

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Application of BellSouth Corporation,)
BellSouth Telecommunications, Inc., and)
BellSouth Long Distance, Inc. for Provisions)
of In-Region, InterLATA Services)
In Louisiana)

CC Docket No. 98-121

**PETITION OF AT&T CORP.
FOR RECONSIDERATION AND/OR CLARIFICATION**

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SUMMARY

AT&T seeks reconsideration and/or clarification of the Commission's Memorandum Opinion and Order in this proceeding in four respects:

First, the Commission should clarify that purchasers of unbundled network elements must, under the Act, be permitted to provide exchange access, including intrastate exchange access, and that, as a necessary corollary of this requirement, the Act precludes incumbent LECs from imposing access charges upon purchasers of unbundled network elements. The Commission should further clarify that if a BOC, in violation of § 251(c)(3), does not allow an element purchaser to be the provider of interstate and intrastate exchange access, the BOC cannot be in compliance with the competitive checklist. See Section I.

Second, the Commission should reconsider its approval of BellSouth's use of a marketing script for inbound calls that violates BellSouth's continuing equal access obligations under § 251(g) of the Act. These obligations necessarily constrain a BOC's general authority under section 272(g)(2) to market an affiliate's interLATA service during the presubscription process. Thus, although a BOC may market its affiliate's long-distance services through mass media advertising, mailings and outbound telemarketing, the Act does not permit it to favor or market those services during inbound calls for local service or PIC changes except in accordance with its equal access obligations. It is thus completely reasonable to require, as the Act does and as the Commission recognized in its Ameritech Order, that BOCs, before leveraging inbound calls for local service and PIC changes into marketing opportunities for their interLATA affiliates, comply with the equal access requirements. See Section II.

Third, the Commission should clarify that the Act requires that compliance with the competitive checklist be demonstrated through full implementation of commitments contained in

interconnection agreements, rather than through commitments contained in Statements of Generally Available Terms and Conditions (“SGATs”). In all events, to the extent that the Commission will consider SGAT commitments, the Commission should clarify that, in order to establish checklist compliance, a BOC must show that it permitted new entrants to incorporate into their interconnection agreements the commitments made in the BOC’s SGAT, and to do so without onerous extraneous conditions and with sufficient time before the application is filed to obtain full implementation of these commitments. See Section III.

Finally, the Commission should make clear that a BOC must disclose transaction between its 272 affiliate and another affiliate where the BOC has transferred its local exchange and exchange access facilities to the other affiliate. Further, the Commission should require that “chain transactions” between the BOC and the 272 affiliate through an intermediary affiliate be disclosed pursuant to section 272 to ensure that BOCs do not use such transactions to avoid their obligations under the Act. See Section IV.

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**PETITION OF AT&T CORP.
FOR RECONSIDERATION AND/OR CLARIFICATION**

Pursuant to section 1.106 of the Commission's Rules (47 C.F.R. § 1.106), AT&T Corp. ("AT&T") seeks reconsideration and/or clarification of the Commission's Memorandum Opinion and Order in this proceeding ("BellSouth Second Louisiana Order" or "Order")¹ in four respects: (1) the Commission should clarify that state commissions cannot prevent a new entrant from providing – or impair a new entrant's ability to provide – exchange access using unbundled network elements as the Act authorizes; (2) the Commission should reconsider its approval of BellSouth's use of a marketing script for inbound calls that violates BellSouth's continuing equal access obligations under § 251(g); (3) the Commission should clarify that a BOC must permit new entrants to incorporate its checklist commitments into existing or future interconnection agreements; and (4) the Commission should make clear that a BOC is required to disclose

¹ Memorandum Opinion and Order, Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, FCC 98-271, CC Docket No. 98-121 (rel. October 13, 1998) ("BellSouth Second Louisiana Order" or "Order").

transactions between its section 272 affiliate and its other non-regulated affiliates which could otherwise be used to circumvent the BOC's obligations under the Act.²

I. THE ACT REQUIRES THAT PURCHASERS OF UNBUNDLED NETWORK ELEMENTS BE PERMITTED TO USE SUCH ELEMENTS TO PROVIDE EXCHANGE ACCESS.

Section 251(c)(3) of the Act requires incumbent LECs to make unbundled network elements available to any requesting carrier to provide any telecommunications service, including exchange access. Local Competition Order³ ¶ 356; Local Competition First Reconsideration Order⁴ ¶ 11. As the Commission has stressed previously, any attempt by an incumbent LEC to impose access charges on carriers who are using unbundled network elements to provide intrastate or interstate telecommunications services would violate the Act. See AT&T Communications, Inc. v. Pacific Bell, Case No C-97-0080 SI, Memorandum of the Federal Communications Commission as *Amicus Curiae* at 14 (N.D. Cal. Oct. 29, 1997) (“FCC *Amicus* Brief”). It would also render economically impractical one of the key paths to local competition

² The Order raises other significant concerns as well. Although it does not decide the issue, the Commission suggests (¶ 46) that section 271(c)(1)(a) “appears to stop short of mandating actual provisioning of competitive facilities-based telephone exchange services independently to both business and residential subscribers.” This interpretation of the Act is wrong. Section 271(c)(1)(a) explicitly requires the provision of facilities-based exchange service to “residential and business subscribers.” Emphasis added. See also H.R. REP. NO. 104-458, 104th Cong., 2d Sess. (1996) (“meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes”) (emphasis added).

³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 (1996) (“Local Competition Order”).

⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd 13042 (1996) (“Local Competition First Reconsideration Order”).

the Act sought to open for new entrants and their customers.

Consistent with the Act’s requirements, the Order holds that “incumbent LECs must permit competing carriers to purchase unbundled network elements, including unbundled local switching, in a manner that permits a competing carrier to offer, and bill for, exchange access and the termination of local traffic.” ¶ 208. The Commission therefore finds that BellSouth’s failure to provide billing information to element purchasers so that they, and not BellSouth, may bill for intrastate access, prevents BellSouth from providing unbundled local switching in compliance with the competitive checklist. ¶¶ 230-31. Yet, despite the Act’s clear mandate that purchasers of unbundled network elements become the exchange access provider, and thus cannot be subject to access charges, the Order contains footnote language that could be read to give state commissions the latitude to prevent such element purchasers from providing intrastate exchange access:

We note that the states have the right to determine whether purchasers of unbundled local switching have the right to collect exchange access charges for intrastate exchange access calls. It is our hope that states will allow purchasers of unbundled local switching to collect such charges and not the incumbent LEC.

¶ 230 n.736.

Although the basis for this statement is unclear, it appears to be based on a misapplication of the 8th Circuit’s CompTel decision,⁵ which vacated that part of Commission Rule 51.515(a) dealing with intrastate access charges as outside the Commission’s jurisdiction.⁶ CompTel,

⁵ Competitive Telecommunications Ass’n. v. FCC, 117 F.3d 1068 (8th Cir. 1997).

⁶ In its CompTel decision, the 8th Circuit vacated that part of Rule 51.515(a) that prohibited the imposition of intrastate access charges on the ground that it was beyond the scope of the Commission’s jurisdiction, even though the Commission was “merely ‘allowing’ the state

however, is not controlling here. The 8th Circuit’s footnote statement in that decision dealt with Commission authority over the rates of an intrastate service offered by incumbent LECs. Here, the Commission is dealing with the more fundamental issue of which carrier is the provider of service when a new entrant purchases an unbundled element. Allowing incumbent LECs or state commissions to deny new entrants the ability to provide exchange access or any other service over unbundled network elements would violate the basic framework of the Act, which is built on the principle that a carrier purchasing a network element “owns” the element and has the exclusive right to provide service using that element to end users.⁷ Such a result would also violate binding Commission rules that were affirmed by the 8th Circuit post-CompTel. Moreover, assuming *arguendo* that this issue were solely a state pricing matter, any state decision must comply with binding federal law, as two United States District Courts have held. See discussion infra.

For these reasons, the Commission should clarify that purchasers of unbundled network elements must, under the Act, be permitted to provide exchange access, including intrastate exchange access, and that, as a necessary corollary of this requirement, the Act precludes incumbent LECs from imposing access charges upon purchasers of unbundled network elements. The Commission should further clarify that if a BOC, in violation of § 251(c)(3), does not allow an element purchaser to be the provider of interstate and intrastate exchange access, the BOC

(footnote continued)

commissions to continue to allow the LECs to collect access charges on intrastate calls.” 117 F.3d at 1075 n.5. However, the court did not challenge the substance of the Commission’s rule, and, indeed, noted that the imposition of access charges on element purchasers “on [its] face appear[s] to violate the statute.” 117 F.3d at 1074.

⁷ It would also violate the Act’s requirement that the pricing of network elements be based on cost.

cannot be in compliance with the competitive checklist.

A. The Act and Binding Commission Rules Prevent Incumbent LECs from Imposing Access Charges on Purchasers of Unbundled Network Elements.

As the Commission has made clear, carriers may purchase unbundled network elements “for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers.” Local Competition Order ¶ 356. Further, a carrier purchasing unbundled network elements to serve an end user “obtains the exclusive right to provide all features, functions, and capabilities of the switch, including switching for exchange access and local exchange service, for that end user.” Local Competition First Reconsideration Order ¶ 11. The Act’s requirement encompasses both intrastate and interstate exchange access. See FCC Amicus Brief at 14.

Binding Commission rules make clear that a purchaser of unbundled network elements has the right to provide exchange access using such elements. Section 51.309(a) prohibits an incumbent LEC from imposing restrictions on the use of network elements “that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.” In fact, the Commission has held that imposing access charges on purchasers of unbundled network elements would “impair, if not foreclose,” the ability of such purchasers to provide competitive access service.⁸ In addition, section 51.309(b) affirmatively states that a network element purchaser may use the purchased

⁸ Access Charge Reform, 12 FCC Rcd. 15982, ¶ 337 (1997), aff’d, Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523 (8th Cir. 1998) (“Access Reform Order”).

element to “provide exchange access to itself in order to provide interexchange services to subscribers.” Each of these rules has been upheld by the 8th Circuit and is in full effect and binding upon BellSouth and other incumbent LECs.⁹ Indeed, the 8th Circuit recently affirmed the Commission’s determination that network element purchasers are not subject to interstate access charges.¹⁰

A BOC’s imposition of intrastate access charges on network element purchasers, and its concomitant refusal to permit such purchasers to bill and collect for intrastate exchange access is therefore not a mere pricing issue. As the Commission has noted, imposing such charges would “impair, if not foreclose,” the ability of network element purchasers to provide competitive access service (Access Reform Order at ¶ 337) – a service that the Act specifically entitles them to provide. The Commission thus plainly has authority to, and indeed must, ensure that state commission and BOCs do not bar element purchasers from providing the telecommunications services, including intrastate access services, they seek to provide.

In this regard, a BOC’s actions are no different than those of BellSouth where, pursuant to state commission decision, it refused to provide a wholesale discount on any resold contract service arrangement (“CSA”). As the Commission found in both its South Carolina Order¹¹ and

⁹ Iowa Utils. Bd. v. FCC, 120 F.3d 753, 818 n.38, 819 n.39, cert. granted sub nom., AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998).

¹⁰ Southwestern Bell Telephone Co. v. FCC, 153 F.3d 523, 540-41 (8th Cir. 1998).

¹¹ Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, Memorandum Opinion and Order, 13 FCC Rcd. 539 (1997) (“South Carolina Order”).

First Louisiana Order,¹² such a restriction on applicability of the wholesale discount would “create a general exemption” from the Act’s wholesale pricing requirement. South Carolina Order, ¶ 218; First Louisiana Order, ¶ 64. The Commission in those proceedings therefore rejected arguments that the applicability of a wholesale discount was a local pricing matter within the exclusive jurisdiction of the state commission, because “allowing incumbent LECs to set the wholesale discount . . . at a discount of zero would wholly invalidate” their resale obligation under the Act. First Louisiana Order, ¶ 70; South Carolina Order, ¶ 219.

By the same token, allowing an incumbent LEC to assess access charges upon network element purchasers would invalidate the Act’s requirement that element purchasers be entitled to provide any telecommunications service, including exchange access. The Commission therefore should make clear that a BOC cannot meet its statutory obligations or satisfy the competitive checklist if it fails to allow network element purchasers to provide interstate and intrastate exchange access.

B. Even If the Imposition of Intrastate Access Charges on a Purchaser of Unbundled Network Elements Were a State Pricing Matter, State Commissions Must Still Comply with the Act.

Although the 8th Circuit’s CompTel decision holds that the Commission lacks authority to regulate intrastate access charges, the court did not, and could not, hold that a state commission is free to disregard the requirements of the Act by permitting incumbent LECs to impose intrastate

¹² Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, Memorandum Opinion and Order, 13 FCC Rcd. 6245 (1998) (“First Louisiana Order”).

access charges on network element purchasers.¹³ Regardless of whether they have exclusive jurisdiction to determine intrastate pricing, “state commissions are still required to ensure that their decisions comply with the Act.”¹⁴ Indeed, the Commission stressed four months after CompTel that a state commission’s “decision to impose access charges on the use of UNEs to provide interstate or intrastate network access violates clear statutory and regulatory requirements that prohibit: (1) discrimination against new entrants, and (2) the adoption of non-cost-based charges.” FCC *Amicus* Brief at 14 (emphasis added).

Two United States District Courts that have considered the issue have thus held that it violates the Act to impose intrastate access charges upon purchasers of unbundled network elements. In the AT&T/PacBell Decision, the court found that Pacific’s attempt to impose interstate and intrastate access charges on network element purchasers – even though pursuant to a state commission decision – did not comply with the Act and was unlawful. 1998 WL 246652, *11. Similarly, in Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, the court rejected Southwestern’s claim that the Texas PUC improperly failed to assess access charges on network element purchasers, holding that the Texas PUC’s determinations “were compelled by the [Act].” 1998 WL 657717, *16 (S.D. Tex. 1998).

Moreover, the Commission is charged with the sole responsibility for determining

¹³ In fact, the court made clear that its ruling was on jurisdictional grounds alone, and it was not deciding at that time whether imposition of intrastate access charges on element purchasers would violate the Act, although it noted that such charges “on their face appear to violate the statute.” 117 F.3d at 1074.

¹⁴ AT&T Communications of California v. Pacific Bell, 1998 WL 246652, *9 (N.D. Cal. 1998) (“AT&T/PacBell Decision”).

compliance with the Act in the context of a section 271 proceeding. As the D.C. Circuit has observed:

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) . . . simply does not apply [in a 271 proceeding]. Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOCs' request for interLATA authorization, and interLATA service is typically interstate.

SBC Communications v. FCC, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

The Commission therefore should clarify that the Act mandates that purchasers of unbundled network elements be permitted to provide exchange access, including intrastate exchange access, and that, as a necessary corollary of this requirement, the Act precludes incumbent LECs from imposing access charges upon purchasers of unbundled network elements. The Commission should further clarify that if a BOC, in violation of § 251(c)(3), does not allow an element purchaser to be the provider of interstate and intrastate exchange access, the BOC does not comply with the competitive checklist.

II. THE COMMISSION SHOULD RECONSIDER ITS APPROVAL OF BELL SOUTH'S MARKETING OF INTERLATA SERVICES DURING INBOUND LOCAL SERVICES CALLS.

Since the break up of the Bell System, a cornerstone of the development of full and fair competition in the long distance market has been the requirement that the BOCs provide access to their networks to all interexchange carriers ("IXCs") so that no IXC is favored over another.¹⁵ A core requirement of equal access is that when a BOC receives an incoming customer call to

¹⁵ See United States v. Western Electric Co., 698 F.Supp. 348, 368 (D.D.C. 1988) ("The requirement that equal access be provided to all interexchange carriers is one of the key components of the [MFJ], ranking closely behind divestiture itself and the line of business restrictions on the [BOCs].")

establish new service or make a primary interexchange carrier (“PIC”) change, the BOC representative must advise the customer of the options available for long distance service in a neutral manner.¹⁶ Thus, for example, if the BOC representative provides a customer with a listing of available IXCs, the listing order must be changed randomly so that no IXC is consistently identified first.¹⁷ These equal access requirements have been repeatedly reaffirmed by the Commission, Judge Greene, and the BOCs themselves in a variety of contexts.¹⁸

¹⁶ In 1983, Judge Greene recited that obligation as follows:

“No [BOC] shall continue automatically to assign to AT&T the calls of a customer who receives new service but fails to designate an interexchange carrier although given an opportunity to do so The [BOC] may instead refer the caller to a recorded announcement advising him of the availability of interexchange carriers, or it may otherwise assist him in locating such a carrier, provided that no favoritism is shown to any particular carrier.” United States v. Western Electric Co., 578 F.Supp. 668, 677 (D.D.C. 1983) (emphasis added).

¹⁷ See, e.g., Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 935, 950 (1985) (“LEC personnel taking [a] verbal order should provide new customers with the names and, if requested, the telephone numbers of the IXCs and should devise procedures to ensure that the names of IXCs are provided in random order.”); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 101 FCC 2d 911, Appendix B, ¶ 7 (1985) (“The LECs must devise a method to give IXCs an equal opportunity to appear first on the Equal Access Ballot.”).

¹⁸ See, e.g., 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 (rel. Dec. 24, 1996) (“Non-Accounting Safeguards Order”) ¶ 292; United States v. Western Electric Co., 890 F.Supp. 1, 12 (BOC salespersons “who receive inquiries by prospective Wireless Exchange Service subscribers . . . shall not recommend, sell, or otherwise market the interexchange service of any interexchange carrier, and shall administer interexchange carrier selection procedures on a carrier-neutral and nondiscriminatory basis”), order vacated as moot, 84 F.3d 1452 (D.C. Cir. 1996); BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 351, 6 FCC Rcd. 1592 (rel. Mar. 7, 1991) (approving BellSouth tariff that provided that, for 0- callers who have no preference for an IXC, the BellSouth operator “will read a list of subscribing [IXCs] from which the caller may choose. . . . The order of the names on the list would be changed monthly, with subscribers rotating up in order.”); Ameritech Operating Companies

These requirements were specifically adopted and continued in force by the Act. Thus, section 251(g) provides, in part, as follows:

[E]ach local exchange carrier . . . shall provide exchange access, information access, and exchange services for such access to interexchange carriers . . . in accordance with the same equal access . . . restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order or policy of the Commission

(emphasis added). In the Non-Accounting Safeguards Order (§ 292), the Commission confirmed that section 251(g) maintains the equal access regime because the Commission had “not adopted any regulations to supersede these existing requirements.”¹⁹ The Act therefore requires that BOCs inform new local exchange customers of their right to select the interLATA carrier of their choice, provide the names of all interexchange carriers in random order, and take the customer's order for the interLATA carrier the customer selects. Non-Accounting Safeguards Order § 292. Moreover, the Commission recognized that the BOCs' joint marketing authority under section 272(g) must be exercised consistent with the equal access requirements mandated by section 251(g), finding that “the continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell services of their section 272 affiliates under section 272(g).” Id.

(footnote continued)

Petition for Waiver of Section 69.4(b) of the Commission's Rules, Transmittal Nos. 425, 467, 6 FCC Rcd. 1541, ¶ 5 (rel. Mar. 5 1991) (approving Ameritech tariff that described a method for reciting random lists of IXCs for 0- callers).

¹⁹ Because § 251(g) provides that the existing equal access requirements shall continue to apply until they are “superseded by regulations prescribed by the Commission,” the Commission may modify the existing requirements only by a rulemaking. See Perales v. Sullivan, 948 F.2d 1348 (2d Cir. 1991).

The Commission reiterated and reinforced these findings in the Ameritech Order, holding that Ameritech could not, consistent with equal access, steer customers calling for new service to its long-distance affiliate at the outset of the presubscription process. The Commission therefore rejected the following marketing script proposed by Ameritech:

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 Order²⁰ ¶ 375. The Commission concluded “that this script, if actually used by Ameritech, would violate the ‘equal access’ requirements of section 251(g).”²¹

Yet, in the South Carolina Order, and again in this Order, the Commission has held that BellSouth may recommend its long distance affiliate in the context of an inbound call from a customer seeking to establish new local service or make a PIC change. First, in the South Carolina Order, the Commission approved BellSouth's use of the following marketing script on inbound calls for new service:

You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance.

South Carolina Order ¶ 233. Now, in the BellSouth Second Louisiana Order, the Commission finds that BellSouth may use “the joint marketing/equal access approach” set forth in the South

²⁰ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, Memorandum Opinion and Order, 12 FCC Rcd. 20543 (1997) (“Ameritech Order”).

²¹ Id. The Commission thus found that “[m]entioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order.” Id. ¶ 376 (emphasis added).

Carolina Order.

A. The Approved Marketing Script Does Not Comply with the Continuing Equal Access Obligations of § 251(g).

Because the equal access obligations specifically codified in section 251(g) continue to apply, they necessarily constrain the BOCs' general authority under section 272(g)(2) to market an affiliate's interLATA service during the presubscription process. Thus, although a BOC may market its affiliate's long-distance services through means such as mailings and outbound telemarketing, the Act does not permit it to favor or market those services during inbound calls for local service or PIC changes except in accordance with its equal access obligations. This is precisely the approach the Commission took in the Ameritech Order. The Commission's South Carolina Order, which it follows in the instant Order, obliterated these equal access requirements by allowing BellSouth at the outset of the call to steer customers to BellSouth's interLATA affiliate.²²

The primary rationale for the equal access requirements – to prevent the BOCs and other incumbent LECs from leveraging their unique position into interexchange markets – applies with equal force to BOC leveraging in favor of their section 272 affiliates. Absent the protections of

²² Moreover, that a BOC may “contemporaneously” state that “other carriers also provide long distance service and offers to read a list of [them],” South Carolina Order ¶ 237, does not cure the equal access violation any more than if a BOC currently recommended AT&T interLATA service but offered to read a list of other available IXC. As a California PUC ALJ has found: “The equal access requirement is an empty formalism if Pacific Bell can satisfy it by simply referring to ‘many choices,’ and then describing its affiliate's long distance service in detail.” Application of Pacific Bell Communications for a Certificate of Public Convenience and Necessity to Provide InterLATA, IntraLATA and Local Exchange Telecommunications Service Within the State of California, Calif. PUC, A.96-03-007, at 36-41 (May 5, 1997) (ALJ decision) (“California ALJ Decision”).

equal access, BOCs inevitably will abuse their incumbent position – and any residual market power remaining after obtaining interLATA authority – to steer callers seeking new service or a PIC change toward selecting their affiliates' interLATA services.²³ Such a practice would give a BOC affiliate a significant – and potentially insuperable – advantage, an advantage unrelated to the quality and price of its services.

B. Permitting BOCs to Market Their Affiliates' Long Distance Service During Inbound Local Services Calls Is Not Necessary to Preserve the BOCs' Ability to Engage in Joint Marketing.

The Commission apparently based its conclusion in the South Carolina Order, which it follows in this Order, on the belief that adoption of BellSouth's proposed script was the only way to preserve a BOC's ability to engage in joint marketing. Yet, enforcement of the equal access requirements in keeping with the Non-Accounting Safeguards Order and the Ameritech Order will not unreasonably or unfairly limit the BOCs' ability to jointly market their affiliates' services under section 272(g). Nothing in the equal access requirement prevents a BOC from using its overwhelming local name recognition in radio, television, print, and other mass media advertising, as well as outbound telemarketing and direct mail, to promote its long distance affiliate. The

²³ For example, in 1996 the Florida Public Service Commission found that BellSouth's similar practice of telling callers ordering new service that BellSouth provided intraLATA toll service, and then offering to read a list of other carriers was "inappropriate" and "unfairly favor[ed] BellSouth's intraLATA toll service." Complaint of Florida Interexchange Carriers Association, Fla. PSC, Final Order, Order No. PSC-96-1569-FOF-TP, Docket Nos. 960658-TP, 930330-TP (Dec. 23, 1997), at 6. The PSC therefore ordered BellSouth to modify its practices to advise callers of their right to select a long distance carrier for their toll calls, to offer to read a list of available carriers, and, if the customer declined to hear the list, to ask the customer to identify the carrier of choice. The PSC further precluded BellSouth from marketing its intraLATA toll service unless the customer specifically inquired about it. Id.

equal access requirements merely serve to limit a BOC's ability to steer customers to its affiliates when customers call for new service or to make a PIC change. The value to a section 272 affiliate of owning the exclusive right to market on inbound calls to its incumbent sibling is immense. It is thus completely reasonable to require, as the Act does and as the Commission recognized in its Ameritech Order, that BOCs, before leveraging inbound calls for local service and PIC changes into marketing opportunities for their interLATA affiliates, comply with the equal access requirements.²⁴

For all of these reasons, the Commission should reconsider its approval of BellSouth's proposed marketing script, and should require BOCs to comply fully with their equal access obligations before they market the services of their long distance affiliates.²⁵

²⁴ Indeed, recognizing the inherent risk that a BOC may abuse its market power during inbound calls, an Administrative Law Judge in California has adopted stringent procedures to be used by Pacific Bell during inbound calls. Under this arrangement, if the customer expresses an interest in hearing about the long distance affiliate's interLATA service, the call would be transferred to a special marketing group within Pacific, separate and apart from the customer service representatives responsible for taking new service calls. Separating the marketing of the affiliate's services from the BOC representatives responsible for the equal access disclosures would reduce the risk that these representatives would engage in unfair marketing practices, including the discriminatory use of CPNI. Moreover, such a separation would aid in identifying the appropriate costs for the marketing effort undertaken by the BOC. California ALJ Decision at 36-41. See McFarland Aff. ¶ 80 n.46.

²⁵ In its comments, AT&T suggested a number of alternatives that could be adopted for handling of inbound calls in order to accommodate a BOC's equal access obligations. McFarland Aff. ¶¶ 81-82. The Order does not discuss any of them. Cf. Professional Pilots Federation v. F.A.A., 118 F.3d 758, 763 (D.C. Cir. 1997) (Agency must "demonstrate[] that it afforded adequate consideration to every reasonable alternative presented for its consideration").

III. A BOC MUST PERMIT NEW ENTRANTS TO INCORPORATE ITS CHECKLIST COMMITMENTS INTO INTERCONNECTION AGREEMENTS

Under the Act, an applicant for in-region, interLATA authority under Track A must demonstrate that it complies with the competitive checklist through access and interconnection provided pursuant to interconnection agreements. Yet, without any discussion, the Order considers commitments that BellSouth makes only in its SGAT in determining whether BellSouth has proven compliance with the checklist. For example, in its discussion of resale, the Commission finds that changes to BellSouth’s SGAT provisions have brought it into compliance with the resale checklist item, except for continuing OSS deficiencies. Order ¶¶ 310-11. Moreover, the Commission states that BellSouth need not modify its interconnection agreements to include the checklist commitments made in its SGAT, but instead new entrants must incorporate the entire resale section of BellSouth’s SGAT to obtain the benefit of the new commitment. Id. ¶ 312.

The Order is wrong as a matter of law and policy. In the first place, the Act requires that compliance with the competitive checklist be demonstrated through full implementation of commitments contained in interconnection agreements. In all events, to the extent that the Commission will consider SGAT commitments, the Commission should clarify that, in order to establish checklist compliance, a BOC must show that it permitted new entrants to incorporate into their interconnection agreements the commitments made in the BOC’s SGAT, and to do so without onerous extraneous conditions and with sufficient time before the application is filed to obtain full implementation of these commitments.

A Track A applicant must demonstrate that it “is providing access and interconnection

pursuant to one or more [interconnection] agreements” that “meet[] the requirements of” the competitive checklist. § 271(c)(2)(A). The Act’s requirement that a BOC make written, legally binding commitments gives CLECs the ability to arbitrate the adequacy of those commitments and to enforce them through contractual and statutory penalties, and this ability is essential to establish meaningful terms on which new entrants can rely. By contrast, an SGAT is not an adequate substitute for an interconnection agreement. SGATs typically lack the kind of remedies and protections that interconnection agreements contain, often contain harmful provisions that operate like a “poison pill,” and almost always are too vague and general to function as a surrogate for an interconnection agreement.²⁶

Moreover, permitting BOCs to rely on SGATs for purposes of a Track A application would permit them to game the application process. For example, having refused to agree in an interconnection agreement to provide a function or capability needed by CLECs, a BOC could – as BellSouth did – make unilateral changes to its SGAT minimally necessary to remove an impediment to checklist compliance, while at the same time adding or retaining other adverse terms and conditions in its SGAT.

The Commission should not condone such chicanery. Instead, the Commission should enforce the Act’s requirement that compliance with the competitive checklist be demonstrated through full implementation of commitments contained in interconnection agreements. In all events, if the Commission considers commitments made in SGATs, the Commission should clarify

²⁶ See *Falcone Aff.* ¶ 86, citing NextLink’s Georgia Comments (BellSouth refused to permit NextLink to order collocation out of BellSouth’s SGAT because, according to BellSouth personnel, the SGAT “lacked sufficient terms and conditions for collocation.”).

that, in order to establish checklist compliance, a BOC must permit new entrants to incorporate unconditionally such commitments into their interconnection agreements without abandoning the negotiated and arbitrated protections contained in those agreements, and to do so to permit full implementation of those commitments in advance of the BOC's section 271 application.

IV. THE NONDISCRIMINATION REQUIREMENTS OF SECTION 272 REQUIRE THAT TRANSACTIONS BETWEEN THE 272 AFFILIATE AND OTHER AFFILIATES BE DISCLOSED IN CERTAIN CIRCUMSTANCES.

In its comments, AT&T pointed out that transactions between BellSouth's 272 affiliate, BellSouth Long Distance (BSLD), and BellSouth's nonregulated affiliates must be disclosed if they involve "local exchange and exchange access facilities" that had been transferred to BSLD by a nonregulated affiliate (Non-Accounting Safeguards Order ¶ 309; Ameritech Michigan Order ¶ 373), or if they involved "chain transactions" where a nonregulated affiliate stands between BellSouth and BSLD in the provision of assets, information or services. See Accounting Safeguards Order²⁷ ¶ 183.

In its Order, the Commission appears to have misunderstood AT&T as seeking BellSouth's disclosure in its section 271 application of "all transactions between the section 272 affiliate and other nonregulated affiliates." ¶ 338 (emphasis added). In response, the Commission states that its rules require "only public disclosure of transactions between the BOC and its section 272 affiliate." Id. Yet, as the Commission has made clear, if a BOC transfers its local exchange and exchange access facilities to an affiliate, the affiliate will be considered an "assign"

²⁷ Accounting Safeguards under the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 17539 (1996) ("Accounting Safeguards Order").

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local exchange and exchange access facilities to an affiliate, the affiliate will be considered an "assign" of the BOC with respect to those network elements and will be subject to section 272 "in the same manner as the BOC." Non-Accounting Safeguards Order ¶ 309. Thus, in such situations, the Act and the Commission's rules mandate disclosure of such transactions. For this reason, the Commission should clarify that a BOC will be required to disclose such transactions. Further, the Commission should require that "chain transactions" be disclosed pursuant to section 272 to ensure that BOCs do not use such transactions to avoid their obligations under the Act.

CONCLUSION

For the foregoing reasons, the Commission should grant AT&T's petition for reconsideration and/or clarification.

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Dated: November 12, 1998

CERTIFICATE OF SERVICE

I, Julie Rygiel, do hereby certify that on this 12th day of November, 1998, a copy of the foregoing Petition of AT&T Corp. for Reconsideration and/or Clarification was served by U.S. first class mail, postage prepaid, to the parties shown on the attached Service List.


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