

EX PARTE OR LATE FILED



Frank S. Simone
Government Affairs Director

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-2321
FAX 202 457-2165
fsimone@lgamgw.attmail.com

December 31, 1998

RECEIVED

DEC 31 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, S. W. – Room TWB-204
Washington, D. C. 20554

Re: CC Docket No. 98-147 -- Deployment of Wireline Services Offering Advanced Telecommunications Capability

Dear Ms. Roman Salas:

This letter responds to several issues raised in recent discussions AT&T has had with members of the Commission's staff regarding the Commission's authority under § 3(25)(B) of the Communications Act to grant Bell Operating Companies what has been referred to as "targeted interLATA relief." In particular, some of the RBOCs, such as Ameritech, have proposed in their comments on the pending NPRM in this docket that the Commission should establish new "data LATAs" that would encompass entire states that are today divided into multiple LATAs (or that otherwise would have geographic boundaries larger than current LATAs). According to these proposals, BOCs that have not met the requirements of § 271 would nonetheless be authorized, within these larger areas, to provide what are currently prohibited interLATA data services, provided they met certain minimal conditions, such as utilizing a separate affiliate.

Such relief would exceed the Commission's statutory authority, because it would represent an act of forbearance from the requirements of § 271 -- which § 10(d) of the Act expressly prohibits. These requests are merely an improper attempt to resurrect, through the back door of § 3(25)(B), the § 271 forbearance requests that the Commission correctly held were beyond its authority in its Memorandum Opinion and Order in the instant docket.¹ In that Order, the Commission expressly rejected attempts to recharacterize such relief as "boundary

¹ See Memorandum Opinion and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶¶ 69-79 ("*Advanced Telecommunications Services*").

No. of Copies rec'd 0+1
List ABCDE

modifications," holding that requests for "large-scale changes in LATA boundaries" were "functionally no different" from requests for prohibited forbearance from § 271.² The present proposals cannot be saved by claims that they are less "large-scale" than the proposals the Commission has already rejected. That is so for at least two independent reasons.

First, any such distinction, even if true, would be irrelevant. All of the present and past BOC proposals for interLATA relief for so-called "data" services share a common and dispositive flaw: they fundamentally misperceive the difference between the authority to establish or modify LATA boundaries under § 3(25)(B), which the Commission has, with the authority to forbear from particular requirements of § 271, which the Commission lacks. Section 3(25)(B) defines -- and gives the Commission some authority to redefine -- the geographical boundaries of LATAs. The regulatory consequences of those geographical boundaries, however, are the sole province of § 271. That section, as is well understood, prohibits the BOCs from providing within their regions landline telecommunications services that cross the boundaries established under § 3(25)(B), unless they first satisfy the competitive checklist and the other statutory prerequisites for interLATA relief. Section 10(d), moreover, expressly and unequivocally prohibits the Commission from forbearing from applying the requirements of § 271 unless (as no one claims has yet occurred) those requirements have been "fully implemented."

Accordingly, while the Commission can engage in some degree of "redrawing the map lines" under § 3(25)(B), it cannot revise the statutory requirements that *apply* to those lines under § 271. Thus, for example, because § 271's prohibitions apply equally to "data" and voice services,³ the Commission cannot say that a LATA boundary that exists for voice services (whether a LATA boundary that was established under the MFJ or one that was subsequently established or modified by the Commission) can be disregarded for data services. Similarly, because the competitive checklist may not be "limit[ed]" by the Commission,⁴ and because those requirements and the others imposed by § 271 may not be the subject of forbearance,⁵ the Commission may not decide that satisfaction of some lesser portion of those requirements will suffice to enable a BOC to provide service across certain LATA boundaries. Such action would not be a boundary "modification" or "establishment" under § 3(25)(B), but rather a prohibited attempt to rewrite § 271 by substituting a new regulatory scheme governing when BOCs may provide interLATA service. Each of the BOC proposals is unlawful for that reason.

² *Id.*, ¶¶ 80-82.

³ *See Advanced Telecommunications Services*, ¶¶ 35-37.

⁴ *See* 47 U.S.C. § 271(d)(4).

⁵ *See* 47 U.S.C. § 160(d).

This analysis is confirmed by the very authorities on which the BOCs seek to rely. Bell Atlantic's comments, for example, claim (at p. 5 n.2) that "[m]odifications of LATA boundaries were granted under the MFJ for specified purposes, particularly to make possible the speedier deployment of new telecommunications services or increased competition," and argue that the Commission here would be exercising the same type of authority. But the cases Bell Atlantic cites were not "boundary modification" decisions. To the contrary, they were decisions in which Judge Greene granted partial *waivers* of the MFJ's interexchange restriction -- precisely the authority that the Commission is precluded from exercising under § 10(d). Thus, for example, when the MFJ Court authorized the BOCs to provide cellular services in certain areas across LATA boundaries, it made clear that the granting of such relief required that the BOCs first meet the MFJ's stringent standard for "removal" of the decree's line-of-business restrictions.⁶ Moreover, the Court made clear that, when such waivers were granted, the LATA lines remained unchanged -- for the Court's decisions stated that the BOCs would be prohibited from constructing or owning the interLATA links themselves, and instead were required to lease any transport across LATAs from interexchange carriers.⁷ Thus, the Court in those decisions was not modifying LATA boundaries (the authority the Commission may exercise under § 3(25)(B)), but rather was waiving the prohibition against providing certain services across certain of those boundaries (the authority the Commission is precluded from exercising by § 10(d)).

Second, even the Commission's authority simply to "establish" or "modify" LATA boundaries -- *i.e.*, to redraw lines *without* purporting to dictate new regulatory requirements for how those lines would affect the rights of the BOCs -- is limited by § 10(d). That section "limits the manner in which the Commission may exercise its sole and exclusive authority to approve the establishment of or modification to LATA boundaries" and does not sanction "the piecemeal dismantling of the LATAs."⁸ Thus, for example, the Commission correctly held that establishing a single "global LATA," as Ameritech previously requested, would exceed its authority because such action would "effectively eviscerate" §§ 10(d) and 271.⁹ The broad interLATA relief the BOCs have requested would be unlawful under this second ground as well.

In particular, the principal distinction on which the BOCs rely in suggesting that the relief they seek would be "limited" -- a purported distinction between "data" and "voice" services -- is unsustainable. If the BOCs were provided with relief for so-called "data" traffic,

⁶ See *United States v. Western Elec. Co.*, 578 F. Supp. 643, 649-650 (D.D.C. 1983).

⁷ See *id.* at 650 n.28, 651-652.

⁸ Order, *Petition for Declaratory Ruling Regarding U S WEST Petitions to Consolidate LATAs in Minnesota and Arizona*, 12 FCC Rcd. 4738, 4751, 4752 (1997).

⁹ *Advanced Telecommunications Capability*, ¶¶ 80-82.

then they would have every reason to convert what is today circuit-switched voice traffic into IP telephony so as to magnify the scope of their relief and "effectively eviscerate" §§ 10 and 271. Data traffic already is rapidly outstripping voice as a source of minutes and revenue for carriers, and even the BOCs concede that the two could soon be indistinguishable. As Bell Atlantic Chairman Raymond Smith has stated, "Currently, 55 percent of our traffic is data. In three to four years, 75 percent of our traffic will be data and 25 percent voice; it will be hard to tell one from the other when you consider voice over the Internet."¹⁰

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Smith".

cc: L. Strickling
C. Matthey
J. Goldstein
A. Gomez
G. Cooke
T. Power
L. Kinney
J. Casserly
K. Dixon
P. Gallant
K. Martin

¹⁰ *Internet Week* (March 2, 1998). Although Ameritech has suggested in *ex parte* filings in this docket that the Commission somehow could exclude IP telephony from LATA boundary modifications targeting "data" traffic, there appears to be no practical means to accomplish that end (and Ameritech has proposed none).