, we conclude that, if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an “assign” of the BOC under section 3(4) of the Act with respect to those network elements. Any successor or assign of the BOC is subject to the section 272 requirements in the same manner as the BOC. We also note that, based on the plain language of the statute, section 272(c) only applies to the BOC or an affiliate that is a “successor or assign” of the BOC.

Non-Accounting Safeguards Order at p. 22054, ¶ 309.⁹ In Appendix B of the Non-Accounting Safeguards Order the Commission amends the Code of Federal Regulations with the following language:

If a BOC transfers to an unaffiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) of the Act, such entity will be deemed to be an “assign” of the BOC under section 3(4) of the Act with respect to such transferred network elements. A BOC affiliate shall not be deemed a “successor or assign” of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act.

⁹ See also, Non-Accounting Safeguards Order at p. 22055, ¶ 311. “In view of our decision to treat a BOC affiliates as a ‘successor or assign’ of the BOC if the BOC transfers network elements to the affiliate . . .” There is likewise no mention of one exclusive method for an affiliate to be deemed a ‘successor or assign’.

Non-Accounting Safeguards Order, Appendix B §53.205 at p. 22096, as corrected to §53.207 by the Order on Reconsideration, CC Docket No. 96-149, released February 19, 1997, p. 5. Neither the Commission's discussion or final rules can be construed as setting forth the transfer of network elements subject to unbundling under Section 251(c)(3) as the *exclusive* way an ILEC affiliate could be deemed an ILEC. The ILECs' comments betray their own inadequacy; they never directly quote language supporting their position, and cannot, because there is none.

In all events, the Non-Accounting Safeguards Order was developed from the record before the Commission one and a half years ago. At that time, the Commission recognized the potential need for additional regulations, standards, or interpretations applicable to Section 272 affiliates, if the evidence warranted.¹⁰ Commenters in this proceeding point out new and material evidence the Commission should consider in a fully developed rulemaking proceeding.¹¹ Furthermore, AT&T and other commenters demonstrated in their comments that one of the Commission's underlying assumptions – that existing requirements under the Act are adequate to

¹⁰ “. . . we find it unnecessary *at this time* to adopt additional nondiscrimination regulations applicable to section 272 affiliates. . . . We conclude based *on the current record* that these existing requirements *should be adequate* to protect competition . . .” (emphasis added) Non-Accounting Safeguards Order at p. 22055 (¶ 311). See also, the Local Competition Order, wherein the Commission declined “[a]t this time” to “adopt specific procedures or standards for determining whether a LEC should be treated as an incumbent LEC.” Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 1248 (subsequent history omitted).

¹¹ See, e.g., ALTS comments discussing connection with Section 706 issues, pp. 2-5; e.spire comments discussing local frame relay data interconnection, pp. 6-7; Sprint comments discussing xDSL services, p. 4; and TCG comments discussing cross-subsidy issues, pp. 4-5.

protect competition and additional regulations are not necessary¹² – has been proven false by the actions of the ILECs.¹³

In this regard, the comments demonstrate that, unless the Commission acts, the ILECs' conduct could enable them to avoid their obligations under Section 251 of the Act by, for example, ceding portions of their market to the ILEC affiliate, and thereby purporting to claim no obligation to make wholesale services available for those portions of the market.¹⁴ The comments also highlight the enormous uncertainty introduced into the marketplace by the continuing prospect of ILEC avoidance of obligations through the artifice of ILEC affiliates.¹⁵ As we stated before, this uncertainty increases the already substantial risks and costs of local market entry.

¹² Non-Accounting Safeguards Order at p. 22055, ¶ 311; pp. 22056-57, ¶ 314; pp. 22057-58, ¶ 315.

¹³ See, e.g., AT&T comments, pp. 1-2; e.spire comments, pp. 1-2; KMC comments, p. 4; MCI comments, pp. 3-7; and TCG comments, pp. 3-5.

¹⁴ See, e.g., AT&T comments, p. 4; e.spire comments, p. 6; Intermedia comments, p. 3; MCI comments, p. 4; and TRA comments, pp. 5-6.

¹⁵ See, e.g., AT&T comments, pp. 4-5; and MCI comments, pp. 12-13.

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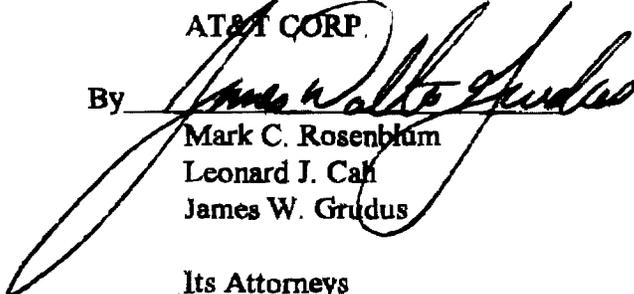
CONCLUSION

For the reasons stated above and in its comments, AT&T urges the Commission to initiate a rulemaking proceeding to determine the minimum requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC.

Respectfully submitted,

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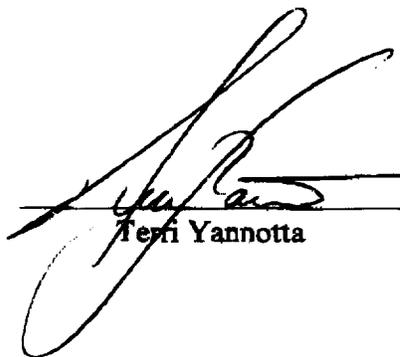
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(CC Docket No. 98-39)

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BellSouth Corporation ("BellSouth")
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Intermedia Communications Inc. ("Intermedia")
KMC Telecom Inc. ("KMC")
LCI International Telecom Corp. ("LCI")
MCI Telecommunications Corporation ("MCI")
National Telephone Cooperative Association ("NTCA")
SBC Communications Inc. ("SBC")
Southern New England Telephone Company ("SNET")
Sprint Corporation ("Sprint")
Telecommunications Resellers Association ("TRA")
Teleport Communications Group, Inc. ("TCG")
United States Telephone Association ("USTA")
WorldCom, Inc. ("WorldCom")

CERTIFICATE OF SERVICE

I, Terri Yannotta, do hereby certify that on this 1st day of June, 1998, a copy of the foregoing "AT&T Corp.'s Reply Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.



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June 1, 1998

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